Case studies

Case studies

Conflict of interest

Conflict of interest

Published: 29 October 2019

Print this page [#] Save as PDF [https://update.sra.org.uk/pdfcentre/?type=Id&data=146482816]

Related guidance

This case study should be read in conjuction with the guidance on conflicts of interest [https://update.sra.org.uk/solicitors/guidance/conflicts-interest/] .

Your firm is advising a company (A) on the sale of one of its non-core businesses (X) to a listed company (B). Your firm is subsequently approached to act for a prospective bidder (C) who is interested in making a public offer for B.Is your firm able to accept C's instructions?

Under Rule 6.2 of the SRA Code of Conduct for Firms, a law firm must not act for two or more clients in relation to the same matter (or a particular aspect of it) or a related matter (or a particular aspect of it) where the firm's separate duties to act in the best interests of each of those clients would conflict, or there is a significant risk that those duties may conflict. The position is the same for individual solicitors under Rule 6.2 of the SRA Code of Conduct for Solicitors, RELs and RFLs.

There needs to be some reasonable degree of relationship between two matters for them to be related. Generally, any matters which concern the same asset or liability will be related. Because your firm would potentially be helping one client (A) sell an asset (X) to another party, at the same time as helping another client (C) acquire that asset (through its acquisition of B), these two matters may be related. This is the case even though C may (currently at least) be unaware that its offer for B would involve it potentially acquiring X.

Your firm would need to consider therefore whether:

1. the matters are related – as noted above, that will generally be the case if they concern the same asset or liability, but will not necessarily be the case; and
2. there is a potential conflict of duties here - could the firm doing its best for A on the sale of X affect its ability to do its best on C's potential bid for B? This is likely to primarily turn on the

comparative values of X and B's businesses. It is not relevant that X is non-core to A.

If the value of X is low compared to the value to B or not significant to B, a conflict of interest or significant risk of a one arising under Rule 6.2 is less likely. This is because there must be a reasonable degree of relationship between two related matters for a conflict to arise. If in effect X would be a minor or non- material asset of B, once acquired, your firm would not be prevented from acting for C as potential bidder even though X would be an asset of B and included in any acquisition of B. The more material X's value is, however, the more likely it is that C will have a view on whether or not it wishes to acquire X as part of its offer for B. If, for example, on learning of the prospective purchase of X by B,C were to say that any offer it made for B would be conditional on B not proceeding with the acquisition of X, your firm will find itself in a position of conflict – as C only wishes to acquire B without X. Whether there is or might be a conflict of duties is therefore very fact dependent, and your knowledge of C and its plans for B once acquired will need to be both understood and taken into account. (An analogous example would be where you are acting on a supply agreement for A with B (the supplier), which whilst potentially very material to A is a business-as-usual non -material contract for B. Here your firm would not be prevented from acting for C as potential bidder even though the supply contract would be an asset of B and included in any acquisition of B.

Your firm will also need to consider the timing of A's sale of X to B. If the sale process is at an early stage, there is the risk that C's potential bid for B could result in a delay to, or ultimately derail, the acquisition of X by B. In those circumstances, your firm would find itself in a position of conflict, or a significant risk of a conflict, as it would not be in A's best interests in respect of its sale of X for the firm to act for C on its potential bid for B. If B's purchase of X is more advanced, it is less likely that your firm would find itself in a position of conflict, or a significant risk of conflict, from this perspective. Again, this is very fact dependent.

Ideally, your firm would seek views from A and C on your analysis that there is no conflict, or significant risk of one here (if that is indeed what you have been able to conclude). However, this is not possible for confidentiality-related reasons. You cannot risk tipping off where a possible public bid is involved.

You should also consider, as both a commercial matter and with the reputation of the profession (and therefore SRA Principle 2) in mind, whether acting for C would create any risk of material embarrassment when it became known that your firm also acted on A's matter at the same time. Again, this will be very fact dependent.

As a practical matter you may wish to check whether your firm has agreed to be bound by A's or C's Outside Counsel Guidelines/similar (commonly known as "OCGs") and, if so, whether either include a

contractual definition of what constitutes a "conflict" which is wider than the SRA definition. If so, this may affect your ability to accept C's instructions, as a contractual matter. You will not be in a position to seek a "waiver" of any such contractual provisions from your clients given the confidentiality position referenced above.

If you conclude that your firm is able to and should accept C's instructions you will need to support the individual solicitors acting for A and C in complying with their confidentiality obligations in Rule 6.3 of both Codes and avoiding any clashing duties of disclosure under Rule 6.4 of the SRA Code of Conduct for Solicitors, RELs and RFLs. Your firm should use a separate legal team to represent C and put information barriers in place to prevent C's confidential information being shared with the legal team acting for A and vice versa.