

Consultation

Solicitors acting for seller and buyer in conveyancing, property selling and mortgage related services

Solicitors' Code of Conduct 3.07 - 3.15, formerly Practice Rule 6(2)

26 April 2007

The Solicitors Regulation Authority seeks your views on whether to retain or to amend the provisions in Rule 3 (3.07-3.15) of the Code of Conduct (in force 1 July 2007) relating to conflict of interests and solicitors acting for seller and buyer in conveyancing, property selling and mortgage related services. (These provisions also appear in Practice Rule 6(2) of the Solicitors' Practice Rules 1990.)

You are invited to participate in the consultation by completing an online questionnaire (please visit www.consultations.sra.org.uk). If you prefer not to complete our online questionnaire, you can submit your response by email or post.

For our email and postal addresses, please visit www.sra.org.uk/contact-us.

If you choose not to complete our online questionnaire, we suggest that you use the attached questionnaire as a template for your response. While responses will be accepted in any format, please ensure that you

- identify yourself, and
- advise us if you do not wish your name or the name of your firm or organisation to appear on the published list of respondents.

The consultation period ends on 26 July 2007.

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Purpose of consultation

The aim of this consultation is to obtain your views on solicitors' professional conduct requirements in relation to conflicts of interests when solicitors wish to act for seller and buyer in conveyancing, property selling and mortgage related services.

Context

Reasons for examining the conflict provisions relating to acting for seller and buyer are

- a simpler rule could be better understood by both solicitors and clients,
- the advent of Home Information Packs in June 2007 requires a fresh look at the issues relating to acting for sellers and buyers, and
- the current rule may unnecessarily limit the scope for solicitors to act, reducing options and increasing costs for clients.

Solicitors' rules should conform to principles of good rule making. Rules should be

- **necessary**—related to solicitors' proper duties and necessary to enable solicitors to meet the reasonable expectations of clients
- **clear**—open and user friendly for solicitors, clients and regulators
- **fair**—to clients, the administration of justice and to solicitors
- **enforceable**—to provide a system that works and meets expectations of solicitors and clients
- **proportionate**—to the risk and not over-burdensome
- **targeted**—focused on the problem, minimising side effects on those who do not present a risk
- **consistent**—with other rules and with regulatory priorities

The Solicitors Regulation Authority aims, as a matter of public protection, to

- prevent solicitors acting where there is a risk of conflict of interests, but
- in clients' interests, to allow solicitors freedom to meet clients' needs, and not unnecessarily restrict clients' choice of solicitor.

Options

There are three principal options to achieve this aim:

1. to keep the rule as it is,
2. to remove the rule and rely on the general provisions on conflicts of interests,
3. to remove the rule and rely on the general conflict provisions, but with specific safeguards.

The option of banning acting for seller and buyer in all situations is disproportionate and unnecessary, and therefore fails to meet the principles of good rule making.

Each option can be considered in terms of the following factors:

- **public protection**—to protect clients and the public from the risks of solicitors acting where conflicts of interest exist or may arise
- **service**—to allow solicitors to meet the needs of clients, and clients maximum freedom to choose their solicitor
- **clarity and simplicity**—to make the requirements clear to both solicitors and clients, in order to assist understanding and compliance

The principles of good rule making are relevant to each of these factors.

- Fairness and enforceability are reflected in a rule giving a high standard of public protection.
- A proportionate and targeted rule allows solicitors the option, when appropriate, to provide the services clients want.
- A simple rule can be clearer and more consistent.

Option 1—retain the rule as it stands

Broadly, the effect of the rule is that a solicitor can act for seller and buyer if

- he or she obtains the written consent of both parties,
- no conflict of interest exists or arises, and
- the seller is not selling as a builder or developer.

If these conditions are met, it is possible for the solicitor to act, but only in limited situations—for example, if

- seller and buyer are related to each other; or
- both are established clients of the solicitor.

Arguments in favour of retaining the provisions as they stand include the following:

- There has been extensive consultation on the rule in the past. On balance, responses indicated no need to change the rule.
- The rule has been in force for many years without serious problems arising. The inference could be drawn that it is an effective measure of client protection.

Option 2—remove the rule and allow the general conflict provisions to apply

Arguments in favour of this include

- simplicity, and
- consistency with the wider rules on solicitors avoiding conflicts of interest.

The current rule states that “a solicitor must not act for seller and buyer...if a conflict of interest exists or arises...” However, it then states that the solicitor can only act in limited situations—see above. This “double hurdle” may appear to be over-complex.

A single test—is a conflict present or likely?—may

- be easier for solicitors and clients to understand, and
- would allow solicitors to make appropriate decisions in each case.

Such a rule would be accompanied by guidance explaining the risk of conflict in conveyancing. However, it is not the function of guidance to address every situation; solicitors would need to make their own judgements in each case.

Option 3—remove the rule and rely on the general conflict provisions, but with safeguards

Due to the risks of conflict of interests in conveyancing, it may be that general conflict provisions should apply as in Option 2, but with safeguards requiring the solicitor to

- provide each client with an assessment of the risk of conflict, and information regarding the consequences of a conflict arising, and
- obtain each client’s agreement in writing to the firm acting. The agreement would be on the following basis.
 - If a conflict should arise, the solicitor must cease acting for both parties, and cannot charge the parties for any work done.
 - This is a deterrent—to ensure that the solicitor carefully addresses the risk of conflict. It is not intended to compensate the client—not paying for the work is unlikely to recompense for the disruption to a conveyancing transaction.

- All material information must be freely disclosable between the clients. If, part-way through the transaction, one client decided he or she could no longer go along with this, the firm would have to cease to act for that client (but could charge for any work already done).
- This would address the issue of the firm handling each client's confidential information.

As with Option 2, guidance explaining the risk of conflict in conveyancing would accompany such a rule.

Questionnaire

If you prefer **not** to complete our online questionnaire (available at www.consultations.sra.org.uk), we suggest that you submit a response using the questionnaire below as a template—or print it and complete it as a form. Such responses should be submitted by email or post.

For our email and postal addresses, please visit www.sra.org.uk/contact-us.

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- identify yourself, and
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The consultation period ends on 26 July 2007.

About you

Your name

Your role

- solicitor
- member of the public
- other, please specify _____

On whose behalf are you responding?

- on own behalf
- on behalf of a firm of solicitors
- other, please specify _____

If applicable, how many partners are there in your firm?

- | | |
|--|-------------------------------------|
| <input type="checkbox"/> 1 (sole practitioner) | <input type="checkbox"/> 11 to 25 |
| <input type="checkbox"/> 2 to 4 | <input type="checkbox"/> 26 to 80 |
| <input type="checkbox"/> 5 to 10 | <input type="checkbox"/> 81 or more |

Confidentiality

We will publish a list of respondents with an overall analysis of responses. Attributed responses will not be published. Please advise us if you do not wish your name or the name of your firm or organisation to appear on the published list of respondents.

- Include my name and/or the name of my firm or organisation in the published list.
- Exclude my name and/or the name of my firm or organisation from the published list.
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Question 1—Overall preference

Which of the three options is your *overall preference*?

You can select one option only. Select the option you believe provides the best benefit. (See the discussion paper for more information about the options.)

- Option 1**—Retain the rule as it stands
- Option 2**—Remove the rule and allow the general conflict provisions to apply
- Option 3**—Remove the rule and rely on the general conflict provisions, but with safeguards

Please briefly explain your answer.

Question 2—Public protection

Which of the three options provides the best benefit to the public and clients in terms of *public protection*?

You can select one option only. Select the option you believe provides the best benefit. (See the discussion paper for more information about the options.)

- Option 1**—Retain the rule as it stands
- Option 2**—Remove the rule and allow the general conflict provisions to apply
- Option 3**—Remove the rule and rely on the general conflict provisions, but with safeguards

Please briefly explain your answer.

Question 3—Service

Which of the three options provides the best benefit to the public and clients in terms of *service*?

You can select one option only. Select the option you believe provides the best benefit. (See the discussion paper for more information about the options.)

- Option 1**—Retain the rule as it stands
- Option 2**—Remove the rule and allow the general conflict provisions to apply
- Option 3**—Remove the rule and rely on the general conflict provisions, but with safeguards

Please briefly explain your answer.

Question 4—Clarity and simplicity

Which of the three options provides the best benefit to the public and clients in terms of *clarity and simplicity*?

You can select one option only. Select the option you believe provides the best benefit. (See the discussion paper for more information about the options.)

- Option 1**—Retain the rule as it stands
- Option 2**—Remove the rule and allow the general conflict provisions to apply
- Option 3**—Remove the rule and rely on the general conflict provisions, but with safeguards

Please briefly explain your answer.

Question 5—Further comments

If you wish to make any further comments, please do so below.