

Conflict of Interest Rules

Rationale for and Outcome of Review

The current rules at B2.1 have not been significantly reviewed or amended since their creation in 1986. The rules on conflict which form part of the Standards of Conduct at B1.7 have not been significantly reviewed since 2008.

The Regulatory Committee instructed a review of these rules to identify whether amendments should be sought to promote achievement of the regulatory objectives and best regulatory practice.

The review included consideration of:

- Trends in applications for waiver of rule B2.1.4;
- Trends in complaints alleging breach of conflict of interest rules;
- SSDT judgments where a failure to comply with the rules on conflict of interest was identified by the Tribunal as the main reason for an adverse finding against a solicitor;
- Views expressed by specialist sub-committees of the Society;
- Approaches taken in other jurisdictions.

The conclusion reached was that amendments should be considered – with the aim of improving the understanding of the principles behind the existing rules, rather than seeking to radically amend or replace them. We believe that the wording of the rules should be modernised and that any amendment proposals should re-emphasise the overriding principle that acting in an *actual conflict* is *never permissible*.

The proposed amendments (detailed below) therefore aim to clarify and improve understanding of the existing principles, rather than substantially amend those principles.

Proposed draft amendments to practice rules

Note:

This paper sets out (in Part A) possible new wording which aims to reflect the principles of the existing rules but improve their expression.

The proposed draft wording does, however, add a blanket prohibition on acting where there is significant potential for an ‘own interest’ conflict (a conflict between the interests of the client and those of the practitioner or his or her practice unit) – see 1.7.1(b) – which is an innovation on the current rules. The review considered that this was necessary to remove any dubiety.

The text of the existing rules is included at Part B of this paper for ease of reference.

Part C of this paper includes some working draft Guidance which may assist interpretation of the proposed wording. This would not be all of the Guidance provided on conflict of interest, the extensive Guidance already available would also be revised and updated and a new version of the conflict of interest flowchart (or decision tree) would be added.

PART A

Draft proposed new wording (to replace current wording) – terms defined in the Glossary would be linked to their definitions there (as per current practice):

Rule B1. Standards of Conduct

Conflict of Interest

1.7.1 You¹ must not act:

- (a) for two or more clients in matters where there is a conflict of interest between the clients;
- (b) for any client where there is either (i) a conflict or (ii) significant potential for a conflict, in each case between the interests of the client and your interests or the interests of your practice unit;
- (c) for two or more clients in matters where there is a significant potential for a conflict of interest between them except only whilst all of the following conditions are met, namely:
 - (i) no dispute has arisen or might reasonably be expected to arise between the clients;
 - (ii) each client has given informed consent to you (or your practice unit) so acting;
 - (iii) your so acting is not prohibited by any other rule.

Rule B2.1

Potential Conflict of Interest – Additional Restrictions

2.1.1 In this rule 2.1, unless the context otherwise requires, terms listed in the first column of rule 2.1.1 shall have the meanings respectively ascribed to them in the second column of that rule:

<u>Term</u>	<u>Definition</u>
client	includes prospective client

¹ i.e. any person, individual or not, who is bound by the Standards of Conduct rules

connected	<p>parties are connected if:</p> <ul style="list-style-type: none"> (a) at least one of them is a body corporate and one is controlled by the other or both are controlled by the same third person; or (b) they are companies within the same group as defined in section 474 of the Companies Act 2006 <p><i>[This has been amended to include what were previously described as 'associated companies' within the 'connected' definition]</i></p>
established client	a person for whom you have or your practice unit has acted on at least one previous occasion
practice unit	as defined in Schedule 1 but including, for the purposes of this rule 2, any office at which that practice unit carries on practice and any practice unit in which that practice unit has a direct interest through one or more of its managers
related	parties are related if one is the spouse, civil partner, co-habitant, ascendant, descendant or sibling (including by adoption) of the other;
transaction	includes a contract and any negotiations leading thereto

2.1.2 Where your only or principal employer is one of the parties to a transaction you may not act for any other party to that transaction unless:

- (a) so acting would not breach any part of rule B1.7.1 and, in particular, the conditions specified in rule B1.7.1.(c) are met; and
- (b) the parties are connected or are public authorities, public bodies, or government departments or agencies.

[Amended to remove reference to 'employed regulated person' and make applicable to all (in-house and private practice)]

Purpose of (a) is to make it clear that this rule is in addition to the main rule at B1.7.1 – i.e no acting at all where actual conflict etc ...but also to effectively 'deem' this scenario as one where there is automatically a significant potential for a conflict of interest – and hence require that the conditions at B1.7.1(c) are met, as well as the special rules added here.]

2.1.3 A regulated person, or two or more regulated persons practising in the same practice unit or in the employment of the same employer, shall not, at any stage, act for both:

- (a) the seller (or transferor) and the purchaser (or transferee) in the sale, purchase or conveyance of heritable property;
- (b) the landlord and the tenant in the lease of heritable property;
- (c) the assignor and the assignee in the assignation of a lease of heritable property;
- (d) the lender and the borrower in connection with any loan secured or to be secured over heritable property

unless, in every case

- (i) so acting would not breach any part of rule B1.7.1 and, in particular, the conditions specified in rule B1.7.1(c) are met²; and
- (ii) the principal terms of the transaction were agreed prior to the involvement of the relevant regulated person or persons and none of them has negotiated or advised, or will negotiate or advise, on any matter of substance between the parties; and

² See the comment re 2.1.2 – again this is intended to make it clear that B1.7.1 applies – does not permit acting where there is an actual conflict – and we are deeming all these scenarios as triggering significant potential for conflict – and also adding special rules reflecting the risk

- (iii) none of the relevant regulated person or persons has provided, or will provide, any advice on value, price, rent or on the terms of any loan

and

where one of the parties is a builder or developer and the matter relates to residential property, the parties are connected³

or, **in every other case except (d) above**⁴, one (or more) of the following applies:

- (w) the parties are connected or related; or
- (x) the parties are both (or all) established clients; or
- (y) the prospective purchaser, transferee, tenant, assignee or borrower is an established client or related⁵ to an established client; or
- (z) there is no other regulated person in the vicinity whom any of the parties could reasonably be expected to consult.

[The current rule at B2.1.5 – which requires letters to be sent to both clients when it is proposed to act for both sides has been deleted as this is already covered in the requirement for informed consent in B1.7.1 – we believe that the current rule B2.1.5 may confuse by suggesting that it is permissible to start acting and then send the letters – informed consent needs to be obtained before acting]

2.1.4 Unless the contrary be proved, for the purposes of rule 2.1.3, you shall be presumed to be acting for a party for whom you prepare an offer, whether complete or not, in connection with a transaction of any kind specified in this rule 2.1, for execution by that party.

2.1.5 When you are acting on behalf of a party or prospective party to a transaction of any kind you shall not issue any deed, writ, missive or other document requiring the signature of an unrepresented party to that party without informing that party in writing that:

- (a) such signature may have certain legal consequences, and
- (b) that party should seek independent legal advice before signature.

2.1.6 Where a practice unit knowingly intends to act on behalf of two or more prospective purchasers or tenants (other than prospective joint purchasers or tenants) of heritable property (in this rule 2.1.6 referred to as “the clients”), the clients shall be informed of such intention, and a single natural person shall not, where he or she has given any advice to one of the clients with respect to the price or rent to be offered, or with respect to any other material condition of the prospective bargain, give advice to another of the clients in respect of such matters.

³ not extended to ‘related’ – existing rule does not include familial relationships here

⁴ Borrower/lender excluded here as per existing rules

⁵ as per the existing rules – familial connections rather than corporate ones

PART B

CURRENT WORDING

Standards of Conduct

Conflict of Interest

- 1.7.1 You must not act for two or more clients in matters where there is a conflict of interest between the clients or for any client where there is a conflict between the interest of the client and your interest or that of your practice unit.
- 1.7.2 Even where there is only a potential conflict of interest you must exercise caution. Where the potential for conflict is significant, you must not act for both parties without the full knowledge and express consent of the clients.

Rule B2.1

Conflict of Interest

- 2.1.1 In this rule 2.1, unless the context otherwise requires, terms listed in the first column of rule 2.1.1 shall have the meanings respectively ascribed to them in the second column of that rule:

<u>Term</u>	<u>Definition</u>
client	includes prospective client
connected	parties are connected if at least one of them is a body corporate and one is controlled by the other or both are controlled by the same third person
established client	a person for whom you have or your practice unit has acted on at least one previous occasion
employed regulated person	a regulated person employed by his employer for the purpose, wholly or partly, of offering legal services to the public whether or not for a fee
practice unit	as defined in Schedule 1 but including, for the purposes of this rule 2, any office

at which that practice unit carries on practice and any practice unit in which that practice unit has a direct interest through one or more of its managers

transaction includes a contract and any negotiations leading thereto

2.1.2 You shall not act for two or more parties whose interests conflict.

2.1.3 Without prejudice to the generality of rule 2.1.2, where you are an employed regulated person and your only or principal employer is one of the parties to a transaction you shall not act for any other party to that transaction; provided always that you may, where no dispute arises or appears likely to arise between the parties to that transaction, act for more than one party thereto, if and only if:

- (a) the parties are associated companies, public authorities, public bodies, or government departments or agencies; or
- (b) the parties are connected.

2.1.4 Without prejudice to the generality of rule 2.1.2, a regulated person, or two or more regulated persons practising either as manager or employee in the same practice unit or in the employment of the same employer shall not, at any stage, act for both seller and purchaser in the sale or purchase or conveyance of heritable property, or for both landlord and tenant, or assignor and assignee in a lease of heritable property for value or for lender and borrower in a loan to be secured over heritable property; provided, however, that where no dispute arises or might reasonably be expected to arise between the parties and that, other than in the case of exception (a) hereto, the seller or landlord of residential property is not a builder or developer, this rule shall not apply if:

- (a) the parties are associated companies, public authorities, public bodies, or government departments or agencies;
- (b) the parties are connected;
- (c) the parties are related by blood, adoption or marriage or civil partnership, one to the other, or the purchaser, tenant, assignee or borrower is so related to an established client; or
- (d) both parties are established clients or the prospective purchaser, tenant, assignee or borrower is an established client; or
- (e) there is no other regulated person in the vicinity whom the client could reasonably be expected to consult; or
- (f) in the case of a loan to be secured over heritable property, the terms of the loan have been agreed between the parties before the regulated person has

been instructed to act for the lender, and the granting of the security is only to give effect to such agreement.

- 2.1.5 In all cases falling within exceptions detailed at paragraphs (c), (d) and (e) of rule 2.1.4 both parties shall be advised by the regulated person at the earliest practicable opportunity that the regulated person, or his practice unit, has been requested to act for both parties, and that if a dispute arises, they or one of them will require to consult an independent regulated person, which advice shall be confirmed by the regulated person in writing as soon as may be practicable thereafter.
- 2.1.6 Unless the contrary be proved, for the purposes of rules 2.1.3 and 2.1.4, you shall be presumed to be acting for a party for whom you prepare an offer, whether complete or not, in connection with a transaction of any kind specified in this rule 2.1, for execution by that party.
- 2.1.7 When you are acting on behalf of a party or prospective party to a transaction of any kind you shall not issue any deed, writ, missive or other document requiring the signature of an unrepresented party to that party without informing that party in writing that:
- (a) such signature may have certain legal consequences, and
 - (b) he should seek independent legal advice before signature.
- 2.1.8 Where a practice unit knowingly intends to act on behalf of two or more prospective purchasers or tenants (other than prospective joint purchasers or tenants) of heritable property (in this rule 2.1.8 referred to as "the clients"), the clients shall be informed of such intention, and a single natural person shall not, where he has given any advice to one of the clients with respect to the price or rent to be offered, or with respect to any other material condition of the prospective bargain, give advice to another of the clients in respect of such matters.

PART C

PARTIAL WORKING DRAFT GUIDANCE

N.B. This wording is still under review and incomplete- it is included here for illustration only and to assist interpretation of the proposed draft rules

Guidance related to Rule B1.7: Standards of Conduct: Conflict of Interest Commentary on B1.7

The rules at B1.7 apply at all times, to all types of legal work or representation. Whilst the term ‘solicitor’ is used for ease of reference in this Guidance, that term should be interpreted to include any person to whom the rules at B1.7 apply. That includes registered European lawyers and registered foreign lawyers and practice units – the managers of practice units are responsible for ensuring compliance by all those who work for the practice unit.

The rules prohibit acting:

- for two or more clients in matters where there is a conflict of interest between the clients;
- for any client where there is a conflict of interest – or significant potential for a conflict of interest – between the interests of that client and the interests of the individual solicitor or of the practice unit in which the solicitor works;
- for two or more clients where there is a significant potential for a conflict of interest between them except only whilst all the conditions in B1.7.1(c) are met.

Acting where there is an *actual* conflict (whether the conflict is ‘client-to-client’ or ‘client-to-agent’) is, therefore, prohibited at all times – with **no** exceptions.

Acting where there is significant potential for a ‘client-to-agent’ conflict is also prohibited – with **no** exceptions.

However, acting where there is significant potential for a ‘client-to-client’ conflict *may* be permissible whilst (and only whilst):

- no dispute has arisen or might reasonably be expected to arise between the clients – *as this would mean that an actual conflict has arisen*;
- each client has given **informed** consent – for guidance on which see below;
- acting is not prohibited by any other rule – for example, Rule B2.1 or B2.2 – but other rules may be relevant, in particular B1.3 (Independence), B1.4 (Interests of the Client), B1.6 on (Confidentiality), B1.8 (Disclosure of Interest), C4.4 (Solicitor Advocates, C4.4.26, for example) – but this is not an exhaustive list.

Reference should also be made to Guidance relevant to the matter in hand – for example, [list specific C of I Guidance that survives under B2.1 or B2.2] and the Code of Conduct for Criminal Work – but, again, this is not an exhaustive list.

Solicitors must ensure that they are satisfied that acting for all the clients will not compromise or impair their ability to fulfil all the duties they owe each client, and that no client will be

prejudiced by lack of separate representation, before they agree to take on acting for more than one client.

Whether it remains permissible to act under Rule B1.7.1 needs to be continually monitored in light of any changes in circumstances, information or instructions. The fact that acting may be permissible does not, of course, necessarily make it good practice or effective risk management to do so, in all the variable circumstances which may apply.

The Society cannot waive any of the rules contained in B1. Requiring compliance with the Standards of Conduct is considered fundamental to achievement of the regulatory objectives.

Identifying Conflict and Significant Potential for Conflict

Solicitors should examine whether a conflict of interest (or the potential for such a conflict) exists, not only at the outset of the transaction or matter, but throughout its duration because new circumstances, information or instructions may reveal an actual or potential conflict.

Examples of areas where conflicts of interest may occur

General

Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

- (a) A solicitor acts as a representative in one matter against a person when the solicitor also represents that person on some other matter;
- (b) A solicitor provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse;
- (c) A solicitor, a manager in the solicitor's practice unit, or a family member of the solicitor has a personal financial interest in a client's affairs or in a matter in which the solicitor is requested to act for a client, such as a partnership interest in some joint business venture with a client;
(A solicitor owning a small number of shares of a publicly traded company would not necessarily have a conflict of interest in acting for the company because the holding may have no adverse influence on the performance of the solicitor's duties to the client);
- (d) A solicitor has a sexual or close personal relationship with a client;
(Such a relationship may conflict with the solicitor's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the solicitor and client relationship and may jeopardise the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her solicitor);

- (e) A solicitor or his or her practice unit acts for a public or private company and the solicitor serves as a director of the company.
(These two roles may result in a conflict of interest or other problems because they may
- i. affect the solicitor's independent judgment and fiduciary obligations in either or both roles,*
 - ii. obscure legal advice from business and practical advice,*
 - iii. jeopardise the availability of legal professional privilege, and*
 - iv. disqualify the solicitor or the practice unit from acting for the organisation);*
- (f) Sole practitioners who practise with other solicitors in cost-sharing or other arrangements represent clients on opposite sides of a dispute;
(The fact or the appearance of such a conflict may depend on the extent to which the solicitors' practices are integrated, physically and administratively, in the association);
- (g) Drafting wills where the solicitor or a family member of the solicitor has an interest in the testator's estate – special rules apply in addition to those at B1.7 – see B2.2 and related Guidance;
- (h) Acting for more than one party in a transaction/matter-
- (i) Where the solicitor's employer is one of the parties – this is regarded as heightening the risk of a conflict of interest emerging and hence the circumstances where this is permissible are restricted by B1.7 and an additional rule at B2.1;
 - (ii) Acting for both 'sides' in certain transactions (e.g. seller and purchaser in a sale of heritable property, or landlord and tenant in a lease etc.) would usually involve acting where there is, at least, significant potential for a conflict of interest to arise between the clients. As a result of the level of risk, additional rules apply – see Rule B2.1 and related Guidance– solicitors must comply with B1.7 and B2.1 before they can act;
 - (iii) Acting for co-accused – refer to Code of Conduct for Criminal Work, Rule C4.4 for solicitor advocates [SLAB Code of Conduct?]

Informed Consent

For consent to be 'informed' it must be given:

- freely and without duress or undue influence;
- after disclosure of all the material facts within the knowledge (actual or imputed) of the solicitor;
- after being clearly advised of all relevant risks and issues, specifically including:
 - (i) possible impact on confidentiality of client information [link to Guidance on confidentiality];
 - (ii) possible need to obtain alternate representation if conflict develops – timing and cost implications;
 - (iii) [others which should be specified?]

Disclosure

Disclosure is an essential pre-requisite to obtaining a client's informed consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, then there is an actual conflict and the solicitor must decline to act.

Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. Therefore the solicitor should inform the client of the relevant circumstances and the reasonably foreseeable ways that the potential conflict of interest could adversely affect the client's interests. This would include the solicitor or practice unit's relationship to the parties.

The practice rule does not require that clients be advised to obtain independent legal advice about the potential conflict of interest, but it may be appropriate in some cases to recommend that approach. This is to ensure that the client's consent is informed, genuine and freely given, especially if the client is vulnerable or not sophisticated.

Solicitors must communicate effectively with clients, and tailor the manner and method of communication to best meet each client's individual needs – which may vary dependent on levels of sophistication or vulnerability, bargaining position, expertise and experience in purchasing legal services [refer to Guidance re acting for Vulnerable Clients etc]. As a result, the Society has not mandated the manner and method of disclosure or the granting of consent. Solicitors should, however, be able to evidence that informed consent was granted – and the information and advice given prior to the grant of consent. Clients must be advised of any relevant change in circumstances or information and must be able to reconsider (and withdraw) consent at any stage. Whether it remains appropriate to act must be monitored throughout the course of any transaction or matter and reassessed in light of changes in instructions, information or circumstances.

Guidance related to Rule B2.1

Potential Conflict of Interest – Additional Restrictions

Rule B2.1 applies in addition to Rule B1.7. It imposes additional restrictions in relation to some of the more commonly occurring circumstances where solicitors may be asked to act for more than one party to the same transaction. The Society considers that there may often be such a significant potential for a conflict of interest to arise in such circumstances that it is not appropriate for the same solicitor or the same practice unit to act for both parties unless there are features which mitigate the risks – such as a relevant connection between the parties, for example.

The Society recognises that the rules at B2.1 may not exhaustively describe all relevant connections or relationships between parties (or other features) which may, in a particular transaction, operate so as to reduce the risk of an actual conflict of interest emerging between those parties. Anticipating and describing all such connections etc. is not realistically achievable and an attempt to do so would be likely to result in rules too complex to be readily understood.

Where a solicitor considers that there are special features relating to a particular transaction or matter which are not covered by the rules at B2.1 but do reduce the risk of conflict sufficiently that it would be appropriate to allow the same solicitor or practice unit to act, then reference should be made to the Advice and Information here [\[insert link\]](#) on applying for a waiver of B2.1.

Note, however, that Rule B1.7 must be complied with at all times – no waivers of that rule are permitted.