Amendments to rule 3 (conflict of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007

Consultation paper

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1. Introduction

1.1 We invite views on draft amendments to rule 3 (conflict of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007 ("the Code"). The relevant provisions of the current rules 3 and 4, and guidance, with the proposed changes shown in revision mode, are annexed to this paper. We propose to make these changes now, despite our longer-term plans to re-draft the Code in a more principles-based form and to make changes to accommodate alternative business structures (ABSs).

1.2 This consultation follows an earlier consultation launched in December 2008. In this consultation, we sought views on proposals put forward by the City of London Law Society (CLLS) suggesting that we relax some of the provisions of rule 3 and rule 4 in circumstances in which the clients are sophisticated users of legal services. Most of the respondents to that consultation[1] supported the proposals, provided that adequate safeguards are put in place.

1.3 In light of the responses, we believe that the current rules are not sufficiently flexible to provide for the needs of sophisticated users of legal services. We think it is possible to draft amendments to the current rules that will meet these needs while continuing to protect the best interests of these clients and the public.

1.4 The responses identified some key risk areas that we would like to ensure are minimised. We invite your views on whether the draft rules achieve an appropriate balance between allowing the changes and dealing with the risks so that the clients and public are protected. In particular, we ask for input as to whether the protections are set at the right level. The risks, and how we propose to deal with them, are identified and discussed in section 2.

1.5 We hope to hear from respondents to the earlier consultation and from other firms, regulators, academics and, most importantly, users of legal services.

1.6 The proposals in relation to rules 3 and 4 will be dealt with separately, as they are not related and pose different levels of risk.

1.7 The closing date for the consultation is 12 February 2010. This is shorter than the normal consultation period but has been agreed with the Law Society. We have already consulted on the principles involved, and time is limited before the Code will be replaced with more-principles-based requirements. In deciding to proceed, we have also taken into account the fact that the proposed changes to rule 3 do, to an extent, foreshadow the move to principles-based regulation and would provide a testing ground for this approach.

[1] See www.sra.org.uk/sra/consultations/conflict-confidentiality-rules-proposed-amendments-december-2008.page

2. Rule 3 (conflict of interest)

The changes

2.1 Rule 3 currently prevents solicitors and firms acting for clients with conflicting interests. However, there are two exceptions to this rule. The exceptions permit a firm to act with the informed consent of the clients concerned if the clients

(a) have a substantially common interest, or

(b) are competing for the same asset.

Both exceptions must satisfy a test of reasonableness. The guidance makes it clear that the second exception is only applicable to specialised areas of legal services and where the clients are sophisticated users of those services.

2.2 The proposed amendment will form a third exception that will allow firms to act for sophisticated clients in any situation—excluding litigation in which there is a conflict of interest. This exception will only apply if the clients give informed consent and it is, and remains, in the best interests of each client for the firm to continue to act for them.

2.3 Relaxation of rule 3 brings with it certain risks. The main risks, which were identified in the earlier consultation, and how we propose to deal with them in the draft rule and guidance are set out below:

Risk 1: the firm fails to discharge its obligations under rule 1 to give each client truly independent advice and to act in each client's best interests.

2.3.1 We believe that this risk must be minimised by requiring that firms act only if they are properly resourced to do so. Proper resourcing means that the firm must have teams that can operate independently of each other to service all the needs of the different clients in a matter. It also means having an individual or team (of sufficient status) within the firm who can make dispassionate and independent decisions about whether the firm can properly act, and continue to act, for each client. This individual or team must not act for any of the clients in the matter.

2.3.2 This is provided for in rule 3.02(3)(d) and (g). Rule 3.02(3)(d),(e) and (f) reinforces this and makes clear that there must be full compliance with rule 1, that no individual acts for, or is responsible for, the supervision of the work of more than one client, and that the firm must have an independent individual or team monitoring compliance with the rule.

2.3.3 Situations in which teams must negotiate with each other increase the risk of a breach of rule 1. Some respondents to the consultation highlighted this as particularly difficult because of the dynamics of relationships within a firm and because it was felt that it may be more uncomfortable to negotiate in an uninhibited manner with your own colleagues than with those outside the firm.

2.3.4 Again, we have highlighted in the rule the importance of compliance with rule 1 and the fact that the firm must be satisfied that the interests of one client are not put above the interests of another. In the guidance at note 6(c)(vii), we have flagged the increased risk to clients when negotiations become complex and/or prolonged; it is important that firms carefully monitor this type of situation.

Risk 2: the client fails to understand what it is agreeing to or the full implications of what is involved when it gives consent.

2.3.5 The main way to minimise this risk is to make sure that the type of client intended to benefit from this exception is properly defined in the rule and guidance.

2.3.6 Suggestions from the earlier consultation as to a definition of the type of client intended to benefit from this expection include

- o a sophisticated or self-certifying client;
- o when the client is a lawyer or has access to an in-house lawyer;
- o when the client has taken separate legal advice on the conflict issue (which could involve the issue of a certificate from the independent lawyer);
- o an experienced user of the legal services involved;
- o when the client consults a professional (lawyer, or risk or compliance professional) with understanding of and expertise in the law of conflicts and confidentiality;
- o a sophisticated consumer of legal services;
- o a comprehensive list (e.g. a lawyer, law firm, public company, subsidiary of a public company, large private company, foreign company, liquidator, administrator, trustee of a pension fund, fund manager, etc.).

2.3.7 However, none of these suggestions met with majority approval, and we feel there is no perfect or easy definition. Your views are sought on our draft definition, which requires that the client

(a) is a lawyer, or

(b) has access to an in-house lawyer or other independent advice, and the firm believes the client is capable of understanding the implications of using the exception.

The rule also requires the client to be an experienced user of the type of legal services involved in the matter.

2.3.8 The issue of who decides whether the client is sufficiently sophisticated to make the decision about joint representation was also

flagged in the earlier consultation. Should it be the client itself, the firm, or a combination of the two? We have drafted the definition in a way that ensures the firm retains some responsibility for the decision. However, input from the client is essential, and we have dealt with this as part of the confirmation required in a written consent. The supporting guidance advises that it may be prudent to check that the client has, in fact, received independent advice.

2.3.9 We have also considered the question of the nature of the consent required to be given by the client. Clearly, the client needs to understand that it is agreeing to the firm representing other clients in the matter and that conflict will arise between them, or there is a significant risk that it will do so. The draft rule does not require that consent be "informed" because, due to the constraints of confidentiality, there will always be limits on the information each client can be given. The guidance suggests that as a minimum each client should know the identity of the other clients (see guidance note 6(c)(ii)). The existing "reasonableness test", which must be satisfied in relation to the use of the current exceptions, would require the firm to discuss the nature of the conflict or possible conflict with the client.

2.3.10 We propose adopting the requirement that client consent be given in a written form, given the potential impact if something goes wrong. This will serve as a record of the fact that the client is aware of the nature of the risks arising from the retainer. It will also help focus both the firm's and the client's minds on the decisions they are making in agreeing to act/deciding to instruct.

Risk 3: the firm fails to protect confidential information.

2.3.11 We consider the protection of clients' confidential information to be fundamental (see the professional principles in section 1 of the Legal Services Act 2007); we also consider that safeguards should be incorporated into rule 3 itself. We have done this in the draft by requiring that each client agree, in writing, to the arrangements for protecting their confidential information. This written consent could be given at the same time as the informed consent to acting in a conflict situation is given, or shortly afterwards; the draft makes clear that this must happen before accepting instructions. The guidance suggests, again for consistency, that these arrangements take account of the existing guidance to rule 4 (see guidance note 6(c)(iv)).

Other points on rule 3

2.4 We have applied the same "reasonableness" requirement to this exception as the rule currently applies to the other exceptions that allow firms to act where there is conflict. This requires that all relevant issues are drawn to the client's attention before a firm agrees to act. Existing guidance makes it clear that the relevant issues in relation to conflict should be discussed with the client and that it would be prudent to set them out in the letter confirming the instructions.

2.5 Some respondents to the earlier consultation made the point that, if a firm accepted instructions from two or more clients under this exception, it was important to agree at the outset what would happen if the conflict became such that the firm could no longer act for all of them. The respondents felt that this was important to ensure that the clients were not prejudiced at a critical point in a transaction. Therefore, we have added a requirement that each client's agreement regarding arrangements that will prevail if the firm can no longer continue to represent all the clients in a matter must be given at the outset.

2.6 Some respondents also suggested that, if a firm accepted instructions to act in a conflict situation, it should identify the client it regarded as the dominant client. They suggested that this would be the client that the firm would wish to retain in any situation in which it became impossible to act for all the clients. We believe that this might be difficult for a firm to do in all situations; however, if clients all knew what would happen if the firm could no longer act for all of them, this would prevent prejudice.

2.7 Conveyancing conflicts are treated entirely separately under rules 3.07 to 3.22 and do not form part of the present review. The conveyancing conflict rules apply to all types of transactions, whether the clients can be classified as sophisticated or not. Neither the current, nor the proposed, exceptions in the general part of rule 3 apply, or will apply, to such transactions. To avoid confusion, it is proposed to amend the introduction to rule 3 to make this even clearer.

2.8 Rule 3.03 will also require amendment to incorporate the three 3.02 exceptions. Small consequential changes to the rest of 3.02 are highlighted in the draft.

Questions on rule 3 changes

2.9 Have we got the balance right between flexibility in relation to the exception and safeguarding against risks to clients and the public?

2.10 Does the rule and guidance protect against the three main risks:

(a) that the requirements of rule 1 are not adequately met,

(b) that the client does not have the knowledge or experience necessary to understand the arrangement fully, and

(c) that confidential information leaks.

If not, how could we better protect against these risks?

2.11 Have we got the balance right between essential conditions set out in the rule itself, and guidance to assist interpretation?

2.12 Are there any aspects of the drafting that could be clearer? If so, please explain.

3. Rule 4 (Confidentiality and disclosure)

The changes

3.1 Rule 4 deals with protecting confidential information. The key requirement here is that firms must keep the affairs of their clients confidential. The rule includes a duty not to put confidentiality at risk by acting for another client on a matter in which such information would be material. This prevents firms accepting instructions from one client if information held for another client is material and if the clients have adverse interests. There are two exceptions to this. The first is when the clients give informed consent and agree the measures to protect their confidential information. The second is when it is not possible to get the informed consent of the client whose information needs to be protected but the firm has already started acting for another client when the problem arises. In these circumstances, the rule allows the firm to continue acting—provided an information barrier that meets the very stringent common law requirements is put in place.

3.2 We have made the decision to extend this second exception to allow firms to accept instructions in the knowledge that it would not be possible to get consent from the client whose information required protection. This is on the basis, at present with this second exception, that the common law requirements concerning information barriers are complied with. We recognise that only those firms large enough to have institutionalised structures and systems for putting these barriers in place will be able to comply, but that is an inevitable consequence of the common law requirements.

3.3 The change to rule 4 will bring the rule into line with the law concerning the use of information barriers. This change appears to require only minimal changes to rule 4.05 as shown in the annex. The minimum protections required for the information barrier are listed in the guidance to rule 4, the relevant parts also being attached.

Questions on rule 4 changes

3.4 Does anything further need to be added to the rule or the guidance to make the position clearer? If so, please explain.

3.5 Do you consider there is sufficient emphasis placed on the use of the 4.04 exception? Is it clear that the 4.05 exception is intended to be a last resort?

3.6 Do the protections in the rule and guidance remain adequate?

4. How to respond

For information on how to respond, please visit our website.

- Go to www.consultations.sra.org.uk.
- Select **Conflict and confidentiality rules – proposed amendments**.

- Click **How to respond.**

We are unable to acknowledge receipt of responses. We take this opportunity to than you for your response.

Submission deadline

The deadline for responses is 12 February 2010.

Annex

Introduction to rule 3

Rule 3 sets out provisions for dealing with conflicts of interests. Conflicts between the duty of confidentiality and duty of disclosure owed by an individual or a firm to two or more clients are dealt with in rule 4 (Confidentiality and disclosure).

Rules 3.01 to 3.03 deal with conflicts generally, except conflicts in conveyancing.

Rules 3.04 to 3.06 deal with conflicts in particular high risk situations – gifts from clients, public offices and appointments leading to conflict, and alternative dispute resolution (ADR).

Rules 3.07 to 3.22 deal with conflicts in conveyancing. Note the special meaning of "you" in 3.07 to 3.15 (acting for seller and buyer) and 3.16 to 3.22 (acting for lender and borrower). See also 18.03 which sets out additional requirements which apply to the provision of property selling services.

Rule 3.23 sets out that there is no power to waive 3.01 to 3.05.

Rules 3.07 to 3.22 do not apply to your overseas practice unless the land conveyed is situated in England and Wales.

Rule 3 – Conflict of interests

3.01 Duty not to act

(1) You must not act if there is a conflict of interests (except in the limited circumstances dealt with in 3.02).

(2) There is a conflict of interests if:

(a) you owe, or your firm owes, 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; or

(b) 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.

(3) For the purpose of 3.01(2), a related matter will always include any other matter which involves the same asset or liability.

3.02 Exceptions to duty not to act

(1) You or your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the different clients have a substantially common interest in relation to that matter or a particular aspect of it; and

(b) all the clients have given in writing their informed consent to you or your firm acting.

(2) Your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the clients are competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s);

(b) there is no other conflict, or significant risk of conflict, between the interests of any of the clients in relation to that matter;

(c) the clients have confirmed in writing that they want your firm to act in the knowledge that your firm acts, or may act, for one or more other clients who are competing for the same asset; and

(d) unless the clients specifically agree, no individual acts for, or is responsible for the supervision of, more than one of those clients.

(3) your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) each client is a sophisticated client and an experienced user of the type of legal services involved in the matter; and

(b) each client has confirmed in writing;

(i) that it wants your firm to act in the knowledge that your firm acts, in relation to that matter, for one or more other clients whose interests give rise to a conflict or possible conflict; and

(ii) that it has agreed the safeguards which will be put in place to protect the client's confidential information; and

(iii) that it has agreed the arrangements should the firm no longer be able to represent each client in the matter; and

(c) the matter is not and does not become a contentious matter; and

(d) your firm has satisfied itself that it has sufficient resources fully to represent the interests of each client and that the interests of each client will be adequately safeguarded; and

(e) those acting for each client comply fully with rule 1 throughout all aspects of the matter and your firm is, and remains, satisfied that the interests of one client are not preferred to those of another; and

(f) no individual acts for, or is responsible for the supervision of the work for, more than one of those clients; and

(g) your firm, but independently of those acting for each client, must ensure and monitor compliance with (a) to (f) above and retain documentary evidence of compliance.

~~(3)~~ (4) For the purposes of 3.02(3)(a), a sophisticated client is a client (i) which is a lawyer or (ii) which has access to an in-house lawyer or which has taken separate legal advice on the issue before giving the confirmation referred to in 3.02 (b) and which the firm believes is capable of understanding the implications of agreeing to your firm acting for other clients in the matter.

(5) For the purposes of 3.02(3)(d), a matter is a contentious matter if one client makes any threat or move against another client (for which your firm acts in relation to this matter) to refer any issue to court or any other dispute resolution mechanism or instructs you to lend assistance to any such actions by a third party.

(6) When acting in accordance with (1), (2) or (3) it must be reasonable in all the circumstances for you or your firm to act for all those clients.

~~(4)~~ (7) If you are relying on the exceptions in 3.02(1), ~~or~~ (2), or (3) you must:

(a) draw all the relevant issues to the attention of the clients before agreeing to act or, where already acting, when the conflict arises or as soon as is reasonably practicable, and in such a way that the clients concerned can understand the issues and the risks involved;

(b) have a reasonable belief that the clients understand the relevant issues; and

(c) be reasonably satisfied that those clients are of full capacity.

3.03 Conflict when already acting

(1) If you act, or your firm acts, for more than one client in a matter and, during the course of the conduct of that matter, a conflict arises between the interests of two or more of those clients, other than a conflict which your firm had already considered as a conflict or possible conflict and where your firm is acting pursuant to any of the exceptions in rule 3.02(1), (2) or (3), you, or your firm, may only continue to act for one of the clients (or a group of clients between

whom there is no conflict) provided that the duty of confidentiality to the other client(s) is not put at risk.

Guidance to rule 3 – Conflict of interests

6. ~~Two~~ Three different situations are defined. These are in 3.02(1)~~,~~ ~~and~~ (2) and (3)):

The "common interest" exception – rule 3.02(1)

(a) (i) Rule 3.02(1) deals with the situation where the clients have a "common interest", they all want to continue to instruct you and it would be disproportionate, for example, in terms of cost and general disruption to their matter, to require them to instruct separate solicitors.

(ii) For there to be a "common interest" there must be a clear common purpose and a strong consensus on how it is to be achieved. However, it will be for you to decide objectively on the facts in each

(iii) The "common interest" might arise, for example, where you are acting for several members of a family in relation to their affairs or acting for various individuals in the setting up of a company. Any areas of conflict must be substantially less important to all the clients than their common purpose and may, for example, relate to slightly different views on how the common purpose is to be achieved. It will be your duty to keep the differences under review with the clients and to decide if the point has been reached when it would be untenable to continue to represent all of them in a fair and open manner or without any of them being prejudiced.

(iv) There exist some multi-party complex commercial transactions, where sophisticated users of legal services, who have a common purpose, may expect a firm to act for two or more parties, because this will facilitate efficient handling of the matter (taking into account amongst other things the desire to complete the transaction quickly, the availability of necessary experience/expertise and the overall costs). Indeed in many cases it may already be accepted business practice for firms to act in this manner. An example is acting for different tiers of lenders (for example senior lenders and mezzanine lenders) and/or different parties (for example arrangers/underwriters and bond/security trustees) in entering into a financing transaction where there is already an agreed or commonly understood structure with regard to the ranking of their respective claims, the content of their respective obligations and associated commercial issues.

(v) While accepted business practice can be considered as a factor in determining whether an appropriate common purpose exists, you and your firm should always exercise caution when

proposing to act in accordance with 3.02 and should be mindful of the residual test of reasonableness referred to in 3.02~~(3)~~(6).

(vi) In some situations it might be possible for you to consider whether the retainer could be limited to those areas where there is no conflict with the clients seeking separate advice on any areas of conflict. This could only be done where the conflict did not undermine the overriding common purpose (see below for further guidance on limiting retainers).

(vii) In some circumstances it might be possible that, while a conflict would prevent you from acting for another party on all aspects of a matter, a mandate limited to a specific issue where there is common purpose might be accepted. For example, you may be retained by the owner of a company to advise on its disposal. In that case you would not generally be able to advise another party on the purchase of the company. However, in the hope and anticipation of a successful sale a seller client which is a sophisticated user of legal services might agree that you should also accept a limited retainer to provide competition law advice to the prospective purchaser regarding the filings for competition law purposes that would be required in the event that the two businesses were combined.

(viii) When acting under this exception, especially in family situations, you need to consider the developing legal position. Courts are likely to make a presumption of undue influence where one of the parties who is considered vulnerable through age or other circumstances places trust and confidence in the other party. In any situation of doubt it may well be in the best interests of the clients that they are separately represented.

"Competing for the same asset" exception – rule 3.02(2)

(b) (i) Rule 3.02(2) is intended to apply to specialised areas of legal services where the clients are sophisticated users of those services and conclude that rather than seek out new advisers they would rather use their usual advisers in the knowledge that those advisers might also act for competing interests. An "asset" is not necessarily physical, and can include a contract or a business opportunity. Examples where this exception might apply include:

(A) acting on insolvencies so that a firm can act for more than one creditor;

(B) acting for competing bidders, and/or for those involved with the funding of bidders, for a business being sold by auction; and

(C) acting for competing tenderers submitting tenders to perform a contract.

(ii) The wording of 3.02(2) is sufficiently wide to permit other transactional work in the commercial field where clients can give consent. Solicitors and their firms should exercise considerable caution when proposing to act in accordance with 3.02(2) in categories of work where to do so is not already accepted business practice.

(iii) Rule 3.02(2) should not be applied to disputes over assets other than in the context of corporate restructurings and insolvencies.

The "sophisticated client" exception – rule 3.02(3)

(c) (i) This exception should only be used with great caution and when it is demonstrably for the benefit of all the clients involved. The ability to comply fully with rule 1, in particularly the ability to act with independence and in each client's best interests is a prerequisite to its use. Firms will also need to demonstrate that they have the resources (a) to provide individuals or teams with suitable experience to act in the best interests of each client (b) to protect the confidential information of each client and (c) to monitor compliance with the rules through an independent team or individual not acting for any of the clients.

(ii) Benefit to the clients concerned is most likely to arise where the relevant clients habitually use your firm and it would be inconvenient for them to instruct another firm, either because this will materially increase the cost or affect the efficiency with which the matter can be completed. You and your firm should therefore be particularly cautious about acting under this exception in the context of large, lengthy and/or high profile matters where the impact on the client of appointing a different firm is small relative to the overall cost and timeframe of the matter. Although there may be more reason to use the rule 3.02(3) exception where the clients are established clients of the firm you and your firm should also bear in mind that savings of time and money for your client may not always materialise if the teams at your firm are discharging their rule 1 duties fully.

(iii) Before acting under this exception the rule requires that firms have the written consent of each client. Generally, when a client confirms that your firm may act for another client under this exception, it will need to know the identity of that other client and the role it plans to play in the matter. However, it is acceptable to obtain consent to act for an unnamed client on preliminary work while it decides whether or not to participate in the matter. This should always be on the basis that if the client does decide to participate and wishes to continue to use your services, you must reveal its identity to, and obtain fresh consent from, your other client.

(iv) Your firm must give careful consideration to whether it is in a position to comply fully with rule 4 as to the protection of confidential information by creating effective information barriers before agreeing to act for clients. Your firm should have regard to the safeguards for information barriers referred to in notes 41-45 of the guidance to rule 4. Written consent to the arrangement for protecting the clients' information could be given at the same time as the informed consent to your firm acting, or shortly afterwards when the arrangements have been settled, but must be given in advance of advice or work on the matter commencing.

(v) To comply with the rule your firm must also have an independent team or individual(s) of sufficient seniority and experience to (a) agree that it is appropriate for the firm to act for each client in the matter and (b) monitor that the matter is proceeding in compliance with the requirements of the rule 3.02(3) exception. That team or individual(s) must not have any involvement in the work for the clients and no-one who has any involvement in the clients' work should be responsible for the decision as to whether the firm can act or continue to act.

(vi) If you are acting for one of the clients and at any time you consider that you cannot continue to comply or are not complying with your duties under rule 1 you must stop acting and bring the problem to the attention of those monitoring the matter under rule 3.02(3)(c). Your firm must cease acting for that client, and may only continue to act for the other client(s) if it can do so in accordance with rules 1, 3.02 (3) (4) and (5).

(vii) This exception cannot be used where the matter is, or becomes, contentious.The definition of a contentious matter is expressed widely, and will be interpreted so by the SRA. It is intended to encompass situations where litigation or other dispute resolution mechanisms may arise or where one client has made a threat or move against another client in relation to the matter where your firm acts for the clients.

(viii) This does not prevent you acting for the clients where there is an element of negotiation between them. However, the more complex and lengthy the negotiation becomes, the more difficult it may be for your firm to act in the best interests of each client. It will be a matter for the team or individuals monitoring compliance to be sure that any of the teams acting for the clients in a negotiating situation do not feel inhibited in trying to achieve the best results for their respective clients.

(ix) In some situations it may be possible to limit the retainer with all clients to exclude contentious issues or with all or all but one client to exclude aspects of the matter on which it might be otherwise unreasonable to act for more than one client, with the client or other clients agreeing to seek separate legal advice on these issues. However, the impact of having to do so

may mean that it is not in the best interests of that client that you act for that client on the matter as a whole.

(x) Where your firm is considering acting for a client under this exception you should ensure that you are satisfied that the client is "sophisticated" within the definition in the rule and an experienced user of the type of legal services involved. If the individual instructing you asserts that he or she is a sophisticated client because he or she has taken separate legal advice on the issue, you should ensure that you are reasonably satisfied that that is the case. If in doubt, you should ask who that advice has been obtained from, and ask for consent that you may contact the lawyer in question to obtain confirmation that advice has been given. Where the lawyer is an insolvency practitioner, it is sufficient that he has access to an in-house lawyer in any professional organisation in which he or she is a partner, member or director.

(xi) Your firm, in recording it's reasons for acting, will need to be able to show evidence of any steps it took to obtain confirmation that the client took, or had access to, independent advice. Evidence that the client is an experienced user of the type of legal services involved is most likely to be demonstrated by the record of work previously undertaken for the client by your firm. Sometimes, however, you may need to obtain this evidence from the client where the client has used other firms.

(xii) Record-keeping is important to manage the risks involved in acting under this exception and to demonstatre compliance. Your firm must keep records of decisions it makes about acting, and the reasons for them, and at key points when deciding to continue to act, if appropriate, in order to demonstrate how it complies with each aspect of rule 3.02(3). Each client's written consent to your firm acting under this exception and to the arrangements for protecting it's confidential information must be recorded.

7. Reasonableness is an important rider to the exceptions in 3.02. There may be situations where, despite compliance with 3.02, it would still not be reasonable to act. The apparent unequal bargaining position of the parties, concerns about the mental stability of one of the parties, a family arrangement where an elderly parent is providing security for their son's or daughter's business loan, and the importance of one of the clients to the firm may all be situations where instructions to act for both or all parties should be declined. Having accepted instructions you must be satisfied that you can act even-handedly for both or all clients and that, taking into account any limitations in a specific retainer, you do not favour one at the expense of the other(s).

8. The criterion against which reasonableness will be judged is whether one client is at risk of prejudice because of the lack of separate representation. In relation to all situations where you are proposing to act for two or more clients under the provisions of 3.02, the onus will be on you to demonstrate why it

was reasonable to act for all the clients at the time the instructions were accepted. Above all, you must be satisfied that unfettered advice can be given, without fear or favour, to the clients. You must also keep under review whether it remains reasonable to continue to act for them. You should also have regard to 1.04 (Best interests of clients) which requires you to act in the best interests of each of your clients.

9. (a) Rule 3.02(4) places obligations on you to discuss with the clients the implications of you, or your firm, continuing to act for all of them. You must be satisfied that the clients understand the issues and that their consent is independently and freely given. You should consider setting out in your initial terms of business letter the issues discussed in relation to the conflict of interests and how that might affect your ability to represent both or all of the clients as the matter progresses. Extreme caution will be required where one of the clients is particularly vulnerable due to mental health, language or other problems affecting their understanding of the issues, although where a litigation friend acts for a person who lacks capacity they will be able to consent on that person's behalf. Similarly, you must always be alert to situations where a client might be consenting under duress or undue influence and in those circumstances must insist on separate representation. For the avoidance of doubt, and for evidential purposes, you should always keep a written record of all discussions with the clients about the implications of your acting for them. You must always obtain all the clients' written consent on each occasion when acting under either of the exceptions.

(b) Where seeking informed consent under 3.02(1)(b) or 3.02(3)(g) you should identify by name the other clients you or your firm propose(s) to act for, or be able to do so when their identities are known. Provided that you do this and comply with the requirements of 3.02(4), the obligation to obtain "informed" consent in 3.02(1)(b) or 3.02(3)(g) will have been satisfied. Where consent is sought under 3.02(2), you need to comply with the requirements of 3.02(4) but you need not identify by name the other clients you or your firm propose(s) to act for.

10. When acting for two or more clients on a matter, or a related matter, there may be circumstances where you will have to cease acting for one or both clients. This may be in circumstances where no conflict was apparent when accepting instructions but a conflict subsequently arose or when acting under one of the exceptions and it becomes impossible to fulfil the conditions set out in 3.02. One of the reasons for this is that the conflict which arises is not one which your firm considered as a possibility at the time your firm started acting pursuant to one of the rule 3.02 exceptions. Your firm will not therefore have obtained the necessary consents to act from the client because the risks were not contemplated, and the safeguards are not appropriate to enable your firm to act despite the conflict (because that conflict was not a factor when setting them up) In these circumstances it is important to try and limit the disruption that will inevitably be caused for the clients. One way of doing this is to discuss and agree with the clients at the outset what will happen if a conflict arises and agree which client the firm would continue to represent where this is possible.

Rule 4 - confidentiality and disclosure

4.04 Exception to duty not to put confidentiality at risk by acting - with clients' consent

(1) You may act, or continue to act, in the circumstances otherwise prohibited by 4.03 above with the informed consent of both clients but only if:

(a) the client for whom you act or are proposing to act knows that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material information (in circumstances described in 4.03) in relation to their matter which you cannot disclose;

(b) you have a reasonable belief that both clients understand the relevant issues after these have been brought to their attention;

(c) both clients have agreed to the conditions under which you will be acting or continuing to act; and

(d) it is reasonable in all the circumstances to do so.

(2) "Both clients" in the context of 4.04(1) means:

(a) an existing or former client for whom your firm, or a lawyer or other fee earner of your firm, holds confidential information; and

(b) an existing or new client for whom you act or are proposing to act and to whom information held on behalf of the other client is material (in circumstances described in 4.03 above).

(3) If you, or you and your firm, have been acting for two or more clients in compliance with rule 3 (Conflict of interests) and can no longer fulfil its requirements you may continue to act for one client with the consent of the other client provided you comply with 4.04.

4.05 Exception to duty not to put confidentiality at risk by acting – without clients' consent

You may act, or continue ~~continue~~ to act, for a client ~~on an existing matter, or on a matter related to an existing matter,~~ in the circumstances otherwise prohibited by 4.03 above without the consent of the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, confidential information which is material to your client (in circumstances described in 4.03) but only if:

(a) it is not possible to obtain informed consent under 4.04 above from the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material confidential information;

(b) your client has agreed to your acting in the knowledge that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, information material to their matter which you cannot disclose;

(c) any safeguards which comply with the standards required by law at the time they are implemented are put in place; and

(d) it is reasonable in all the circumstances to do so.

Guidance to rule 4 – confidentiality and disclosure

Acting with appropriate safeguards (information barriers) – 4.04 and 4.05

31. Rule 4.03 sets the basic standard that you should not normally act on a matter where material confidential information is held elsewhere in the firm and where the matter would be adverse to the interests of the client/former client to whom the duty of confidentiality is owed. To act in these circumstances might increase the risk that the confidential information could be put at risk. The firm can act if the confidential information is not material to the instructions. For guidance on the meaning of "material" see note 24 above.

32. Rules 4.04 and 4.05 set out two situations where you can act even when material confidential information is held by another member of the firm. Both recognise ~~for the first time~~ that it can be acceptable to use information barriers. The first situation is where the party to whom the duty of confidentiality is owed consents. The second situation is where ~~you are already acting and~~ consent has not been given or cannot be sought.

33. Where the client consents as envisaged by 4.04 there is scope for more flexibility in the arrangements for the information barrier as the safeguards can be discussed with, and agreed by, the client. It is important, nonetheless, that the safeguards are effective to avoid a real risk of disclosure. A firm will be liable if confidential information does leak in breach of that agreement.

34. Rule 4.04 requires "informed consent" and one of the difficulties with seeking such consent of the client is that it is often not possible to disclose sufficient information about the identity and business of the other client without risk of breaching that other client's confidentiality. You will have to decide in each case whether you are able to provide sufficient information for the client to be able to give "informed consent". Every situation will be different but generally it will be only sophisticated clients, for example, a corporate body with in-house legal advisers or other appropriate expertise, who will have the expertise and ability to weigh up the issues and the risks of giving consent on the basis of the information they have been given. If there is a risk of prejudicing the position of either client then consent should not be sought and you and your firm should not act. It may, however, be possible to give sufficient information to obtain informed consent even if the identity of the other client(s) and the nature of their particular interest(s) are not disclosed. Wherever possible you should try to ensure that the clients are advised of the potential risks arising from your firm acting before seeking their consent.

35. In the case of sophisticated clients (such as those referred to in note 34 above) only, it may be possible to seek consent to act in certain situations at the start of and as a condition of your retainer and to do so through standard terms of engagement. For example, a sophisticated client may give its consent in this way for a firm to act for a future bidder for that client if, when the bidder asks the firm to act, a common law compliant information barrier is put in place to protect any of the client's confidential information which is held by the firm and which would be material to a bidder.

36. Where the client does not consent or does not know about the arrangements, an extremely high standard in relation to the protection of confidential information must be satisfied. In this situation, as has been demonstrated in recent case law, the client can have the firm removed from acting with all the attendant disruption for the other client, if there is shown to be a real risk of confidential information being leaked.

37. Where your firm holds material confidential information you may ~~not without consent take on new instructions adverse to the interests of the client or former client to whom the duty of confidentiality is owed (4.04). However, where you are already acting and discover that your firm has - or comes to possess - such information, you may continue to~~ act ~~on that matter, or a related matter,~~ in circumstances where the party to whom the duty of confidentiality is owed refuses consent or cannot be asked (4.05). This may be because it cannot be contacted or because making the request would itself breach confidentiality. You should always seek consent when you can reasonably do so.

38. Where under ~~4.04~~ 4.05 your firm has erected an information barrier without the consent of the party to whom the duty of confidentiality is owed, the firm should try to inform that party as soon as circumstances permit, and outline the steps which have been taken to ensure confidentiality is preserved. If some material points (such as the name of the client to whose matter the confidential information might be relevant, or the nature of that matter) still cannot be divulged for reasons of confidentiality and it is reasonably supposed that that party would be more concerned at news of your retention than if fuller details could be given, it might be appropriate to continue to wait before informing that party. There may be circumstances, however, where it is impossible to inform that party.

39. Where two or more firms amalgamate, or one firm takes over another, the new firm needs to ensure that this does not result in any breach of confidentiality. If the firm holds confidential information that is material to a matter being handled for another client, the firm must be able to ensure that the confidential information is protected by ceasing to act for both clients, or ceasing to act for the client to whom the information is relevant, or by setting up adequate safeguards in accordance with either 4.04 or 4.05.

40. Confidential information may also be put at risk when partners or staff leave one firm and join another. This might happen where, for example, an individual joins a firm which is acting against one of the individual's former clients. An individual joining a new firm could not act personally for a client of the new firm where to do so would put at risk confidential information which he or she personally possesses about a client of the previous firm. In addition, the individual and the firm which the individual is joining must ensure that adequate safeguards are put in place in accordance with 4.04 or 4.05 to ensure that confidential information held by that individual is safeguarded.

Safeguards for information barriers

41. Rigid safeguards for information barriers have not been enshrined in the rules. Where 4.04 applies (i.e. consent has been given), it is for the firm to agree the appropriate safeguards, but it would normally be necessary to satisfy note 44 (a) to (f). Some of note 44 (g) to (n) may also be applicable.

Where 4.05 applies, the firm must satisfy the requirements of common law and at least most, if not all, of note 44 (a) to (n) might be essential.

42. If, at any stage after an information barrier has been established, it becomes impossible to comply with any of the terms, the firm may have to cease to act. The possibility of this happening should always be discussed when instructions are accepted so that the client is aware of this risk, or addressed with reasonable prominence in standard terms of engagement.

43. Firms will always need to consider whether it is appropriate in any case for an information barrier to be used, and also whether the size or structure of a firm means that it could not in any circumstances be appropriate. It is unlikely that, for example, safeguards could ever be considered adequate where:

    (a) a firm has only one principal and no other qualified staff;

    (b) the solicitor possessing, or likely to possess, the confidential information is supervised by a solicitor who acts for, or supervises another solicitor in the firm who acts for a client to whom the information is or may be relevant; or

    (c) the physical structure or layout of the firm is such that confidentiality would be difficult to preserve having regard to other safeguards which are in place.

44. The following note 44 (a) to (f) would normally be appropriate to demonstrate the adequacy of an information barrier when you are proposing to act in circumstances set out in 4.04. It might also be appropriate to agree some or all of note 44 (a) to (f) where you are acting with consent in accordance with 4.05:

    (a) that the client who or which might be interested in the confidential information acknowledges in writing that the information held by the firm will not be given to them;

    (b) that all members of the firm who hold the relevant confidential information ("the restricted group") are identified and have no involvement with or for the other client;

    (c) that no member of the restricted group is managed or supervised in relation to that matter by someone from outside the restricted group;

    (d) that all members of the restricted group confirm at the start of the engagement that they understand that they possess or might come to possess information which is confidential, and that they must not discuss it with any other member of the firm unless that person is, or becomes, a member of the restricted group, and that this obligation shall be regarded by everyone as an ongoing one;

    (e) that each member of the restricted group confirms when the barrier is established that they have not done anything which would amount to a breach of the information barrier; and

(f) that only members of the restricted group have access to documents containing the confidential information.

The following arrangements may also be appropriate, and might in particular be necessary where acting in circumstances set out in 4.05:

(g) that the restricted group is physically separated from those acting for the other client, for example, by being in a separate building, on a separate floor or in a segregated part of the offices, and that some form of "access restriction" be put in place to ensure physical segregation;

(h) that confidential information on computer systems is protected by use of separate computer networks or through use of password protection or similar means;

(i) that the firm issues a statement that it will treat any breach, even an inadvertent one, of the information barrier as a serious disciplinary offence;

(j) that each member of the restricted group gives a written statement at the start of the engagement that they understand the terms of the information barrier and will comply with them;

(k) that the firm undertakes that it will do nothing which would or might prevent or hinder any member of the restricted group from complying with the information barrier;

(l) that the firm identifies a specific partner or other appropriate person within the restricted group with overall responsibility for the information barrier;

(m) that the firm provides formal and regular training for members of the firm on duties of confidentiality and responsibility under information barriers or will ensure that such training is provided prior to the work being undertaken; and

(n) that the firm implements a system for the opening of post, receipt of faxes and distribution of e-mail which will ensure that confidential information is not disclosed to anyone outside the restricted group.

"Member", in the context of this note, applies to principals and all staff members including secretaries, but does not apply to any staff member (not having any involvement on behalf of any relevant client) whose duties include the maintenance of computer systems or conflict/compliance procedures and who is subject to a general obligation of confidentiality in relation to all information to which he or she may have access in the course of his or her duties.

This guidance should not be read as a representation that compliance with note 44 (a) to (n) above will necessarily be considered sufficient at common law.

45. Where a firm proposes to erect an information barrier (whether under 4.04 or 4.05) it must first inform the client for whom it acts - or wishes to act - on the matter to which the confidential information might be material. The firm should not act - or continue to act - without that client's consent, with that client understanding that the firm holds information which might be material and which will not be communicated to it; see 4.04(1)(a) and 4.05(b). Although the rule does not require consent to be in writing, it is recommended that this be obtained for evidential purposes to protect both your client's position and your own position.