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Law firm compliance: own interest conflicts

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A note examining the circumstances that may give rise to an own interest conflict for law firms and individual solicitors or legal practitioners under the SRA Standards and Regulations 2019. The note considers issues including the impact of personal and professional relationships and appointments, business and financial interests, and professional negligence. The note also offers practical tips for identifying and responding to own interest conflicts.

Scope of this note

The principle that solicitors, as fiduciaries, must not place themselves in a position where their duties and interest conflict is well established by common law and not considered to be controversial (*Bristol & West Building Society v Mothew [1998] Ch 1*). However, despite the relatively straightforward nature of the prohibition it is still common for both individuals and firms to be sanctioned by the Solicitors Regulation Authority (SRA) and the Solicitors Disciplinary Tribunal (SDT) for failing to identify these own interest conflicts and act accordingly (for recent cases, see Solicitors Disciplinary Tribunal tracker: 2022 and Solicitors Regulation Authority decision tracker: 2022).

This practice note provides guidance for SRA regulated individuals and firms on the circumstances in which own interest conflicts are likely to arise, the approach that the SRA takes to such cases, and the steps that firms can take to both prevent own interest conflicts, and to manage them if they arise during the course of a matter.

This note does not cover conflicts of interest between two or more clients, or conflicts between the duties of disclosure and confidentiality (also called "information conflicts" or "conflicts of duty"). For information about these, see Flowchart, Client conflicts of interests and duties decision tree.

SRA rules

Historical position under SRA Code of Conduct 2011

The SRA Code of Conduct 2011, which is no longer in force, set out the rules governing conflicts of interest in mandatory outcomes. Outcome 3.4 prohibited firms or individuals from acting where there is an own interest conflict or significant risk of one.

The SRA Code of Conduct 2011 also provided the following non-exhaustive list of "indicative behaviours" (IBs) which would tend to indicate that an individual or firm had not achieved outcome 3.4 and complied with the 2011 SRA Principles in relation to own interest conflicts:

- In a personal capacity, selling to or buying from, lending to or borrowing from a client, unless the client has obtained independent legal advice (IB 3.8).
- Advising a client to invest in a business, in which you have an interest which affects your ability to provide impartial advice (IB 3.9).
- Where you hold a power of attorney for a client, using that power to gain a benefit for yourself which in your professional capacity you would not have been prepared to allow to a third party (IB 3.10).

The provisions of the SRA Code of Conduct 2011 were replaced by the SRA Standards and Regulations (StaRs) in November 2019.

Standards and Regulations (StaRs) 2019

The StaRs contain several provisions which may be breached by acting in an own interest conflict situation.

SRA Principles

Acting where there is an own interest conflict may contravene some or all of the following SRA Principles, which provide that both solicitors and firms must act:

- In a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons (Principle 2).
- With independence (Principle 3).

- With integrity (Principle 5).
- In the best interests of each client (Principle 7).

SRA Codes of Conduct

Paragraph 6.1 of both the SRA Code of Conduct for Individuals and the SRA Code of Conduct for Firms provides as follows:

> "You do not act if there is an own interest conflict or a significant risk of such a conflict."

The SRA glossary defines an own interest conflict 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".

(See SRA: glossary.)

The SRA's guidance on conflicts of interest states that for matters to be "related" there needs to be some reasonable degree of relationship between them (see SRA: Case studies: Conflict of interest). Matters that concern the same asset or liability will generally be related.

Crucially, there are no exceptions which would enable an individual or a firm to act where there is an own interest conflict. This is unlike conflicts of interests arising between two (or more) clients of the firm, or conflicts between the duties that the individual or firm owes to two (or more) clients (sometimes called information conflicts or conflicts of duty) where it may be possible to continue acting if the conditions in paragraph 6.2 of the SRA Codes of Conduct for Individuals and Firms are satisfied.

Conflicts of interests between two or more clients, and conflicts of duties, are outside the scope of this note. For information about those issues, see Flowchart, Client conflicts of interests and duties decision tree.

Individual and firm regulatory liability

The prohibition against acting in an own interest conflict scenario applies to both individuals and firms.

Previously, outcome 3.2 of the SRA Code of Conduct 2011 provided that firms must have appropriate systems and controls in place to enable them to identify whether the firm's or its staff's ability to act in the best interests of their client was impaired by:

- Any financial interest.
- A personal relationship.
- Their appointment, or that of a member of the firm or their family, to public office.
- Commercial relationships.
- Their employment.

This express obligation is no longer contained in the SRA Code of Conduct for Firms. However, paragraph 2.1 of the Code provides that firms must have effective governance structures, arrangements, systems and controls in place to ensure compliance with the SRA's regulatory arrangements. Paragraph 2.2 of the Code provides that firms must keep and maintain records to demonstrate that compliance. Firms should accordingly consider the policies and procedures they have in place to identify own interest conflicts.

Policies and procedures for law firms

Policies and procedures that firms should consider implementing include:

- Maintaining a written conflicts of interest policy, which addresses own interest conflicts, that is accessible to all staff and on which staff receive regular training. For a template, see Standard document, Conflicts of interest policy for law firms.
- Providing training to all staff on the types of interest that can create a risk of own interest conflict, and refreshing this training regularly as part of the firm's regular training programme (see Training implementation toolkit (UK)).
- Maintaining a register of interests where individuals are required to declare any personal, financial or commercial relationships. New staff should declare their interests as part of the onboarding process, and all staff should be required to review and update their information when circumstances change, or at least annually. For a template, see Template conflicts of interest register.
- Ensuring that any relationships declared are inputted into the firm's accounting, client management or other software, so they are picked up when a conflict check is run. Firms may wish to create a system whereby potential own interest conflicts show up on a conflict check as an instruction to refer to the compliance team, to protect the confidentiality of the individual with the relevant interest.
- Where there is a personal or other relationship, but on the facts the firm considers that this does not result in an own interest conflict or a significant risk of such a conflict arising, ensuring that the decision to act is documented so it can be demonstrated that the potential conflict was considered. For an example of how this could be recorded in the file opening risk assessment, see Standard document, File opening client and matter risk assessment for law firms: paragraph 3.3.

SRA enforcement strategy

The SRA's enforcement strategy sets out the circumstances in which it will take action against either individuals or firms, or both (see SRA: enforcement strategy). The enforcement strategy provides that action will be taken against individuals where they are personally responsible for misconduct, and to address the risk that the relevant individual may present to clients. Conversely, action may be taken against firms where it is not possible to apportion individual responsibility or when the events demonstrate a failure which relates to the culture, systems, supervision arrangements or processes for which the firm as a whole should be held accountable.

There is therefore potential for action to be taken against both individuals and firms for acting in an own interest conflict.

The SRA may consider action against an individual where there is evidence that the individual failed to identify, or to address, a personal own interest conflict. They may consider action against a firm where there has been a collective failure to address an own interest conflict, or where the firm's systems were not robust enough to identify the conflict in the first place.

Personal and professional relationships

Given the absolute prohibition on acting in an own interest conflict, individuals and firms should be extremely wary of entering into contractual or other relationships with clients where the individual or firm stand to either personally benefit or suffer detriment.

The relationships and interests which can give rise to an own interest conflict are many and varied, and often not well understood. Firms must ensure that their staff receive training to ensure that they understand the issues, and put in place procedures to ensure that staff are able to identify whether they (or anyone in the firm) have any personal relationships with either the client or a connected third party in a matter, which could impact on their, or the firm's, ability to act in the client's best interests in that matter.

Financial interests

Loans and other financial arrangements with clients

Individuals and firms should be extremely wary of entering into any financial arrangements with clients beyond the usual matter funding relationships like conditional fee agreements (for information about the conflicts which can arise out of matter funding arrangements, see Funding arrangements).

Depending on the circumstances, it may be tempting to view the arrangement as mutually beneficial and therefore in the common interest of both the client and the firm. However, SRA and SDT decisions illustrate that there is an inherent conflict of interests in any situation where an individual or firm enter into a bipartite agreement with a client who is instructing them, unless the client is independently advised (see Independent legal advice).

In *SRA v Norman (SDT Case No 11485-2016)* the respondent was fined £10,000 and ordered to pay the SRA's costs for borrowing £407,758.55 from clients without ensuring they obtained independent legal advice before the loans were entered into. The SDT found that the clients had been content to make the loans, which were repaid in full, and had been advised to take independent legal advice but had elected not to do so. However, the SRA Code of Conduct made clear that the solicitors should not accept loans from clients unless the clients had been independently advised, and it followed that where the client was unwilling to obtain such advice the transaction could not proceed.

The same considerations apply when the individual benefiting from the transaction is not the solicitor themselves, but a member of their family. In *Richards v Law Society [2009] EWHC 2087 (Admin)* the High Court upheld the decision of the SDT to fine Mr Richards £10,000 for entering into a financial arrangement with a client which benefited Mr Richard's children, without ensuring that the client was independently advised.

In *SRA v Harvie (SDT Case No 11257-2014)*, a solicitor was fined £305,000 by the SDT for entering into a financial arrangement with a client in which he acquired ownership of the client's house, without ensuring that she obtained independent advice.

Gifts in wills

The SRA has published guidance on the drafting and preparation of wills which will include a gift to the lawyer, the firm, or related individuals, which states:

> "If you draft a will where the client wishes to make a gift of significant value to you or a member of your family, or an employee of your business or their family, you should satisfy yourself that the client has first taken independent legal advice with regard to making the gift. This includes situations where the intended gift is of significant value in relation to the size of the client's overall estate, but also where the gift is of significant value in itself."

(See SRA: Drafting and preparation of wills.)

In *SRA v Beach (SDT Case No 11761-2017)* a solicitor was fined £7,500 for, among other things, failing to advise

clients to take independent advice where significant gifts on death were to be made to him or his employees under wills he prepared for them. The solicitors also advised clients on wills that he had prepared for them which provided for significant gifts to be made to him, without ensuring that they received independent advice on the terms of those wills.

In a regulatory settlement agreement, the SRA rebuked a solicitor who drafted a will under which the solicitor's family member inherited 50% of a client's estate without advising that client to take independent legal advice (decision 099661, see Solicitors Regulation Authority decision tracker: 2022: Agreements).

Independent legal advice

In the cases referred to above (see Loans and other financial arrangements with clients and Gifts in Wills), a central issue was that those involved had failed to ensure that the client took independent legal advice.

Financial arrangements with, and significant gifts (whether testamentary or lifetime) to, a legal professional (or their firm or family and so on) inherently carry a potential for a conflict of interests between the parties on either side. It is therefore not possible for the individual or firm involved to advise the client on the financial arrangement or gift without being deemed to be tainted by that conflict of interests.

It is therefore crucial that the client obtains independent legal advice on any proposed financial arrangement or gift. The emphasis for the individual or firm is on ensuring that the client does so. It is not sufficient for the individual or firm to proceed with the transaction on the basis that they have advised the client, or even strongly urged them, to take independent legal advice but the client then chose not to do so. The individual or firm should not proceed unless the client has taken the independent advice.

Best practice is to be frank with the client and explain that professional conduct rules prohibit the individual or firm from proceeding with the arrangement unless the client takes independent legal advice. Most clients will understand that the individual and firm are bound by professional conduct rules, such that the most common drivers of client reluctance to take independent advice are concerns about the time and cost this will involve.

To overcome the costs obstacle, firms may wish to offer to fund the cost of the client obtaining independent legal advice. In principle there is nothing in the regulations to prevent firms from offering to fund a client's independent legal advice. However, firms should exercise caution in doing so, to ensure that any funding proposals do not themselves fetter the client's ability to take genuinely independent legal advice and because of that compound, rather than resolve, a conflict of interests.

Personal business interests

Firms should ensure that they are aware of the personal business interests and close business relationships of individuals within the firm, as these can give rise to significant own interest conflicts in relation to professional work which touches on those interests.

Directorships

In *SRA v Evans and another (SDT Case No 11907-2018)* the SDT approved an agreed outcome in which the respondents were fined £10,000 for acting for a client in the sale of four freehold sites to a company, where they had a beneficial interest in that company and a financial interest in the transaction.

Investment schemes

On 17 August 2020, the SRA published a warning notice highlighting concerns about law firms being involved in or promoting investment schemes (see SRA: Warning notice: Investment schemes including conveyancing). Promoting or advising on such schemes raises several regulatory concerns. However, from an own interest conflict perspective the warning notice highlights that individuals or firms often have a relationship with the seller of the investment scheme, be that an existing business or referral relationship, or a personal friendship, which may make it inappropriate for the individual or firm to advise clients on the merits of such a scheme.

The SRA's warning notice provides that firms should:

> "Carry out effective and thorough conflict checks including assessing any own interest conflicts especially when relying on previous relationships or because of receiving referrals as a 'panel' law firm."

For information and template documents to assist firms in identifying potential conflicts from personal business interests and relationships, see Policies and procedures for law firms.

Professional appointments in relation to firm's work

Where individuals within the firm are appointed as professional post holders, for example, as professional executors or attorneys, or as the deputy to a person who lacks mental capacity, individuals and firms should be vigilant for potential sources of own interest conflict.

Professional post holders engaging other professionals

In ACC and others [2020] EWCOP 9 the Court of Protection considered how professional deputies could ensure that an own interest conflict did not arise when they instructed their own firm, or an associated entity of that firm, to manage the investments of the client or provide other administrative or legal functions.

Before instructing their own firm (where no specific authority to instruct their own firm has been granted), a deputy must:

- Obtain three quotes from providers of legal services who are properly qualified and appropriate to undertake the work. One of the quotes may be from the deputy's own firm. The obtaining of quotes must be done in a way which is proportionate to the magnitude of the costs involved and the importance of the issue (both in financial and non-financial terms) to the person for whom they are deputy.
- Make a best interests decision as to which of the three providers to instruct, and document the decision-making process.
- Where the deputy's best interests decision is to instruct their own firm and the anticipated costs exceed £2,000 plus VAT, make an application to the court for specific authority.
- Clearly set out any legal fees incurred in their account to the Public Guardian and append the notes of the decision-making process to the relevant return.

(*ACC and others, HHJ Hilder at paragraph 56.7.f.*)

Executors

The SRA guidance on the drafting and preparation of wills (see SRA: Drafting and preparation of wills) provides that, before drafting a will which appoints themselves or a member of their firm as an executor, the solicitor and firm must satisfy themselves that the client has made the decision to appoint them on a fully informed basis.

In straightforward cases there may be no need for a professional executor and the lay client should not be led to believe that appointing a solicitor is essential or the default position. Individuals and firms must ensure that they do not put their own interest in being paid to administer the estate over the best interests of the client.

Once in post, own interest conflicts can arise for executors if they or their firm make a mistake that amounts to professional negligence (for further information about professional negligence, see Practice note, Professional negligence).

Additional conflict issues in the event of negligence

Where a member of the firm is appointed as a professional executor, administrator, deputy or attorney for a client, they will effectively assume the role of primary client (or one of them, for example, if there is a lay co-executor), subject to the duties they owe to the estate or individuals involved (the underlying client). Commonly, the professional post holder will instruct their own firm to act for them in the matter.

This can create complex conflict of interest issues if any query is raised about the firm's work on the matter:

- The firm may have a conflict of interests in continuing to act in the matter (see Negligence and allegations of negligence).
- There may be a potential claim against the professional post holder personally, in relation to their conduct of the matter while in post.
- The professional post holder's duty to act in the best interests of the underlying client, or their defence of any claim made against themselves personally, may oblige them to make a service or costs complaint, or claim for professional negligence, against the firm who employs them or in which they are a partner.

If an own interest conflict arises, the individual and firm may need to make an application to be removed from the post of executor by reason of conflict of interests, under section 50 of the Administration of Justice Act 1985 (see *Harris v Earwicker [2015] EWHC 1915 (Ch)* and *Re Weetman [2015] EWHC 1166 (Ch)*).

A detailed examination of this situation is outside the scope of this note. For further information which may assist a firm in considering and addressing this situation, see Practice notes:

- Rights of a beneficiary and duties of a personal representative.
- Methods of advancing or intervening in the administration of an estate.
- Causes of action against personal representatives.
- Defences to claims for breach of duty against personal representatives.

Personal appointments outside the firm

Many solicitors hold personal appointments outside of their firm, including charity trusteeships or governance roles in local schools. Appointments like these are unlikely to cause own interest conflicts day to day. However, staff should declare any trusteeships or other

external appointments and the firm should maintain a central record of these for conflict checking purposes.

Charity trusteeships

In addition to their regulatory obligations as solicitors, charity trustees must avoid putting themselves in a position where their duty to act in the best interests of the charity conflicts with their own interests. This can give rise to an actual, or significant risk of, own interest conflict for the firm if it receives instructions that adverse to the interests of the charity. Potential risk areas for firm therefore include, for example, litigation against a charity where one of the partners or employees is a trustee of that charity. If the advice or strategic handling of the matter would in any way be influenced by the partner or employee's position, then the firm should not accept the instruction.

Memberships, sponsorships and other close affiliations

Where the firm or individual is involved in a membership, sponsorship or other close affiliation with an organisation, this can also present a risk of own interest conflict. In addition to any direct interest the organisation may have to a matter in which the firm is to be instructed, the firm may also need to consider the potential impact of their and the organisation's wider interests. Examples of situations which may require careful consideration include:

- If an individual is a member of an organisation with special interests, for example an environmental or an animal welfare group, the individual may need to consider if their personal position in, or views as a member of, the group would prevent them from being able to properly advise a client with practices, interests or objectives which may be adverse to those views or the interests of the group.
- If the firm has an association with an institution or organisation, for example for the purpose of sponsoring or co-hosting events, this is likely to impact on the firm's ability to advise anyone with a claim against such a sponsor/co-host.

Personal relationships

Benefiting a personal relationship

Firms and individuals should exercise caution whenever professional work comes into contact with the personal relationships of the individuals working on a matter (or close colleagues), or those of significant individuals within the firm. Before any dealings that benefit anyone with whom there is a personal relationship, individuals and firms should consider how their actions may be perceived later and objectively by other parties, public perception and the regulator.

In May 2022, the SRA entered into a regulatory settlement with an in-house solicitor, in which the solicitor was fined £2,000 for engaging an external firm to carry out work for his employer where one of the employees of that firm was a close relative of the solicitor (see SRA: decision 040927). The SRA recorded that the invoices submitted by the firm "appeared to be excessive" and the in-house solicitor approved payment of the invoices without informing his employer that the invoices provided for payment of his close relative's fees.

In these situations, the firm should consider carefully whether it is necessary or appropriate to instruct an organisation or individual if doing so may benefit someone with whom they (the firm or an employee) have a personal relationship.

Issues to consider include:

- Price, expertise and other suitability criteria of the proposed person or entity to be instructed, and whether there are any viable alternatives which do not involve a personal relationship.
- Whether there are other reasons in the best interests of the client for instructing the proposed person or entity, for example, availability or experience with this type of client or transaction.
- How the client is likely to perceive the choice of instruction, or how it will be perceived by other relevant bodies, for example, the Court of Protection where the client is a person for whom the lawyer is a deputy.
- Whether consent should be sought from the client or supervising body before proceeding with the instruction.

Where the decision is made to proceed with the instruction, firms and individuals should document the decision-making process and the reasons for the final selection.

Although there is no course of action which will guarantee that the regulator will not later find that the firm or individual was acting in a conflict of interests, transparency and frankness with clients, other interested parties and any supervising body will assist in demonstrating that the individual's personal interests (arising from their personal relationships) was not a factor in the decision to instruct the person or entity in question.

Best practices include:

- Obtaining fee quotes and gauging interest, expertise, capacity and so on from potential comparators.
- Discussing the issues and potential instruction with an independent senior person internally, for example, the firm's compliance officer for legal practice (COLP).

- Documenting the decision-making process and reasons for the final selection on the file.
- If the proposed instruction which would benefit a personal relationship would be more costly than the available alternatives, documenting carefully why the increased spend is appropriate in all the circumstances.
- Discussing with the client or other interested parties (for example, the beneficiaries, if the lawyer is the executor of an estate), including any costs issues, and recording their views and consent.
- Notifying the matter to (or seeking consent from) any supervising body such as the Court of Protection.

Acting against the interests of a personal relationship

Own interest conflicts can also arise where the firm is instructed to act against a person or entity who has interests adverse to someone with whom the acting individual (or a close colleague) or senior member of the firm has a personal relationship. For example, if the firm were to act in litigation against a school of which one of the partners was a governor, or the headteacher of which was the spouse of the firm's managing partner.

Firms should consider in each case whether the situation is sufficient to give rise to a conflict of interests which would require the firm to decline or cease to act. If the firm concludes that the relationship involved does not create a conflict of interests, best practice would be to implement confidentiality safeguards in any event, to ensure that information from the file is kept confidential from the individual within the firm who has the relevant personal relationship.

Funding arrangements

With firms now able to act under both conditional fee agreements and damages-based agreements in appropriate cases, firms need to ensure that any funding arrangement they propose is in the best interests of the client and does not prioritise the firm's own interest in making a profit. While in many cases an arrangement where the firm takes on the risk of the case being unsuccessful is likely to be in the client's best interests, this may not always be the case and the suitability of any funding arrangement should be considered on a case by case basis.

Once a funding arrangement has been entered into, there is potential for conflict where the recovery of the firm's fees is contingent on the success of the case. The own interest conflict concern relates to whether firms may encourage clients to settle cases for a lower amount than the claim is really worth, to avoid the risk of loss at trial in which case their fees could not be recovered. Obtaining advice from counsel as to quantum or the reasonableness of any offer would usually be recommended to guard against this potential conflict.

Negligence and allegations of negligence

Where the firm has been negligent

Where a solicitor makes a mistake on the file, which causes prejudice to a client that cannot easily be remedied, this will give rise to a potential negligence claim against the solicitor or their firm. The fact that a potential claim could be made against the firm brings the firm's interests in not being sued, or in defending the claim, into conflict with the interests of the client.

An example of such a mistake giving rise to an own interest conflict is *SRA v Tompkins and another (SDT Case No 12178-2021)*. In this agreed outcome, the partner with the conduct of the matter and the firm were ordered to pay £5,000 and £11,000 respectively (in addition to the SRA's costs) for failing to identify an own interest conflict.

The firm had acted for a long-standing property developer client in the purchase of a residential property, and had failed to identify and advise the client about a restrictive covenant which impacted on the ability of the client to develop the property. The purchase completed and the client began development works. The owners of neighbouring properties sought to injunct the development works, relying on the restrictive covenant. Notwithstanding their own failure to identify the restrictive covenant during the purchase (in respect of which they had notified their insurers), the firm then entered into a new retainer with the client to advise him as to the enforceability of the restrictive covenant and to act for him in court proceedings with the neighbours.

The partner accepted that he had failed to recognise the own interest conflict, and that accordingly he also failed to cease acting and advise the client to obtain independent legal advice. The firm also admitted that it had failed to identify the conflict and that it did not have systems in place to identify or respond to own interest conflicts (as expressly required by the SRA Code of Conduct 2011, which was in force at the time of the misconduct).

Attempting to rectify negligent mistakes

The *Tompkins* case above is a relatively straightforward example of an individual or firm failing to identify that their mistake had given rise to an own interest conflict.

The position is more complicated where the individual or firm identifies the conflict arising from their mistake, but attempts to rectify that mistake so that they can continue acting.

Howell Jones

In *SRA v Howell Jones LLP (SDT Case No 11846-2018)* the firm had acted for a matrimonial client in a divorce with his wife. After a financial settlement had been agreed, the client expressed concern that the settlement was unfair to him.

The firm took advice from counsel at their own cost, who advised them that:

- The settlement was unfair to their client.
- It may be possible to make an application to court to resile from the settlement.
- There would be a conflict of interest in the firm acting for the client in any application to resile from the settlement, given that the client had entered into the settlement on the basis of the firm's advice.

After considering counsel's advice, the firm wrote to the client proposing two options. The client could either disinstruct the firm and obtain advice from another firm; or the firm would refund the fees he had incurred to date, and would make an application to court to attempt to resile from the settlement agreement at the firm's own cost. The client chose the second option. The firm considered that, by refunding the fees and taking on the risk of the application being unsuccessful, it was no longer in a position of conflict with the client and could continue to act. The application to resile from the settlement agreement was unsuccessful, resulting in an adverse costs order being made against the client on the indemnity basis, which the firm paid.

In an agreed outcome, the firm was fined £5,000 and paid the SRA's costs. They admitted that the own interest conflict arose at the point that they received counsel's advice and that the proposal they had made to continue acting was insufficient to resolve the conflict. They should have ceased to act instead of making the proposals that they did.

While the firm had offered to put the matter right at their own cost, the client should have been advised on the merits of the alternative route available to them of suing the firm for professional negligence. The test of conflict is objective, not subjective, and the firm clearly could not give the client independent advice on the merits and prospects of bringing a claim against itself without taint of its own significant interest in the client not doing so. As the firm was not able to properly advise the client in this way, it had no alternative but to cease acting.

SRA approach to putting matters right

Paragraph 7.11 of the SRA Code of Conduct for Individuals and paragraph 3.5 of the SRA Code of Conduct for Firms require that:

> "You are 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."

The reference to putting matters right "if possible" recognises that there are circumstances where the mistake puts the individual or firm in an own interest conflict position such that they are unable to continue acting.

The question then arises as to what mistakes can be rectified under paragraphs 7.11 and 3.5 and what mistakes put the individual or firm in a conflict position, requiring them to cease acting.

To help resolve this question the SRA has published guidance setting out the questions that individuals and firms should be asking themselves when deciding whether it is appropriate for them to continue to act, as follows:

- How complex and costly is the remedial course likely to be?
- How certain is the outcome? Does it rely on the actions or decisions of third parties or the court?
- Will the client need to make decisions along the way which will involve considering the relative merits of options which include taking action against the firm?
- Is the firm able to accept the mistake and make admissions?

(See SRA: Putting matters right when things go wrong, and own interest conflicts.)

Applying these questions to the *Howell Jones* matter:

- The remedial course involved an application to the court to re-open a settlement agreement, which was opposed by the opponent and ultimately rejected by the court following a two-day hearing. The outcome was accordingly far from certain.
- Settlement offers had been made before the hearing. The firm quite properly obtained advice from counsel on those settlement offers. However, viewed objectively, any advice the firm gave on those settlement offers risked being tainted by the firm's own interest in the client accepting the offer (to resolve the matter without a claim against the firm).

The SRA's guidance does leave open the possibility of a firm being able to continue acting in a *Howell Jones* scenario, but it appears this would only be permissible if:

- The firm insists on the client obtaining independent and confidential legal advice (which the SRA has suggested that the firm offer to pay for).
- The client does take that independent advice.
- It is possible for the firm to continue acting in their client's best interests while taking the remedial step.

However, firms should be conscious of how any decision to continue acting may be viewed objectively and in hindsight after the outcome is known. In most cases, ceasing to act is likely to be the safest course for the firm.

Continuing to act

If a decision is made to proceed, then this should be properly documented so it can be justified to the SRA if necessary in due course. Clearly insurers will need to be notified at the outset and before any admissions of liability are made (see Practice note, Triaging professional negligence claims, complaints and conduct allegations: 1. Professional negligence issues).

The *Howell Jones* scenario is to be contrasted with a situation where an individual or firm is responsible for their client missing a deadline in litigation and is required to make an application for relief from sanctions. While the application could still be opposed by the opponent, and the court may be required to make a decision, where the breach is relatively minor and relief is likely to be granted then it is common for the firm to continue to act, providing that they admit their mistake, and bear their own costs of the application, as well as meeting any order that is made for adverse costs.

If the application for relief was refused and the client was prejudiced in the litigation as a result, then the individual or firm would need to consider carefully whether they could continue to act in the litigation or whether an own interest conflict had arisen at that point.

Unfounded allegations of negligence

Where a client makes allegations of negligence, a conflict of interests may still arise even where the firm considers that it has not been negligent and the allegations are unfounded, misconceived or frivolous. The firm's interest in defending the allegations or in persuading the client to withdraw or not pursue them may conflict with the client's interests in investigating and being properly advised on their concerns.

In these circumstances firms should consider how best to address the issue. Depending on the circumstances and nature of the allegations made, possible options may include:

- Resolving a simple misunderstanding by providing the client with information or evidence from the file to reassure them of the factual position, following which the client may voluntarily withdraw the allegations.
- Pausing the client's matter while the client obtains independent legal advice to resolve their concerns about the firm's work (see Independent legal advice).
- Ceasing to act, if the allegations will be a matter for argument, or if the client's concerns have led to a breakdown in the solicitor-client relationship such that the firm can no longer act for them effectively.

General counsel and in-house lawyers

General counsel and in-house lawyers are potentially particularly vulnerable to own interest conflicts as they are paid a salary and owe contractual duties to the organisation they are advising as their client.

Further, general counsel and in-house lawyers often have remuneration structures which are linked to the success of the organisation, meaning it may be difficult for them to be completely independent when advising in respect of a transaction in which they (via their employer) could either benefit or suffer detriment.

To guard against this risk it is common for general counsel or in-house lawyers to instruct external lawyers to advise, although they must also ensure that they do not instruct external lawyers with whom they have a personal or financial relationship (see Benefiting a personal relationship).

It is anticipated that the SRA will be setting out guidance in the near future as to how general counsel and in-house lawyers can manage the tensions between their regulatory obligations and their own interests and the interests of their employer client.

For own interest conflict resources designed for general counsel and in-house lawyers in commercial entities, rather than for SRA regulated law firms, see Conflicts of interest toolkit.

How to respond to an own interest conflict

Ceasing to act

Where an own interest conflict has occurred there are no exceptions in the SRA Codes of Conduct which would enable an individual or firm to continue to act. There is no ability for the client to consent to the individual or firm being in an own interest conflict. The rule against acting is absolute and, where a conflict arises

or is brought to the firm's attention during a matter or transaction, they will have to cease acting.

Usually, this will be a straightforward exercise of informing the client that the firm cannot continue to act and that they will need to seek advice from another firm.

Carrying out limited further work

There may be occasions where, for example, it would not be possible for a new firm to be instructed in advance of a deadline, and a failure to meet that deadline may cause prejudice to the client. In those circumstances, the SRA's guidance indicates that it is permissible to take limited steps to protect the client's position, such as making an application for an extension of time to comply with the relevant deadline (see SRA: Putting matters right when things go wrong, and own interest conflicts). The emphasis here is on **limited** steps to protect the client. Firms should therefore be careful only to carry out the steps required to make the matter or transaction safe so that the client has time to instruct new solicitors, and should avoid going beyond this to progress the matter in any substantive way.

Again, where such limited steps are taken, the rationale for continuing to act should be documented and the engagement should be brought to an end as soon as it is possible to do so.

Self-reporting

As well as ceasing to act, individuals and firms should also consider whether there is a need to self-report potential regulatory misconduct to the SRA.

In this regard, paragraphs 7.7 to 7.8 of the SRA Code of Conduct for Individuals and paragraphs 3.9 to 3.10 of the SRA Code of Conduct for Firms state as follows:

> "3.9 You report promptly to the SRA, or another approved regulator, as appropriate, any facts or matters that you reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them (including you) of which you are aware. If requested to do so by the SRA, you investigate whether there have been any serious breaches that should be reported to the SRA.
>
> 3.10 Notwithstanding paragraph 3.9, you inform the SRA promptly of any facts or matters that you reasonably believe should be brought to its attention in order that it may investigate whether a serious breach of its regulatory arrangements has occurred or otherwise exercise its regulatory powers."

OFn an individual level acting in an own interest conflict scenario is likely to constitute a serious breach of the regulatory arrangements, as reflected in the fines that individuals have received from the SDT or the SRA. Similarly, the fines issued to firms in the *Tompkins* and *Howell Jones* matters reflected the fact that the conduct was considered to be "moderately serious/conduct assessed as more serious" respectively for the purposes of the SRA's fining bands.

Self-reporting firms should consider not only whether the conduct of the relevant individual acting in a conflict situation needs to be reported, but also whether the circumstances amount to a breach of the SRA Code of Conduct for Firms (for example, where the firm's systems did not detect the conflict).

For further information about reporting breaches to the SRA, see the following:

- Practice note, SRA Principles and Codes of Conduct: reporting obligations and whistleblowing : Reporting obligations under SRA Codes of Conduct.
- Practice note, Law firm compliance officers: roles and responsibilities: Reporting and recording breaches.
- Standard document, SRA regulatory reporting policy.

Notifying professional indemnity insurers

Where an own interest conflict has been discovered and the firm or individual has ceased to act, the client may raise a complaint, usually in relation to fees (either charged by the firm or which will be charged by a new firm in getting up to speed). However, firms should also consider whether the client has, or may argue that they have, suffered other loss or detriment as a result of the own interest conflict, for example, if the client considers that their confidentiality or position in the transaction may have been prejudiced. If there is any possibility of the client making a claim for loss, firms should consider notifying the matter to their professional indemnity insurers on a precautionary basis.

For guidance on considering the issues that may be raised by the situation, and whether these should be notified to insurers, see Practice note, Triaging professional negligence claims, complaints and conduct allegations.