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# Guide to Conflict Checks

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# Introduction

**Conflict of interests**, if not detected, may give rise to a material risk of damage to the interests of one or more of a firm's clients, give rise to a complaint and/or claim, and may cause the firm to breach its regulatory obligations and suffer both reputational damage and monetary loss.



# What do we Mean by ‘Conflict Check’

In simple terms, a **conflict check** is where firms check their lists of clients, current and past, and make sure there’s no reason that the firm cannot undertake work for the client. The check determines whether there are any previous contacts with a potential client or matter that could lead to a conflict of interest.

It’s also important to note that in the Glossary to the Solicitors Regulatory Authority Standard and Regulations, ‘client’ is defined as: “the person for whom you act and, where the context permits, includes prospective and former clients.”

The effect of this is that it includes clients / those who haven’t actually formally instructed the Firm and signed up to a retainer.

The solicitor’s job is to act in the best interests of its client, and the conflict check makes sure that they are able to do that.





# The Regulations

The key rules relating to conflict checking are now found at rules **6.1** and **6.2** of the **Code of Conduct for Solicitors, RELs & RFLs (COCS)**. Rules 6.1 and 6.2 of the Code of Conduct for Firms (COCF) contain identical provisions for firms. The two codes contain provisions equivalent to those in Chapter 3 of the previous 2011 SRA Handbook. Rules 6.3, 6.4 and 6.5 of the COCF are also relevant to firms (similar provisions are contained in the COCS):

**Rule 6.1: You do not act if there is an own interest conflict or a significant risk of such a conflict.**

**Rule 6.2: You do not act in relation to a matter or particular aspect of it if you have a conflict of interest or a significant risk of such a conflict in relation to that matter or aspect of it, UNLESS:**

- a. The clients have a substantially common interest in relation to the matter or the aspect of it, as appropriate; or
- b. The clients are competing for the same objective, and the conditions below are met, namely that:
  - i. all the clients have given informed consent, given or evidenced in writing, to you acting;
  - ii. where appropriate, you put in place effective safeguards to protect your clients' confidential information; and
  - iii. you are satisfied it is reasonable for you to act for all the clients.

**Rule 6.3: You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents.**

**Rule 6.4: Any individual who is acting for a client on a matter makes the client aware of all information material to the matter of which the individual has knowledge except when:**

- a. The disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
- b. The client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;
- c. The individual has reason to believe that serious physical or mental injury will be caused to the client or another if the information is disclosed; or
- d. The information is contained in a privileged document that the individual has knowledge of only because it has been mistakenly disclosed.

# The Regulations

**Rule 6.5** You do not act for a client in a matter where that client has an interest adverse to the interest of another current or former client for whom you hold confidential information which is material to that matter, unless:

- a. Effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or
- b. The current or former client whose information you hold has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.



# Understanding and Assessing Conflicts of Interest

**It is extremely important that** conflicts of interests are considered prior to accepting instructions and then throughout the life of the matter. Dealing with conflicts at any early stage avoids having to difficult conversations at a later stage should a conflict be found.

**It is also important that** those undertaking conflict searches clearly understand what constitutes a conflict and the exceptions to the rule.

## Own Interests

Firms need to ensure that staff understand the meaning of an 'own interest' conflict, and that they inform the relevant person at the firm of any personal or family interest that may lead to an own interest conflict or which may in any way inhibit the ability of the firm to provide independent advice to clients. This should be covered off in staff training on conflicts of interest. 'Own interest' is defined in the Code of Conduct for Firms as: 'any situation where your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.'

### **Some examples of 'own interest':**

- You borrow from a client, or lend money to a client.
- You have a close personal relationship with a client which may impact on your ability to act independently and in their best interests.
- You wish to sell to, or buy property from your client.

**Firms should** keep a register of own interests.

**It's worth noting that** historically, there has been a practice of solicitors rectifying mistakes made on existing files (if possible) in order to cure an own interest conflict and to continue acting. However, the Solicitors' Disciplinary Tribunal's (SDT) decision in the case of SRA v Howell Jones [2018] SDT 11846] (Howell Jones) cast doubt on a solicitor's ability to do this. In brief, the firm gave incorrect advice on a divorce settlement but continued to act for the client while attempting to overturn the settlement.

The firm tried to rectify its error by taking various steps including informing its insurer of the error and agreeing an alternative course of action with its insurer. The client was kept informed.

# Understanding and Assessing Conflicts of Interest

Howell Jones admitted it had acted in circumstances where there was an own interest conflict. The client was awarded £50,000 and the SDT held that the firm had not stopped acting when it should have done, which was an error of judgment on the part of the firm. The SRA considered the misconduct ‘moderately serious’. The firm was fined £5,000 and made subject to a costs order of £26,850.

**Rule 6.1 of the COCF** is the relevant rule here and makes it clear that you must not act if there is an own interest conflict, or a significant risk of one arising. In addition to Rule 6.1, firms must also comply with **Rule 3.5 of the COCF** (and equivalent **Rule 7.11** of the COCS) which requires you to be *“honest and open with clients if things go wrong, and if a client suffers loss or harm as a result you put matters right (if possible) and explain fully and promptly what has happened and the likely impact...”* And **Principle 7**, which is the requirement to act in the best interests of your client.

The SRA issued its most recent guidance on the matter on 29 November 2019 and there appears to be some tension between the Howells Jones case and the Code. Whilst there are no exceptions to Rule 6.1, the guidance seems to say that firms should consider the situation, be honest and open with the client when things go wrong, and to put things right where possible – so it’s a balancing act for firms, which seems a common-sense approach but it’s still unclear at this point in time quite how the SRA will treat breaches of this type.

It’s important to remember that in all cases, it’s advisable to contact your insurers as early as possible as an error may be a ‘notifiable circumstance’ under your policy.

## The Exemptions

**Rule 6.2 (a) and (b)** sets out two exemptions to the general ban on acting in Rule 6.2, i.e. where a firm may be able to continue to act notwithstanding the existence of a conflict or where there is a risk of a conflict arising. You should ensure that internal training covers this off, so that staff are clear when exemptions do apply. You should take care when applying the exceptions and always record your decision and reasons for it, if you decide to act in these circumstances.

### i. ‘Substantially common interest’

The SRA defines this as “a situation where there is a clear common purpose between the clients and a strong consensus on how it is to be achieved”. There will need to be a clear common purpose here – this is different to clients merely having a common interest in a matter. Those commonly seen include divorce proceedings: acting for both husband and wife on the sale of the marital home and establishing a company: acting for various individuals in setting up a new company.

# Understanding and Assessing Conflicts of Interest

You will need to satisfy your obligation under the Code of Conduct to be able to act in your clients' best interests if you act for all parties. You should make your clients aware of the issues concerning conflicts/potential conflicts and what will happen if the parties, at some point in the matter, cease to have a 'substantially common interest', i.e. you may need to stop acting for some of the parties. It is good practice to inform your clients in writing prior to commencing work, and obtaining their agreement to your proceeding with the work.

## ii. 'Competing for the same objective'

To rely on this exemption, you must be able to satisfy the conditions set out in **Rule 6.2 b(iii)** above as follows:

- All the clients must give informed consent, given or evidenced in writing, to you acting.
- You put in place effective safeguards to protect your clients' confidential information, and
- An overriding requirement that you're satisfied it's reasonable for you to act for all the clients.

Helpfully, the SRA defines **(a)** 'competing for the same objective' as meaning any situation in which two or more clients are competing for an 'objective' which, if attained by one client, will make that 'objective' unattainable to the

other client or clients and **(b)** 'objective' as meaning an asset, contract or business opportunity which two or more clients are seeking to acquire or recover through a liquidation (or some other form of insolvency process) or by means of an auction or tender process or a bid or offer, but not a public takeover.

## iii. The 'Informed consent' exception

You can also act where a conflict exists if all clients give informed consent to the firm acting. In order for consent to be 'informed', you will need to ensure that all clients fully understand all relevant issues and the implications of you acting. Remember to document this carefully so that you can demonstrate informed consent if needed.



# Conflict Check Policy

**All firms should have** a clear policy on how to deal with conflicts. The policy should include the following:

- Details of the person at the firm responsible for implementing and maintaining the policy. This person should ensure that all relevant staff receive training on identifying conflicts and carrying out effective checks at the time of their induction, so they understand the processes from the outset.
- If your firm uses electronic conflict searching, ensure that staff understand how to undertake searches. Remind staff to take care to include all relevant parties including, for example, directors and beneficial owners of corporate vehicles or all partners of a partnership.
- If your process includes undertaking an internal email conflict search, you should set out the process for doing so. If staff have any concerns that may not necessarily be highlighted by the Firm's conflict checking system, an internal email check may assist.
- Details of the person responsible for undertaking conflict checks. Generally the relevant fee earner is responsible for checking for conflicts of interest — both at the outset of a matter and then to conduct ongoing monitoring to note any risk of conflicts that may emerge during the lifetime of the matter. If you are happy to let fee earners delegate conflict checking to their assistants or support staff, you need to clarify this, but it's important that you remind fee earners that ultimate responsibility will remain with them, despite any delegation. Conversely, if your firm does not want to allow this job to be delegated, this should be made clear in your policy.
- Details of what to do when a conflict arises, for example, who it should be reported to and who is responsible for investigating the conflict. You should also remind staff that conflicts may develop after a matter has started, and these must also be brought to the attention of the relevant person.
- Staff should be encouraged to flag any matter where they have doubts as to whether a conflict exists so this can be clarified.
- What to do if a conflict is confirmed. Clients should be informed as soon as practicable that you cannot act. However, you should first check with someone at the firm with appropriate authority (e.g. the COLP or Managing Partner) to see whether one of the exceptions apply and the firm can still act. Where you turn down instructions, clients should be offered an explanation and a recommendation of an alternative firm as appropriate in the circumstances.
- Consequences of non-compliance, both for the firm and relevant fee earner. Repeated non-compliance should result in disciplinary proceedings.

## Record keeping

You should keep copies of all conflict searches, together with the results of each search on the relevant file. This includes any further consideration regarding conflicts that may arise during the life of the matter. Your policy on conflict checking should make this clear.

# Suggested Process to be Followed by Firms for Effective Conflict Checking

We recommend that firms use the following process:

- The most important step of the process is to identify and resolve conflicts of interest before the firm's client relationship commences. The key to consistency is making the conflicts process as easy as possible.
- In addition, you should have a process for checking existing matters, during the life of the matter rather than just at the beginning.
- Next, appoint someone to be responsible for producing a policy.
- Identify those persons who should be contacted in each department should queries arise. You also need to identify those in the firm who can authorise fee earners to proceed notwithstanding that there may be a conflict.
- Firm to put a clear policy on conflict checking in place.
- Ensure your File Review checklist includes conflict checking.
- All relevant staff should receive training on conflict checking. This should be done at the point of induction so those responsible for conflict checking understand their responsibilities from the outset of employment.



# Useful resources

**The Law Society** recently updated its Practice Note on conflicts of interest (20 April 2020) which contains useful information and guidance, including guidance on acting for buyers and sellers:

<https://www.lawsociety.org.uk/support-services/practice-management/client-care/engaging-clients/conflict-of-interests/>

<https://www.sra.org.uk/solicitors/guidance/putting-matters-right-own-interest-conflicts/>



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