Conflicts of Interest:
Recognition, Avoidance, Resolution

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Analysis: Commercial Dispute Resolution and Life at the Bar

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Ben’s practice covers professional liability, regulatory and disciplinary, and commercial work. Ben has particular expertise in regulatory investigations and disciplinary proceedings against accountants and auditors, finance professionals and lawyers. He advises financial institutions and large professional services firms on their regulatory obligations. He also focuses on civil claims arising from the finance sector. Ben is a past Chair of the Professional Negligence Bar Association. He is a Senior Decision Maker for the Guernsey Financial Services Commission.

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Charles specialises in the pursuit and defence of claims (both civil and disciplinary) against professional advisers. He regularly advises lawyers and other professional advisers about their professional regulatory obligations and has a particular interest in lawyers’ fiduciary duties, conflicts of interest (whether own interest conflicts or client conflicts), duties of confidence, and/or the law of privilege. He has been retained by leading commercial firms of solicitors in relation to SRA investigations.

Charles is co-author with the late Lord Toulson of Confidentiality (Sweet & Maxwell, 3rd edition, 2012), a new edition of which is due to be published in late 2019. The directories have said of him: “He has a brilliant legal mind and looks at cases upside-down and back-to-front to absolutely get to grips with the issues”; “Very measured, with a huge wealth of knowledge and case law at his fingertips”; “He is one of the most user-friendly barristers I have dealt with and would be at the top of my list for a measured, strategic opinion on a technical professional negligence case.”
CONFLICTS OF INTEREST: RECOGNITION, AVOIDANCE, RESOLUTION

Introduction

1. As law firms become larger and are forced to be more cost effective per retainer, the need for work grows. Combine this need with (i) increasingly sophisticated and challenging clients and (ii) ever more intense regulation, and the scene is set for problems relating to conflicts of interest.

2. In this talk, we aim (i) to summarise the principles to apply in relation to conflicts of interest and (ii) to identify what can and cannot be done to manage the risks of and arising from conflicts of interest. The law in this area is far from settled and the existence of conflicts and how they are best dealt with is very fact sensitive. Accordingly, what follows is not intended to be definitive or a panacea. But we hope it will serve as a helpful guide through what can seem rather a maze of law and regulation.\(^1\)

The law of conflicts

The present state of the law

3. The law of conflicts is part of the law of fiduciary duties but, across the common law world, there is no basic agreement about what the law of fiduciary duties is. Professor Finn, who has been described as the grandfather\(^2\) of the modern law on fiduciary duties, wrote in 2014\(^3\):

> Over 40 years ago, I began to write on fiduciary law. It was then almost an untilled field. A few articles across the common law world. No textbook addressing the subject as such. And relatively few modern cases in Commonwealth jurisdictions. Today the area is a large and noisy development site. For all the construction and demolition that has gone on across the common law world – the decisions and writings are voluminous and discordant - I question whether we are any closer to agreeing upon a simple, intelligible and coherent account of the law and its rationale.

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\(^1\) This talk should not be taken or relied on as legal advice. Specific advice on any given situation should always be sought.

\(^2\) If Lord Millett is the father

4. On a number of points, the English law of fiduciary duties is nothing like US law, is far removed from Canadian law, is not very similar to New Zealand law, and is not entirely consistent with (the rather more thoroughly developed) Australian law\(^4\). But it is not our purpose today to explore the complex jurisprudential issues that arise.

5. The judgment of Millett LJ in *Bristol & West Building Society v Mothew*\(^5\), the inevitable starting point for consideration of fiduciary duties in modern case law, has not met with universal assent\(^6\). But for present purposes it has two great advantages:

5.1. It may fairly be said to represent the present state of English law.

5.2. It contains convenient definitions of a number of terms which are of central importance to our subject.

6. However, it would be unrealistic to expect a single judge, however distinguished, to provide in a single judgment a complete guide to what is a complex subject and we hope (among other things) to flesh out one or two of the gaps in Millett LJ’s exposition.

The conflicts rules

7. The two fiduciary obligations which are of most direct relevance for present purposes\(^7\) were set out by Millett LJ in these terms:

7.1. A fiduciary “must not place himself in a position where his duty and his interest may conflict”.\(^8\) (This obligation is reflected in the SRA’s rules about “own interest conflicts”.)

7.2. “A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts

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\(^4\) See the brief survey by Matthew Conaglen in *Fiduciary Loyalty* (Hart Publishing, Oregon, 2010), at pages 24 to 26.

\(^5\) [1998] Ch.1


\(^7\) There are a number of others, e.g. the profit principle, the fair-dealing rule and the self-dealing rule.

\(^8\) *Bristol & West Building Society v Mothew* [1998] Ch.1, at 18B
himself in a position where his duty to one principal may conflict with his duty to the other... This is sometimes described as "the double employment rule." Breach of the rule automatically constitutes a breach of fiduciary duty."

Existing/former clients

9. The conflicts rules relate to existing clients, not to former clients. In English law, fiduciary duties do not survive the end of the fiduciary relationship, subject to two points which solicitors should bear in mind:

9.1. First, in some cases (e.g. a long-established family solicitor) a relationship of trust and confidence and consequent fiduciary obligations may survive the end of a specific contractual retainer.

9.2. Secondly, a solicitor who terminates a retainer with the specific intention of evading the consequences of a fiduciary obligation may find the termination ineffective for that purpose (unless done with informed consent).

10. Accordingly, in acting against the interests of former clients, the principal concern of solicitors is usually not the conflicts rules, or fiduciary duties more generally, but the

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9 Bristol & West Building Society v Mothew [1998] Ch.1, at 18H to 19A
10 Bristol & West Building Society v Mothew [1998] Ch.1, at 19G
11 Not so in Canada: see Smith v Jones [1999] 1 SCR 455.
12 Bolkiah v KPMG [1999] 2 AC 222; certainly this is true of the duties imposed by the conflicts rules.
13 See e.g. McMaster v Byrne [1952] 1 All ER 1362, Privy Council (Canada).
14 The cases supporting this proposition mostly concern solicitors who have profited personally from their position and can often be rationalised on the basis of the rules against fiduciary profits, without recourse to conflicts rules, but see Lorrell v SRA [2019] EWHC 981 (Admin), per Martin Spencer J at [25].
solicitors’ obligations of confidentiality. As the House of Lords decided in Bolkiah v KPMG\(^\text{15}\) (in the words of the head-note in the Appeal Cases law report):

...where it was established that solicitors... were in possession of information confidential to a former client which might be relevant to a matter in which they were instructed by a subsequent client the court should intervene to prevent the information from coming into the hands of anyone with an adverse interest unless it was satisfied that there was no real risk of disclosure...

**Interests/duties**

11. Note that the double employment rule refers to clients with conflicting interests, while the actual conflict rule refers to a fiduciary with conflicting duties. This distinction is not the result of casual use of language by Millett LJ and it is important not to conflate conflicts of interest with conflicts of duties: they are different things.

12. However, conflicts of interest can give rise to conflicts of duties, and a conflict of duties - which gives rise inevitably to a breach of duty - is the very situation which the double employment rule (relating to conflicts of interest) is designed to avoid. The way in which the double employment rule serves as a first line of defence against the risk of a breach of duty reflects what might now be described as the prevailing view of the principal function of fiduciary duties in English law\(^\text{16}\): it can be said that fiduciary duties are proscriptive, rather than prescriptive\(^\text{17}\), and secondary, rather than primary; they exist, not for their own sake, but to protect the due performance of the fiduciary’s non-fiduciary duties (such as the duty of care owed by solicitors to their clients).

13. The secondary nature of fiduciary obligations also has potentially significant consequences in the field of remedies (see further below).

**Potential/actual conflicts**

\(^\text{15}\) [1999] 2 AC 222
\(^\text{16}\) See generally Conaglen’s *Fiduciary Loyalty* (Hart Publishing, Oregon, 2010).
\(^\text{17}\) Certainly this is true of the conflicts rules, though doubts about the proposition when applied more generally to all fiduciary duties have been expressed in England (see e.g. *Sharp v Blank* [2017] BCC 187, per Nugee J at [23(2)] and discussed at great length in Australia (see *Westpac Banking Corporation v Bell Group Ltd (in liq)* (No 3) (2012) 44 WAR 1).
14. What amounts to a “potential” conflict of interests, or a “potential” conflict between interest and duty? Fanciful possibilities do not count:

14.1. In Boulting v Association of Cinematograph, Television and Allied Technicians\textsuperscript{18}, Upjohn LJ said:

\begin{quote}
...a broad rule like this must be applied with common sense and with an appreciation of the sort of circumstances in which over the last 200 years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict.
\end{quote}

14.2. Lord Upjohn later said in Phipps v Boardman\textsuperscript{19}:

The phrase "possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

14.3. In the recent case of Burns v Financial Conduct Authority\textsuperscript{20}, the Court of Appeal commented of the last quoted paragraph that:

\begin{quote}
This passage shows that the relevant test is an objective one, and that “a real sensible possibility of conflict” suffices. It is clearly not necessary that the possibility should have already matured into an actual and existing conflict of interest.
\end{quote}

15. Those dicta, while reassuring for solicitors up to a point, leave open the question whether a “potential conflict of interests” refers only to the situation where there may presently be a conflict of interests (but it is impossible to tell), or extends also to the situation where a conflict of interests may arise in the future (but it is clear that there is no present conflict).

16. Despite some unsettling (for solicitors) dicta from Lord Cohen and Lord Hodson in Boardman v Phipps\textsuperscript{21}, we suggest that the possibility of a conflict of interests arising in the

\textsuperscript{18} [1963] 2 QB 606, at 638; cited recently by the Court of Appeal in Paton v Roesilver Group Corporation [2017] EWCA Civ 158, per Henderson LJ at [33]
\textsuperscript{19} [1967] 2 AC 46, at 124B-C
\textsuperscript{20} [2018] 1 WLR 4161, at [75]
\textsuperscript{21} [1967] 2 AC 46, at 103C-104A and 111B
future should not in itself necessarily constitute a bar to a solicitor acting in the present\textsuperscript{22}, so long as it remains possible for the solicitor to cease acting (for one or both of the relevant clients) when the conflict of interests arises.

A “reasonable relationship” between the two employments

17. One point not explored by Millett LJ in \textit{Bristol & West Building Society v Mothew} is whether, since the purpose of the Double Employment Rule is to avoid the possibility of conflicting duties, the rule ought not to apply in circumstances where the nature of the two employments is so separate that they do not give rise to a risk of conflicting duties. As Hollander & Salzedo observe in \textit{Conflicts of Interest}\textsuperscript{23}:

\begin{quote}
The obligation of the fiduciary to advance the interests of the client is related to the retainer... it is not a generalised obligation.
\end{quote}

18. That conclusion is supported by the judgments of Lawrence Collins J and the Court of Appeal in \textit{Marks & Spencer plc v Freshfields Bruckhaus Deringer}\textsuperscript{24}: there must be some reasonable relationship between the two matters for the Double Employment Rule to bite. What constitutes a “reasonable relationship” between retainers remains open to debate, but in broad terms the category should presumably be defined by reference to the likelihood or risk that the clients’ (actually or potentially) conflicting interests will give rise to (actually or potentially) conflicting duties on the part of the solicitor. One relevant question in this context will be: how likely is it that confidential information provided by a client under one retainer could be used (in the absence of any information barrier) against the client’s interest under the other retainer?

19. Similarly for own interest conflicts: if there is really no connection between a solicitor’s duty and a solicitor’s interest, no conflict arises. The classic Edwardian case, which casts an interesting light on the life-style of a solicitor in the early 20\textsuperscript{th} century, is \textit{Allison v Clayhills}\textsuperscript{25}, in which Parker J said:

\begin{quote}
...if a solicitor is actually engaged to conduct or is conducting for his client an action, say, for slander, and, while that action is pending, meets his client in the hunting field
\end{quote}

\textsuperscript{22} That appears to be the view of both Finn (\textit{Fiduciary Obligations}, at paragraphs 567 and 582) and Conaglen (\textit{Fiduciary Loyalty}, at page 118, fn.89); but contrast the “prospective” significance of the SRA’s rules suggested in Hollander & Salzedo’s \textit{Conflicts of Interest} (5\textsuperscript{th} edition, Sweet & Maxwell, 2016), at paragraph 3-007.

\textsuperscript{23} 5\textsuperscript{th} edition, 2016, at paragraph 3-010

\textsuperscript{24} [2004] 1 WLR 2331 (Lawrence Collins J); [2005] PNLR 4 (Court of Appeal)

\textsuperscript{25} (1907) 97 LT 709, at 711-712
and bargains and buys from him a horse, each party relying upon his own knowledge of horseflesh, that transaction will stand on the same footing as a transaction between strangers, because the matter is entirely outside any confidential relationship between the parties and the solicitor owes his client no duty whatever in the particular matter.26

**Contractual restrictions**

20. Solicitors are able to limit contractually the scope of their retainer (and thereby, theoretically at least, the scope of their fiduciary duties). In *Minkin v Landsberg*27 Jackson LJ summarised the relevant principles as follows:

(i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.

(ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.

(iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.

(iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.

(v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.

21. However, the courts (and the SRA) are likely to be chary of any provisions in a solicitor’s contract of retainer which would have the effect of depriving a client of the protections that a solicitor’s client normally enjoys:

21.1. In the first place, it would probably be unacceptable for solicitors to agree with their clients that they should not owe them fiduciary duties in respect of the services

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26 We would suggest that solicitors should only rely on this principle and passage with some caution in the modern era; there is a risk that a court or the SRA would accept a client’s assertion that they reposed general trust and confidence in their solicitor in all dealings.

27 [2016] 1 WLR 1489, at [38]
which the solicitors provide (in other words, for solicitors to contract out of the fiduciary nature of the solicitor-client relationship)\textsuperscript{28}.

21.2. Whether it is acceptable in any given set of circumstances for solicitors to agree that they will perform function A for the client, but not function B, may depend on a variety of matters including:
21.2.1. the degree of severability of the two functions, A and B;
21.2.2. whether another solicitor is performing function B for the client; and/or
21.2.3. the level of understanding and insight that the client has as to why the solicitor may be seeking to limit the retainer.

**Informed consent**

22. As a matter of general law, a fiduciary whose interest conflicts with his duty may nevertheless continue to act with the beneficiary’s informed consent. Similarly, if there is a conflict between the interests of two clients, a fiduciary may nevertheless continue to act for them both with their informed consent.\textsuperscript{29}

23. It is often said\textsuperscript{30} that informed consent cannot operate as a defence for a fiduciary with an actual conflict of duties, but that may be just a matter of definition: if a duty is breached, it is breached, regardless of the issue of consent. On the other hand, in principle at least, the client’s provision of consent to a specific course of action might serve to prevent the fiduciary’s (breached) duty to that client from arising in the first place.\textsuperscript{31}

**The duty of good faith and the no inhibition principle**

24. The conflicts rules discussed above constitute the main concern of solicitors seeking in good faith to further the interests of their clients, but it is worth mentioning briefly two further obligations by which all fiduciaries are bound. In *Bristol & West Building Society*

\textsuperscript{28} Jacobson J took a contrary view in relation to fiduciary relationships arising in the commercial sphere in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4) (2007) 160 FCR 35*, at [276] to [281]
\textsuperscript{29} Solicitors are subject to special restrictions: see further below.
\textsuperscript{30} See, e.g., Hollander & Salzedo’s *Conflicts of Interest* (5\textsuperscript{th} edition, 2016), at paragraph 2.010.
\textsuperscript{31} Again, solicitors are a special category: see further below.
v Mathew Millett LJ also provided definitions of “the duty of good faith” and “the no inhibition principle”:

...even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other... I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal. Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment. [Emphasis added]

25. Any solicitors who consciously prefer the interests of one client over the interests of another are likely to find themselves in very serious legal and regulatory difficulties.

The SRA Code of Conduct 2011

26. It is crucial that solicitors appreciate that their regulatory obligations under the SRA Code of Conduct 2011 (“the 2011 Code”) differ from and are more onerous than under the general common law.

27. The 2011 Code defines Conflict of Interests as follows:

any situation where:

(i)
you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "client conflict"); or

(ii)
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 (an "own interest conflict").

[emphasis added]

**Own Interest Conflicts**

28. As for Own Interest Conflicts:

28.1. The 2011 Code provides at Outcome 3.4: 

_**you do not act if there is an own interest conflict or a significant risk of an own interest conflict**_

**own interest conflict**

_for the purpose of Chapter 3 of the SRA Code of Conduct, means 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._

28.2. The reference to a “related matter” might be said to be a somewhat confused and unnecessary attempt to import from the Double Employment Rule the reasoning in _Marks & Spencer plc v Freshfields_: it might be thought that either there is a risk that the solicitor’s duty conflicts with the solicitor’s interest or there is not.

28.3. A further example of seemingly confused drafting in Outcome 3.4 is that the definition of an Own Interest Conflict includes the situation where there is “a significant risk” of conflict between interest and duty, while Outcome 3.4 then also inhibits acting in a situation where there is “a significant risk” of an Own Interest Conflict. In other words, the Code introduces the unwieldy (and it might be said nonsensical) concept of avoiding acting in a situation where there is a significant risk of a significant risk of an Own Interest Conflict.
28.4. The SRA’s reference to “a significant risk” of an Own Interest Conflict would tend to suggest that this test is applied by reference to the then position at that moment in time (the present) rather than by reference to what may happen in the future (contrary to the view in Hollander & Salzedo on *Conflicts of Interests*); whether the SRA would take the same view is very much a moot point.

28.5. It is important to note that Outcome 3.4 is absolute in its terms. It makes no provision for acting with the client’s informed consent.

29. As for Client Conflicts:

29.1. The Code provides:

“client conflict” for the purposes of Chapter 3 of the SRA Code of Conduct, means any situation where you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict.

Outcome 3.5: you do not act if there is a client conflict, or a significant risk of a client conflict unless the circumstances set out in Outcomes 3.6 or 3.7 apply;

Outcome 3.6: where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if:

(a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;

(b) all the clients have given informed consent in writing to you acting;

(c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and

(d) you are satisfied that the benefits to the clients of you doing so outweigh the risks;

Glossary:

Substantially common interest for the purposes of Chapter 3 of the SRA Code of Conduct, means a situation where there is a clear common purpose in relation to any

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32 5th edition, 2016, at paragraph 3-007
mature or a particular aspect of it between the clients and a strong consensus on how it is to be achieved and the client conflict is peripheral to this common purpose.

Outcome 3.7:
...where there is a client conflict and the clients are competing for the same objective you only act if:
(a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;
(b) the clients have confirmed in writing that they want you to act, in the knowledge that you act, or may act, for one or more other clients who are competing for the same objective ...

29.2. It is important to note that, in the 2011 Code, the source of the conflict is where a solicitor owes two separate duties to act in the best interests of two or more clients in relation to the same or related matters and those duties conflict or there is a significant risk that those duties may conflict.

29.3. Thus, the drafting of Outcome 3.5 introduces the same confusion in the drafting for Client Conflicts as with Own Interest Conflicts: the Code imposes an Outcome of not acting where there is a significant risk of a significant risk of a Client Conflict.

29.4. Fundamental then to Outcome 3.5 is to identify when matters are “related”. This will be acutely fact sensitive and from a practical viewpoint might best be approached not as a piece of technical legal analysis but by a broader test of “how would the SRA/SDT characterise this”. As above, a helpful yardstick is to consider the degrees of risk that (i) information gained under retainer A could be relevant to retainer B, and/or (ii) a course of action might be advisable to (or require investigation on behalf of) client A which would be potentially disadvantageous to client B.

29.5. Whilst the 2011 Code does permit a solicitor to continue to represent clients where there is a Client Conflict (including where there is an existing client conflict), this is only in limited and specified circumstances; the exceptions (substantially common interest and competing in some circumstances for the same objective) should be considered and applied cautiously.
The New SRA Codes of Conduct 2019

30. The SRA is introducing new SRA Standards and Rules as from 25 November 2019 with separate Codes for firms and solicitors.

31. The 2019 Codes both provide a streamlined version of the rules in the 2011 Code.

32. A “conflict of interest” is now defined as:

... a situation where your separate duties to act in the best interests of two or more clients conflict.

33. An “own interest conflict” is now defined 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.

34. The Code now provides as follows in relation to the exceptions for Client Conflicts:

Conflict of interests

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

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

(a) the clients have a substantially common interest in relation to the matter or the aspect of it, as appropriate; or

(b) the clients are competing for the same objective,

and the conditions below are met, namely that:
(i) all the clients have given informed consent, given or evidenced in writing, to you acting;
(ii) where appropriate, you put in place effective safeguards to protect your clients’ confidential information; and
(iii) you are satisfied it is reasonable for you to act for all the clients.

35. So for Own Interest Conflicts, the embargo on acting and the “double whammy” of “significant risk of a significant risk” both remain. But the latter has been removed for Conflicts of Interest (i.e. Client Conflicts), and the exceptions of “substantially common interest” and “competing for the same objective” remain. This also tends to suggest that, for Client Conflicts one probably tests the position as matters stand (i.e. the present) rather than by reference to possible events in the future.

**Practical problems facing solicitors**

The risks of civil and regulatory liability

36. In some respects the legal consequences of a breach of the conflicts rules may be relatively limited. In particular, it is only rarely that a breach of those rules will expose solicitors to a liability to pay damages/compensation which would not otherwise have arisen:

36.1. As discussed above, the conflicts rules are prescriptive (rather than proscriptive) and exist to protect the performance by fiduciaries of their non-fiduciary duties.

36.2. If those non-fiduciary duties are breached, compensation will be available in any event and the claim for breach of fiduciary duty is unnecessary.

36.3. Conversely, if the non-fiduciary duties are not breached, it is difficult to see any basis on which compensation could properly be awarded. Finn’s *Fiduciary Obligations*\(^{33}\) states:

> In many cases, and particularly where the conflict lies only in an undisclosed double employment, the aggrieved beneficiary’s position would often be not one bit different had he in fact had the advantage of a fiduciary with undivided loyalties.

\(^{33}\) at paragraph 591
37. That said, breaches of the conflict rules may have serious legal consequences for solicitors:

37.1. They may entitle claimants to avail themselves of more favourable equitable rules relating to causation, remoteness, and/or contributory negligence.\(^{34}\)

37.2. They may entitle claimants to injunctive relief restraining the solicitors from continuing to act for other clients, potentially exposing the solicitors to liability to those other clients.

37.3. They may lead to arguments over whether some or all of the solicitors’ fees are recoverable by the client on a restitutionary/profit-stripping basis.\(^{35}\)

38. Even if legal liability for breach of fiduciary duty is avoided, solicitors may nevertheless be exposed to regulatory liability at the hands of the SRA, which presently shows no signs of reluctance in holding solicitors to the more demanding requirements of the Code of Conduct.

The *Hilton* dilemma

39. In *Hilton v Barker Booth & Eastwood*\(^{36}\) the House of Lords held that solicitors’ contracts of retainers\(^{37}\) contain no implied term that they need not impart to their clients confidential information belonging to other clients. On the factual causation findings at first instance, the logical consequence of the House of Lords’ decision against the defendant solicitors is that solicitors who have been acting for two clients with conflicting interests, and who hold information which is confidential to one client but which it is in the interest of the other

\(^{34}\) Contributory negligence is not an available defence in relation to intentional breaches of the duty of good faith or the no inhibition principle (*Nationwide Building Society v Balmer Rudmore* [1999] PNLR 606, *per* Blackburne J at 672ff), and may also not be available in relation to breaches of the actual conflicts rule and/or the double employment rule (*Conaglen’s Fiduciary Loyalty*, at pages 172 to 176)

\(^{35}\) See Cockerill J’s review of relevant authority in *HPOR Servicos De Consultoria Ltd v Dryships Inc* [2018] EWHC 3451 (Comm), at [86] to [101].

\(^{36}\) [2005] 1 WLR 567

\(^{37}\) Unlike estate agents’ retainers (*Kelly v Cooper* [1993] AC 205) and accountants’ retainers (*Harlequin Property (SVG) Ltd v Wilkins Kennedy* [2017] 4 WLR 30); in the latter case, Coulson J’s distinction of *Hilton*, on the further basis that it makes a difference at what point the relevant information is acquired, is a brave one.
client to know, cannot escape liability by simply ceasing to act. Solicitors in that position are doomed inevitably to breach either their duty of confidence to one client or their duty of disclosure to the other (“the Hilton dilemma”)\(^{38}\).

40. The Hilton dilemma is most stark if the two clients have conflicting interests in the matter(s) to which the confidential information relates, but the dilemma may arise even if the clients’ interests are relatively well-aligned: the conflict may simply be the result of two inconsistent duties (of confidentiality and disclosure) owed to different clients, even if those clients’ underlying interests do not significantly conflict.

41. The only reliable answer to the risk posed by the Hilton dilemma for solicitors who propose to act separately for clients with conflicting interests\(^ {39}\), or who appreciate that information confidential to one client is likely to be relevant also to another client, is probably:

41.1. to obtain the express consent of each such client to the non-disclosure of the other’s confidential information; and

41.2. to erect information barriers, so that no individual solicitor charged with furthering one client’s interest is burdened with knowledge that is confidential to the other client.\(^ {40}\)

The practicalities of conflict-handling

42. Although strictly relating to confidential information rather than conflicts of interest, the case of *Georgian American Alloys Inc & Ors v White & Case LLP\(^ {41}\)* and the subsequent Agreed Outcome entered into by the SRA and that firm, and approved by the SDT\(^ {42}\), serve as a salutary example of what can happen when the practicalities of conflict-handling go wrong. In the civil case, Field J granted a permanent injunction to the applicant companies

\(^{38}\) Outcome 4.3 of the SRA Code of Conduct requires such solicitors to prefer their duty of confidence over their duty of disclosure.

\(^{39}\) In the limited circumstances permitted by the SRA

\(^{40}\) Note that the duty of disclosure in Outcome 4.2 of the Code of Conduct is addressed to the individual solicitor, not to the firm.

\(^{41}\) [2014] EWHC 94 (Comm) per Field J.

\(^{42}\) Case No. 11592-2016; Date of Hearing: 18 July 2017.
to restrain their former solicitors from acting for a client in commercial proceedings against the companies’ owners because there was a real risk that confidential information (relating to knowledge of assets of the owners that could be of significant use for enforcement purposes\(^{43}\)) which the solicitors had acquired when previously acting for the companies could be used in subsequent commercial proceedings.

43. However, the disciplinary proceedings went much further. It was alleged against and admitted by both the partner and the firm that they each accepted instructions from and undertook work on behalf of clients without causing adequate steps to be taken to ensure that no conflicts of interest between clients, or significant risk of conflicts of interest, arose (in breach of Outcome 3.5) and without causing adequate steps to be taken to ensure the confidentiality of clients’ information (in breach of Outcome 4.4). The firm was fined £250,000.00 in light of an admission of reckless breaches of Outcomes 3.5 and 4.4; the partner was fined £50,000.00 (in light of an admission of recklessness in one respect).

44. The following features of the SDT Judgment are illuminating:

44.1. First, in discussions between the firm’s General Counsel and the partners on each of Matters A and B pursuant to which a decision was taken that no conflict of interest arose (in part on reliance on advance waivers provided by each client):

44.1.1. The partner on Matter A noted the financial and strategic importance of Matter A to the firm;
44.1.2. The partner on Matter A acknowledged that if the client on Matter B knew of Matter A they would not agree to the firm acting on both matters;
44.1.3. Confidential information concerning Matter A was disclosed by the partner on Matter A to a partner working on Matter B in the context of discussing and trying to resolve the potential conflict of interest\(^ {44} \);

44.2. Second, reliance by the partner in Matter A on the decision taken by the firm’s General Counsel did not mean that the partner was not personally responsible for compliance with his professional obligations; reliance on General Counsel was not a defence.

\(^{43}\) See Field J’s judgment at [82].

\(^{44}\) Paragraphs 16 and 17.
44.3. Third, it was identified that the High Court judgment brought to light issues in the firm’s clearance conflicts procedures, which the firm had subsequently addressed:

44.3.1. The investigation as to whether there was a conflict involved discussions with the partners with conduct of Matters A and B together; this created a risk of the leakage of confidential information, and the restricted nature of the discussions meant that an in-depth understanding of the matters could not be obtained before the decision was made that there was sufficient separation between the Matters (i.e. that they were not “related”);

44.3.2. Steps were taken to prevent inadvertent sharing of confidential information between partners as part of the conflicts clearance process in the future;

44.3.3. Systems were introduced to automate the closure of a matter in the Conflicts and New Business (CNB) Department and time entry systems upon 90 days of inactivity; re-activation of any auto-closed matter would then require a fresh conflict search to be run and a full conflict clearance process to be undertaken; this prevented a matter that had been inactive coming back to life without a conflict search being undertaken;

44.4. Fourth, the firm undertook a comprehensive review of its process of dealing with unresolved conflicts, including a re-structure of the General Counsel function, a re-structure of the CNB department and new guidelines in relation to when its New Business Acceptance Committee must be consulted\textsuperscript{45}.

45. It is relatively easy to identify “Don’ts” in light of the above judgments:

45.1. If a potential conflict arises, those responsible within management/compliance should not investigate the matter jointly with the two partners on the relevant matters, but separately; steps must be taken to ensure and preserve confidentiality during the process;

45.2. Do not allow commercial factors to influence decisions on professional obligations;

\textsuperscript{45} Paragraphs 52 to 54.
45.3. Do not rely on advance consents as informed consents, and do not assume that even informed consents are a free pass.

46. The “Dos” are somewhat harder to identify, in part because if a firm is acting when in a conflict of interest then, necessarily, there is an element of “I would not have started here …”:

46.1. Closed files that re-activate should prompt fresh conflict checks;

46.2. Partners/fee-earners must be educated to raise potential conflicts of interest with General Counsel (or whoever has the responsibility);

46.3. General Counsel (or whoever has the responsibility) needs to undertake investigations separately into each of the relevant matters, in such a way that confidentiality is preserved; if need be, this could extend to instructing independent solicitors to undertake the investigations;

46.4. Once the facts are known, adopt a two-stage approach:

46.4.1. Use Section 3 of the 2011 Code as a checklist for considering whether a conflict of interest has arisen;

46.4.2. Then stand back and consider the matter in the round, not by reference to legal niceties but by reference to how the client, the SRA and/or the SDT might approach matters;

46.5. If it is suggested that one client might be unhappy to know that the firm was acting for the other client, then that is a Red Flag and should be treated as such;

46.6. Take a broad-brush and common-sense approach when deciding whether two matters are “related”;
46.7. Be mindful that informed consent is only relevant, from the regulatory perspective, when one of the exceptions in Outcome 3.6 (substantially common interest) and Outcome 3.7 (competing for the same objective) is engaged;

46.8. If there is a conflict of interest within the SRA Codes, then cease acting for at least one and quite possibly both clients (depending on the facts); conflicts once arisen, and the consequences thereof, are likely to get worse with time;

46.9. Approach the matter on the basis that professional obligations always trump commercial factors.

Continuing to act after significant error

47. Solicitors, being human, make mistakes. Sometimes their mistakes cause or threaten significant prejudice to a client’s interests. The usual consequence is a potential conflict between the solicitors’ interests and their duty to the client. In those circumstances Outcome 3.4 of the Code of Conduct imposes an absolute bar on the solicitors continuing to act. The termination of a retainer may cause very great inconvenience to a client and it is very tempting for solicitors (with the best of motives) to look for a way around this prohibition.

48. The risks for solicitors who yield to this temptation are demonstrated by the SDT’s judgment in SRA v Howell-Jones LLP46. Although an agreed outcome with no formal status as precedent, it exemplifies the strictness with which the SDT enforces Outcome 3.4.

49. Howell-Jones LLP had acted for Mr A in relation to a financial remedy application in the course of divorce proceedings against Mrs A. Mr A complained that the firm had negligently compromised the application on unfavourable terms. The firm sought advice from counsel, who advised that the settlement was indeed unfair to Mr A, who might be able to resile from it. In a letter to Mr A the firm admitted its fault and offered Mr A the option either of terminating its retainer or of instructing it to pursue an application to set aside the settlement. The latter option was offered to Mr A on the basis that the firm would

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46 Case No. 11846-2018, 9 November 2018
not charge for its services and would indemnify Mr A against any adverse costs order made in respect of the application to set aside. Mr A chose not to terminate the firm’s retainer, but his application to set aside proved unsuccessful. He pursued a successful complaint to the Legal Ombudsman, who awarded him £50,000, and a further complaint to the SRA. The firm accepted that it had acted in a position of own interest conflict and the agreed outcome included a fine of £5,000 and costs in the sum of £26,850.

50. The difficulties often faced by solicitors in the situation in which Howell-Jones LLP found itself include that:

50.1. Litigants are generally entitled to expect their lawyers to give more-or-less continuous consideration (and, as appropriate, advice) to the possibility of settlement, but this the previously negligent solicitors cannot do - and it is not enough simply to make provision for independent advice in the event that an offer is made by the other side.

50.2. It is potentially in the solicitors’ interest that the client should lose the case for reasons other than the problems for which the solicitors are responsible. It may therefore be difficult for the solicitors to take strategic or tactical decisions which impact on the case’s prospects of success.

51. The safest course will almost invariably be for the solicitors to cease to act. However, it might be possible in some circumstances (and assuming the client’s informed consent):

51.1. for the solicitors to ensure that the client is independently advised\(^\text{47}\) and to limit the scope of their retainer in such a way as to remove the conflict (though the outcome in SRA v Howell-Jones LLP demonstrates the difficulty of achieving this);

\(^{47}\) and the advice is kept confidential from the solicitors, since the matters to be taken into account must include the client’s potential rights against the solicitors. NB that a recommendation of independent advice may not suffice if the client does not actually take the advice recommended: see Lorrell v SRA [2019] EWHC 981 (Admin), per Martin Spencer J at [25].
51.2. for the solicitors to continue to act temporarily in situations of urgency (a) while taking reasonable steps to establish the facts, and/or (b) where the only steps required of the solicitors are straightforward ministerial ones;

51.3. in extremity, for the solicitors to argue that a breach of Outcome 3.4 should not constitute professional misconduct, because the Outcomes in the Code of Conduct exist in order to protect the Principles, and one or more of the Principles require the solicitors not to terminate their retainer.

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May 2019

Disclaimer: this handout is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.

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Conflicts of interest: recognition, avoidance, resolution

By Ben Hubble QC and Charles Phipps

May 2019

Conflicts of interest

The law of conflicts

The present state of the law

- A branch of the law of fiduciary duties
- Professor Finn’s sceptical view of progress over the past 40 years
- Different approaches in USA, Canada, New Zealand, and Australia
- The judgment of Millett LJ in Bristol & West Building Society v Mothew [1998] Ch.1
The conflicts rules

As formulated by Millet LJ:

• A fiduciary must not place himself in a position where his duty and his interest may conflict. ([The SRA’s “own interest conflict”])

• A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other... This is sometimes described as “the double employment rule.” Breach of the rule automatically constitutes a breach of fiduciary duty. ([The SRA’s “client conflict”])

• The fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfill his obligations to one principal without failing in his obligations to the other... I shall call this the “actual conflict rule.”

Former clients

• Fiduciary duties do not typically survive the end of the fiduciary relationship.
• In the case of former clients, the concern is confidentiality: Bolkiah v KPMG [1999] 2 AC 222
• Beware the fiduciary relationship which survives the termination of a contractual retainer: McMaster v Byrne [1952] 1 All ER 1362.
• Beware attempts to circumvent fiduciary obligations by specious/premature termination of a contractual retainer: Lorrell v SRA [2019] EWHC 981 (Admin), at [25]

Interests/duties

• Conflicts of interest ≠ Conflicts of duty
• Fiduciary duties prescriptive, rather than prescriptive
• Fiduciary duties exist to protect the performance of non-fiduciary duties
Potential/actual conflicts

What is a “potential conflict”?

- Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606, at 638
- Phipps v Boardman [1967] 2 AC 46
- Burns v FCA [2018] 1 WLR 4161
- Present or future?

Related employments

For the double employment rule to bite, there must be a “reasonable relationship” between the two employments.

- The obligation of the fiduciary to advance the interests of the client is related to the retainer... it is not a generalised obligation (Hollander & Salzedo, Conflicts of Interest, 5th edition, at 3-010)
- Marks & Spencer plc v Freshfields Bruckhaus Deringer [2004] 1 WLR 2331 (Lawrence Collins J); [2005] PNLR 4 (Court of Appeal)
- Allison v Clayhills (1907) 97 LT 709

Contractual restrictions

Minkin v Landsberg [2016] 1 WLR 4819, per Jackson LJ at [98]:

(i) A solicitor’s contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
(ii) It is implicit in the solicitor’s retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
(iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
(iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.
(v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor’s retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.
Informed consent

• At law, fiduciaries may act with informed consent in both own interest conflicts and client conflicts

• But not when there are actual conflicts of duty

• The special position of solicitors

The duty of good faith and the no inhibition principle

Millett LJ in Bristol & West v Mathew, at 19:

...even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other... I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.

Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment. [Emphasis added]

Conflicts of interest

The SRA Code of Conduct
The SRA Code of Conduct 2011

The 2011 Code defines Conflict of Interests as follows:

any situation where:

(i) you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a "client conflict"); or

(ii) 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 (an "own interest conflict").

Outcome 3.4:
you do not act if there is an own interest conflict or a significant risk of an own interest conflict.

Outcome 3.5:
you do not act if there is a client conflict, or a significant risk of a client conflict unless the circumstances set out in Outcomes 3.6 or 3.7 apply.

Exceptions to Outcome 3.5 – Client Conflicts

Outcome 3.6:
where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if:

(a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;

(b) all the clients have given informed consent in writing to you acting;

(c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and

(d) you are satisfied that the benefits to the clients of you doing so outweigh the risks.

Glossary:
Substantially common interest for the purposes of Chapter 3 of the SRA Code of Conduct, means a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the clients and a strong consensus on how it is to be achieved and the client conflict is peripheral to this common purpose.

Outcome 3.7:
...where there is a client conflict and the clients are competing for the same objective you only act if:

(a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;

(b) the clients have confirmed in writing that they want you to act, in the knowledge that you act, or may act, or more other clients who are competing for the same objective...

The New SRA Code of Conduct – 25.11.19

A "conflict of interest" is now defined as:

...a situation where your separate duties to act in the best interests of two or more clients conflict.

An "own interest conflict" is now defined 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.

Conflict of Interests

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

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

(a) you have a substantially common interest in relation to the matter or the aspect of it, as appropriate; or

(b) the clients are competing for the same objective, and the conditions below are not, namely that:

(i) all the clients have given informed consent, given or evidenced in writing, to you acting;

(ii) where appropriate, you put in place effective safeguards to protect your clients' confidential information; and

(iii) you are satisfied it is reasonable for you to act for all the clients.
Conflicts of interest

Practical problems

Civil liabilities

Breaches of conflicts rules rarely provide free-standing right to compensation, but are not without consequence:

• May result in different rules on causation, remoteness, and/or contributory negligence (Nationwide Building Society v Balmer Radmore [1999] PNLR 686, per Blackburne J at 672ff)
• May entitle claimants to injunctive relief (Bolkiah)
• May lead to restitutionary claim in respect of fees (HPOR Servicos De Consultoria v Dryships [2018] EWHC 3451 (Comm), at [86] to [101])

The Hilton dilemma

Hilton v Barker Booth & Eastwood [2005] 1 WLR 567

• No implied term restricting duty to provide client with confidential information of other clients
• Duty to disclose not avoided by termination of retainer
• Informed consent and information barriers
Practicalities of Conflict Handling

More restrictive regime, rigorously enforced by the SRA

The White & Case example
- *Georgian American Alloys v W&C* per Field J: civil injunction preventing W&C from acting
- The Agreed Outcome / Judgment of the SDT:
  - Breaches of Outcomes 3.5 and 4.4
  - Fines of £250k for W&C and £50k for the partner

What went wrong?

- Discussions concerning the identified risk of conflict between the firm’s General Counsel and the partners on each of Matters A and B pursuant to which a decision was taken that no conflict of interest arose in part on reliance on advance waivers provided by each client;
- The partner on Matter A noted the financial and strategic importance of Matter A to the firm;
- The partner on Matter A acknowledged that if the client on Matter B knew of Matter A they would not agree to the firm acting on both matters;
- Confidential information concerning Matter A was disclosed by the partner on Matter A to a partner working on Matter B in the context of discussing and trying to resolve the potential conflict of interest

Practical Tips: Don’ts

- If a potential conflict arises, those responsible within management/compliance should not investigate the matter jointly with the two partners on the relevant matters, but separately; steps must be taken to ensure and preserve confidentiality during the process;
- Do not allow commercial factors to influence decisions on professional obligations;
- Do not rely on advance consents as if they are informed consents, and do not assume that even informed consents are a free pass.
Practical Tips – Dos – Part 1

− Closed files that re-activate should prompt fresh conflict checks;
− Partners/solicitors must be educated to raise potential conflicts of interest with General Counsel (or whoever has the responsibility);
− General Counsel (or whoever has the responsibility) needs to undertake investigations separately into each of the relevant matters, so that confidentiality is preserved; if need be, this could extend to instructing independent solicitors to undertake investigations;
− Once the facts are known, adopt a two-stage approach:
  1) Use Section 3 of the 2011 Code as a checklist for considering whether a conflict of interest has arisen; then
  2) Stand back and consider the matter in the round not by reference to legal niceties but by reference to how the client, the SRA and/or the SIF might approach matters.

Practical Tips – Dos – Part 2

− If it is suggested that one client might be unhappy to know that the firm was acting for the other client, then that is a Red Flag and should be treated as such;
− Take a broad brush and common-sense approach when deciding whether two matters are “related”;
− Be mindful that informed consent is only relevant, from the regulatory perspective, when one of the exceptions in Outcome 3.6 (substantially common interest) and Outcome 3.7 (competing for the same objective) is engaged;
− If there is a conflict of interest within the SRA Codes, then cease acting for at least one and quite possibly both clients (depending on the facts); conflicts once arisen, and the consequences thereof, are likely to get worse with time;
− Approach the matter on the basis that professional obligations always trump commercial factors.

Continuing to act after significant error

SRA v Howell Jones LLP (9 November 2018): a cautionary tale

Possibilities:
• Independent advice and restriction of retainer
• Temporary continuation (a) while facts being established, and/or (b) in order to perform urgent ministerial functions
• In extremis, appealing over the heads of the Outcomes directly to the Principles?