

# Conflict as a Private Client solicitor

*Conflict is an issue which arises from time to time for all solicitors. However, it arises somewhat more often for private client solicitors, who are regularly instructed by an individual and later by his personal representatives; or by multiple executors or beneficiaries. It also arises in relation to individuals with declining capacity. It is these issues which I am going to consider.*

I will look at the meaning and effect of a conflict of interest, and the similar issues surrounding confidentiality, before considering some of the common situations in which they apply for private client solicitors - capacity, probate and executors/beneficiaries.

Conflict as a conduct issue arises in the SRA Code of Conduct (the "Code") - both chapter 3 (conflict) and chapter 4 (confidentiality/disclosure). Although not explored it is important to keep in mind that conflict is also a legal issue (e.g. when considering fiduciary duties).

## Conflict of Interest

Chapter three of the Code deals with conflict of interest and clarifies that this can occur between a solicitor and his clients ("own interest conflict") and between your clients ("client conflict"), which I will refer to collectively as a "conflict".

The starting point for a retainer is, of course, that a solicitor should not act if there is a conflict, or a significant risk of conflict. As solicitors will be aware, this is subject to exceptions, but only in the case of client conflict. There are no exceptions for own interest conflict. As a result, a solicitor can act where his clients, despite a client conflict or significant risk of one, have a substantially common interest and the benefits of a joint instruction outweigh the risks. The solicitor must have explained (and the clients must have understood) the relevant issues and risks and have given their informed consent in writing.

One of the indicative behaviours set out in the Code is that a solicitor should not act where he cannot represent all clients even-handedly. As I consider below, this might be the case where he already knows one of a number of beneficiaries, or executors.

## Confidentiality and Disclosure

The other issue that arises in respect of conflict, is the conflict between the rule of confidentiality and that of disclosure. In the normal course of events, a solicitor owes a duty of confidentiality to his client and owes him a duty to disclose documents which are relevant to his matter. However, the duty of confidentiality takes precedence, for example, when acting for a party following someone's death, the duty of confidentiality to the deceased client could override any duty to disclose documents to the continuing client.

It is worth remembering that the duty of confidentiality survives death, such that a Will prepared by an individual who is now deceased cannot simply be disclosed by virtue of his death. It can only be released to the executor(s) or on their authority (or on an order of the Court).

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## Capacity

Conflict and confidentiality issues can arise in a number of ways, in relation to capacity. Firstly, it is important to keep in mind that capacity is task specific, most commonly, someone might have capacity to make a relatively modest gift, but not to make a Will. It is therefore something to be kept under review, as instructions are received to take subsequent steps.

It is extremely important to keep in mind not only actual conflicts of interest, but also the perception of conflict - for example, is a Will more likely to be challenged because a firm has also advised one of the beneficiaries on a different matter?

If a client does lose capacity, their solicitor should remember that the duty of confidentiality remains. They cannot release their files or Will without their (capacitous) consent or a court order. A solicitor should always consider whether to include a provision in an LPA or when applying for deputyship, in order to ensure that relevant documents can be released. Sadly, if a client loses capacity during the course of a matter, their solicitor cannot breach their confidentiality to inform the family of their wishes so that appropriate steps can be taken.

## Probate

Considerations of conflict arise in two main ways when dealing with an estate - in acting for multiple executors and/or beneficiaries (which I address further below); and as an own interest conflict when a Will is challenged.

It is understandably difficult for a solicitor or firm to remain neutral if a Will they have drafted is challenged. However, unless allegations are made against the solicitor or firm itself, they should remain neutral. Even if there is, strictly speaking, no conflict, a perception of conflict can taint the whole matter and make a negotiated settlement far more difficult and expensive to achieve, which is unlikely to be in the clients' best interests.

Even if there are fees to be made in acting on the probate, is it worth the additional exposure to an already contentious matter?

## Executors/Beneficiaries

There is almost always a significant risk of client conflict between multiple executors or beneficiaries - they might have different interests in the estate, or different claims on it; they might be in different financial positions from one another; or they might have different relationships or motives in dealing with the estate.

Keeping in mind the exception to chapter 3 of the Code, the key is to warn clients at the outset that, if a conflict arises, they will have to seek separate representation. This can also minimise the risk of a complaint regarding costs, or to the Legal Ombudsman if a conflict does arise at a later stage.

It is also important that instructions are taken appropriately, to ensure that all beneficiaries have had the opportunity to consider the steps taken. For example, a solicitor might be willing to take day to day instructions from one client, but need to take key instructions from them all.

## Conclusion

In addition to the legal and conduct issues, conflict is a reputational and financial concern for law firms. If a firm acts where there is a conflict (or a perception of one), they are more likely to be on the receiving end of a complaint or of costs that they later can't recover. Is it worth the reputational damage or the incurring of ultimately irrecoverable costs?

On balance, if the possible conflict causes a solicitor to pause for too long, there probably is a conflict, or at least the perception of one.

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