

CHAPTER 9

CONFLICT OF INTEREST BETWEEN CLIENTS

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This Chapter deals with conflicts of interest between clients. Conflicts of interest frequently arise involving confidential information or knowledge. Conflicts of interest between solicitors and clients are dealt with in Chapter 7.

9.01 Avoiding conflict

A solicitor has both an ethical and legal duty to avoid conflict. A solicitor or firm of solicitors must not accept instructions to act for two or more clients where there is a conflict or a significant risk of conflict between the interests of those clients.

Commentary

1. A conflict may arise between an existing client and a prospective client, a former client and a prospective or existing client or two or more existing or prospective clients.
2. There are many judicial decisions as to what constitutes a 'conflict' at common law and essentially it is a situation where factors exist which adversely affect a solicitor's duty of loyalty to his client and his duty of confidentiality to such an extent that the solicitor cannot act in the best interests of the client.
3. A conflict of interest may arise from conflicting duties to disclose confidential knowledge or information held in relation to one client to another client.
4. Firms that are in an association under either section 39C of the *Legal Practitioners Ordinance* (Cap. 159) or under rule 1A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and sharing premises, facilities, management and employees will be treated as one firm for the purposes of any rules of conduct relating to conflict of interest and confidentiality (see Principle 8.01 Commentary 18 and Circular 07-767).

9.02 Actual or significant risk of conflict

A solicitor shall not act or shall cease to act where there is an actual conflict of interest or a significant risk of conflict arising during the course of the retainer.

Commentary

When a solicitor or his firm is in possession of information confidential to a former client which might be relevant to a subsequent client and which he

may be bound to disclose in breach of his duty of confidentiality to another existing client, the court will intervene to prevent the solicitor from acting for the subsequent client if it is satisfied that the risk of disclosure of the confidential knowledge or information is real and not merely fanciful. See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, HL.

9.03 Conflict of interest between existing or former client with prospective client

If a solicitor or his firm has acquired relevant confidential information or knowledge concerning an existing or former client during the course of acting for him, he must not accept instructions where it is likely that he would be duty bound to disclose or use such relevant confidential information or knowledge in breach of his duty of confidentiality to such client.

Commentary

1. Any confidential information and knowledge acquired by a solicitor whilst acting for an existing or former client cannot be disclosed without that client's consent: see Principle 8.01. However, a solicitor may be under a duty to another client to inform him of all matters which are material to his retainer: see Principle 8.03. Consequently, a solicitor in possession of confidential information and knowledge concerning one client which is, or might be relevant to another client cannot act in the best interests of either client because of the potential breach of the conflicting duty owed to each.
2. If a solicitor does not have relevant confidential information and knowledge but would, nevertheless feel embarrassed in acting against an existing or former client, he should not act.

Embarrassment may for example arise because of personal feelings of the solicitor or from friendship with such client. It may nevertheless be appropriate for another solicitor in the same firm to act.

3. As a result of this Principle, a solicitor who has acted jointly for both husband and wife in matters of common interest, must not act for one of them in matrimonial or other proceedings where he is in possession of relevant confidential information and knowledge concerning the other, which he received in the course of the joint retainer.
4. Where a solicitor has acted jointly for members of a family and is then asked to act against one or more, then this Principle will apply. If, however, a solicitor is obliged by this Principle to refuse to act for a particular member of a family who is under a legal disability (for example, not of full legal age), then the solicitor should make every

reasonable effort to ensure that he is represented by another solicitor; it is not sufficient for the solicitor merely to cease to act.

5. Another example of the operation of this Principle is where a solicitor has acted for both lender and borrower in the making of a loan. He should not subsequently act for the lender against the borrower to enforce repayment if he has obtained relevant confidential information and knowledge, for example, of the borrower's financial position, when acting for him in connection with the original loan.
6. If a solicitor has acted either for a partnership or has acted in the formation of that partnership, he may only accept instructions to act against an individual partner or former partner provided he has not obtained relevant confidential information and knowledge about that individual whilst acting for the partnership, or in its formation.
7. A solicitor who has acted for a company and also has separately acted for directors or shareholders in their personal capacity may not act for any of them if he has relevant confidential information and knowledge concerning the party against whom he is now instructed to act.
8. A solicitor who prosecutes in criminal trials must not act against a former client who retained him in respect of the same or a related matter: see also Principle 10.14 Commentary 4.

9.04 Existing joint clients

A solicitor or firm of solicitors must not continue to act for two or more joint clients when a conflict of interest arises between those joint clients.

Commentary

1. Before a solicitor accepts instructions from more than one client in the same matter, the solicitor must advise the clients that the solicitor has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the solicitor cannot continue to act for both or all of them and may have to withdraw completely. When accepting instructions to act for more than one client in the same matter the solicitor would be well advised to obtain the informed written consent from the clients that they are fully aware of the basis of the retainer particularly in the context of this Principle (see also Principle 8.01 Commentary 24).
2. If one of the clients is a person with whom the solicitor has a continuing relationship and for whom the solicitor acts regularly, this fact should be revealed to the other at the outset with a recommendation that both

should obtain independent representation. If, following such disclosure, all parties are content that the solicitor should act for them, the solicitor should obtain their consent, preferably in writing, or record their consent in a separate letter to each. A solicitor should, however, guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.

3. If, after the clients involved have given their consent and a contentious issue arises between them or some of them, the solicitor, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of this Principle if he attempted to advise them on the contentious issue. In such circumstances the solicitor should ordinarily refer the clients to another solicitor. However, if the issue is one that involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and there is no obvious imbalance of bargaining power, they may be permitted to settle the issue by direct negotiation in which the solicitor does not participate. Alternatively, the solicitor may refer one client to another solicitor and continue to advise the other if it was agreed at the outset that this course would be followed in the event of a conflict arising.
4. If a solicitor has already accepted instructions from two clients in a matter or related matters and a conflict subsequently arises between the interests of those clients, the solicitor must cease to act for both clients, unless he can without embarrassment and with propriety, continue to represent one client with the other's consent. A solicitor may only continue to represent one client where he is not in possession of relevant confidential information and knowledge concerning the other obtained whilst acting for the other. Even in such a case he should seek the consent of the other client (usually through his new solicitor) and should proceed in the absence of such consent only if there is no good cause for its refusal. Where the expression 'relevant confidential information and knowledge' is used in this Chapter, it is not limited to what the client may have told him but also includes what the solicitor may have learned about the client's confidential affairs during the course of acting for him within the scope of the retainer.
5. Where a solicitor acts for two or more co-defendants in criminal proceedings, and one or more of them changes his plea, the solicitor must consider carefully whether he may continue to represent any of them. For example, in reaching his decision, the solicitor must bear in mind that if his duty of disclosure to the client or clients he proposes to represent conflicts with his duty of confidentiality to the other client or clients, he must cease to act for all of them. Before agreeing to continue to represent one client he must, therefore, examine carefully

whether there is any information in his possession relating to the other clients which may be relevant to the retained client.

6. Following the amalgamation of two or more firms, the clients of the individual firms will, as a result of an express or implied change of retainer, become clients of the new firm; care must be taken to ensure that the interests of the clients of the new firm do not conflict. If they do, the firm must cease to act for both clients unless they are able, within the terms of Commentary 1, to continue to act for one.

9.05 Joint representation in conveyancing transactions

Subject to Rule 5C of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), a solicitor or two or more solicitors practising in partnership or association shall not act for both the vendor and the purchaser on a sale or other disposition of land for value.

Commentary

1. Compliance with subrule (1) of rule 5C is mandatory and unless a particular transaction either falls outside rule 5C or is covered by one of subrules (2), (3), (4), (5) or (6), failure to observe it is professional misconduct.
2. Notwithstanding subrules (2), (3), (4), (5) and (6) a solicitor must not act or continue to act for two or more parties to the transaction where a conflict of interest between them appears. A solicitor must be alert and cease to act at the first sign of conflict. A solicitor should also be alert to the obligations under Commentaries 1 and 2 of Principle 9.04.
3. In those circumstances where a solicitor may properly act for both parties he must ensure that both clients consent to the arrangement, and that he complies with Practice Direction A.12.
4. See also Circular 11-610 and Practice Directions A.9, A.9A, A.9B, A.10, A.11 and A.12.

9.06 Mediation

A solicitor may act as a mediator between two or more parties in a dispute but if a solicitor does so he must make it clear to each party, preferably in writing, that he is acting solely in the resolution of their differences.

Commentary

1. Once it has become apparent that the dispute cannot be resolved he must cease his involvement and shall not thereafter act for any party as a solicitor in respect of that dispute.
2. A solicitor acting as a mediator shall not without the express consent of one party disclose to the other party or any other person any confidential information acquired by him during the course of the mediation (see also Principle 8.04).

APPENDICES

PRINCIPLE 9.01 COMMENTARY 4

**CIRCULAR 07-767 'ASSOCIATION WITH LOCAL FIRMS, FOREIGN
FIRMS AND OVERSEAS FIRMS' SEE CHAPTER 8**

PRINCIPLE 9.05 COMMENTARY 4

CIRCULAR 11-610

22 August 2011

PROPERTY

Consolidated Circular – Rule 5C of the Solicitors’ Practice Rules Updated on 22 August 2011

This Circular consolidates the Practice Directions and guidelines on the separate representation requirement under Rule 5C of the *Solicitors’ Practice Rules* (Cap. 159 sub. leg. H).

1. Scope of Rule 5C(1)

1.1 Rule 5C(1) prohibits a solicitor or 2 or more solicitors practising in partnership or association from acting for both the vendor and the purchaser on a sale or other disposition of land for value. Rule 5C(8) further provides that Rule 5C applies to 2 or more solicitors or firms conducting their businesses as members of the same group practice. For the purpose of this Circular, any reference to ‘solicitor’ shall, where relevant, include references to 2 or more solicitors practising in partnership or association or 2 or more solicitors and firms conducting their businesses as members of the same group practice.

1.2 The Practice Directions have made clear that separate representation is mandatory in the following circumstances given the unusual nature of the transactions:

- Practice Direction A2 - sale and purchase of an interest in a property under construction which is for less than the whole of the residue of the term of years under which the property is held under the relevant Government Grant;
- Practice Direction A7 - subject to the conditions stated in Practice Direction A7, sale and purchase of partitioned ‘residential’ flats and;
- Practice Direction A10 - where A sells to B, B sub-sells to C and there is an agreement in which A is the vendor, B the confirmor and C the purchaser, the solicitor acting for A may not also act for either B or C.

1.3 A solicitor may act for more than one party in certain circumstances, including:

- conveyancing transaction involving a trustee and a beneficiary;

- in sale and purchase and sub-sale and sub-purchase of units in project developments under the Consent or Non-consent scheme subject to certain conditions being satisfied (Rule 5C(2), (3), (4) & (5)); and
 - where the exemption provisions under Rule 5C(6) applies.
2. Rule 5C(3), (4) and (5) – Approved form of Statutory Declaration; Agreements for Sale and Purchase and Agreement for Sub-sale and purchase agreement [updated on 22 August 2011]
- 2.1 The updated forms of Statutory Declaration approved under Rule 5C(3) and the various Agreement forms approved under Rule 5C(3), (4) and (5) can be obtained by clicking the link below. Subsequent amendments to these forms shall be notified in Circulars and shall apply with effect from the date as stated in the relevant circulars.
- [Rule 5C\(3\) Statutory Declaration](#)
 - [Rule 5C\(3\) Agreement \(Uncompleted Development\)](#)
 - [Rule 5C\(4\) Agreement \(Completed Development\)](#)
 - [Rule 5C\(5\) Sub-sale and Sub-purchase Agreement \(Uncompleted Development\)](#)
 - [Rule 5C\(5\) Sub-sale and Sub-purchase Agreement \(Completed Development\)](#)
- 2.2 Members who wish to deviate from the form of Statutory Declaration or the mandatory clauses contained in any approved Agreement forms must apply for a waiver from the Council under Rule 5C(6). The application must be accompanied by a copy of the appropriate approved form marked with the proposed changes in red and the application fees prescribed from time to time by the Society.
3. Rule 5C(5) – Sub-sale and purchase
- 3.1 Rule 5C(5) applies to a sub-sub-sale as well as a sub-sale. The agreement for sub-sale and sub-purchase between the sub-purchaser and the sub-sub-purchaser should be modified to take account of the sub-sub-sale.
- 3.2 The form of Sub-sale and purchase Agreement approved under Rule 5C(5) applies only where the whole of the premises comprised in the Principal Agreement are sub-sold to the purchaser. It does not apply where, for example, the Principal

Agreement comprises 10 units and only one unit is sub-sold. In such case, either the Agreement would need to be modified or the parties to the Agreement should be separately represented. Where such modifications entail alterations of any of the mandatory clauses, they are required to be approved by the Chief Justice and the Council.

3.3 It would be desirable from the purchaser's point of view to insert a power of substitution in the irrevocable power of attorney referred to in clause 3(1)(d) of the approved form of Sub-sale and purchase Agreement.

4. Rule 5C(6) – Associated Parties

4.1 Transactions involving parties who are 'associated parties' are exempted under Rule 5C(6)(a) from the separate representation requirement under Rule 5C(1). The term 'associated parties' is defined in Rule 1A(c) as 2 or more parties being 'related by blood, adoption or marriage'.

4.2 The Council has provided a list of 'related' parties as follows:-

Husband; Wife; Father; Mother; Father-in-law; Mother-in-law; Son; Daughter; Son-in-law; Daughter-in-law; Brother; Sister; Brother-in-law; Sister-in-law; Grandfather; Grandmother; Grandson; Granddaughter; Uncle; Aunt; Nephew and Niece

[N.B. where appropriate, step, half and adopted relatives are included]

4.3 A solicitor acting jointly for 'related' parties should make reasonable enquiries as to their relationship. If he does not know them personally, he should, for instance, ask for documentary evidence to verify their relationship, and in the absence of such evidence, he should require them to make a statutory declaration. In all other cases, members should seek Council's guidance.

5. Joint Representation under Rule 5C(2), (3), (4) or (5) – 'Warning to Purchasers' [Practice Direction A12]

Before a solicitor could act for both the vendor and the purchaser under rule 5C(2), (3), (4) or (5), he must make sure that the appropriate bilingual 'Warning to Purchasers' under Practice Direction A12 has been duly signed by the purchaser and delivered to him at the time of giving or confirming instructions.

6. Stakeholders Funds – *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F) [Practice Direction A3]

Solicitors who act as stakeholders in respect of funds received from purchasers under Rule 5C(2), (3), (4) and (5) has to deposit the funds in a bank or licensed (but not a registered) Deposit Taking Company in accordance with the requirements under Practice Direction A3.

7. Separate Representation [Practice Direction A4]

7.1 Where the vendor offers for sale property in an uncompleted development in circumstances where Rule 5C applies and the vendor and the purchaser are separately represented, the solicitor acting for the purchaser must comply with the requirements under Practice Direction A4.

8. Attestation of Signatures [Practice Direction A9, A9A, A9B and A11]

8.1 Practice Direction A9 requires that a solicitor acting for one party, or any member of his firm, should not attest the signature of another party, who is not represented by that solicitor.

8.2 The general rule in 8.1 is subject to the exceptions contained in the following Practice Directions:

- Practice Direction A9A - Home Ownership Scheme and Private Sector Participation Scheme Conveyancing Transactions
- Practice Direction A9B - Financial Secretary Incorporated Lease Extension Cases
- Practice Direction A11 - Sub-purchaser Appointed as Attorney for a Confirmor

9. Circular 08-364 is superseded.