



IDENTIFYING AND MANAGING CONFLICTS

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INTRODUCTION

1. A conflict of interests arises when a professional's own interests or the interests of his or her client conflict with the professional's obligation to act in the interests of another client. Different professional bodies have different rules regarding conflicts although such codes have to be consistent with the law built up in this area.
2. By their nature professional rules on conflicts, and this guidance, are more relevant to members in practice than members in business. Members in business have a duty to act (within the law and professional ethical requirements) in their employer's interests. Their private interests might sometimes conflict with those of their employer but any potential conflict can generally be resolved by disclosure to the employer.
3. Members in practice represent more than one client. Such members have a duty under the Code of Ethics (the Code) to act with integrity and objectivity, duties which can be equated with the professional's background legal obligation to act loyally and whole heartedly in the interests of each client. It may clearly be difficult to act whole-heartedly on an engagement for two clients whose interests in relation to an engagement directly conflict and rules need to be in place to manage such conflicts. These are set out in the Code.
4. The Code is based on that of the International Ethics Standards Board for Accountants (IESBA). In common with the IESBA Code, the Code's requirements in this area¹ do not prohibit members from undertaking engagements where different client interests conflict, provided that certain effective safeguards are able to be, and are, applied and, generally, informed consent obtained. However, on occasion, the threats to objectivity due to a conflict of interests and the duty referred to above may be of such significance that adequate safeguards cannot be established. In such cases the member² will not be able to act for one or more of the parties. As the Code is principles-based, it is important that the spirit of its requirements is applied, as well as the letter.
5. This guidance highlights matters for members and firms to consider in order to help apply aspects of the Code in various circumstances. In particular, it considers identification of relevant conflicts and, where appropriate, obtaining informed consent and applying appropriate safeguards. It does not add to or change anything in the Code in and of itself.

CONSIDERING WHETHER THERE IS AN ACTUAL OR A POTENTIAL CONFLICT OF INTERESTS

6. It will often be evident when a potential conflict of interests with or between clients might exist, or be seen to exist.³ However, the member should have systems in place to take reasonable steps to check for conflicts or potential conflicts between the member and his or her client, and between clients or potential clients. In practice, members will often give active thought to conflicts only at the beginning of the engagement but the duty not to act when there is a conflict continues throughout the engagement and the member should be alert to changes in circumstances which may generate a new conflict or alter the nature of an existing one.
7. Examples of situations involving potential conflicts between the interests of the member and the client include: providing strategic advice to a client on its competitive position while having business interests with a major competitor; and advising a client on the acquisition of a business which the member is also interested in acquiring.
8. Potential conflicts between clients can arise where the member's actions or services have a bearing on competing interests. Examples of such situations include: providing corporate

¹ Sections 210 and 310 <https://www.icaew.com/technical/ethics/icaew-code-of-ethics/icaew-code-of-ethics>. In addition, for corporate finance activities, there is additional guidance at <https://www.icaew.com/-/media/corporate/files/members/regulations-standards-and-guidance/ethics/corporate-finance-helpsheet.ashx?la=en>.

² In this guidance, 'member(s)' also includes an affiliate, a provisional member, a foundation qualification holder, a provisional foundation qualification holder, and an employee of a member firm or an affiliate, as defined in the code of ethics glossary – *ibid*.

³ Perception is to be considered in the context of what a reasonable and informed third party with knowledge of the facts and circumstances would conclude.

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finance advice to two clients who are competing to acquire the same company, where the advice might be relevant to the parties' competitive position; and preparing valuations of assets for the vendor and potential purchasers.

WHO IS THE CLIENT?

9. An increasingly common issue is the need to ensure that, where there are parties with differing interests in an engagement, it is clear to all of them which is in fact the client and which is not and for the accountant's instructions to be received from that client. In such instances, actual or potential conflicts may not always be evident. This can arise because of a lack of clarity as to who the client actually is, or because there is more than one, potentially conflicting, interest existing within what on the face of it is one client. It may be for example, that:
- there are different constituencies within a group, with different interests. A member might for instance receive instructions from the chief executive of a company in relation to matters also affecting the interests of the company's subsidiary which has different interests. Where there are such multiple interests, the member needs to be careful to ensure that it is clear (in the engagement letter where relevant, but also throughout the engagement) to which party or parties the member's duty is owed;
 - the instructions are being received from an individual who represents a shareholder with different interests from the corporate client concerned;
 - the individual who is instructing the member has personal interests that differ from the client organisation that he or she appears to represent.
10. A member is under no duty to research all the possible stakeholders in a client or potential client but it is important properly to define the client and the persons to whom duties are owed in the engagement letter. On rare occasions, different constituencies within a client might each consider that the member is acting for them and such expectations have the obvious potential to mislead. This can be avoided if the member makes it clear to all identifiable interested parties whom he or she represents.
11. Members are under no obligation to resolve conflicts within their clients or to second-guess the motives of the person instructing them: members are generally entitled to rely on the instruction of anyone within their client with the apparent authority to give such instructions. Each member should bear in mind however that his or her duty is to act in the interest of the client, not the person providing his instructions (even if the member has an interest in future instructions from the same source). If in doubt, the member could consider consulting with other individuals who might be expected to have authority to give such instructions. If the issue remains unclear, the member might wish to consider whether continuing to act is advisable.

SELF-INTEREST CONFLICTS WITH CLIENTS OR EMPLOYERS

12. While this guidance primarily addresses the consequences for members of conflicts between or within clients, members, particularly including those in business, will also need to assess whether there is a self-interest conflict. Their own financial, family or other personal interests may conflict with those of the client or the employer, or they may result in a preference for one party over another in the sort of multi-stakeholder engagement considered in paragraph 9 above. The test is whether the member can give, and be seen by a reasonable and informed third party to give, objective advice or service.

TIMING AND BASIS OF ASSESSMENT

13. The assessment as to whether there are diverging interests (whether as a result of multiple stakeholder interests or self-interest), with its knock-on effects on the need for safeguards, will be based on known facts and circumstances available at the time.⁴ However, circumstances change. For example, a member may be assisting a client with acquiring a business but then be invited to widen the engagement and carry out due diligence on the

⁴ Including, where the professional firm is a member of a network, relationships that the member has 'reason to believe might exist' in the network.

target. Accordingly, the assessment needs to be undertaken not only at the beginning, but also throughout the engagement.

CONSEQUENCES OF MANAGING A POTENTIAL CONFLICT OF INTERESTS

14. The Code's relevant provisions are primarily in section 310⁵ for members in practice. The position of members in business is addressed in section 210⁶. Corporate finance engagements in which the member's advice is relevant to the interests of competing clients are particularly prone to potential conflict of interests. Additional guidance for such engagements, though based on the general premise explained in section 310, is available.⁷
15. The Code does not prohibit members from acting in situations in which there are conflicts, but where such conflicts generate potential threats to, particularly, objectivity, the Code does require safeguards to be applied. These will involve informed consent where conflicts relevant to an engagement or assignment have been identified, as well as specific safeguards against actual and perceived objectivity threats.

OBTAINING CONSENT

16. A significant proportion of the complaints to ICAEW in this area relate not to a concern that the member should not have acted, but that, where there is a conflict, or a situation which might reasonably be perceived to cause a conflict, at least one of the relevant parties was not asked whether he or she agreed to the member acting for both parties.
17. The need for consent, at the very least where the engagement relates to a situation in which the parties have adversarial interests, was reinforced in the UK by a 1998 legal case: *Prince Jefri Bolkiah v KPMG*. In essence, this held that where a professional is acting for two clients in respect of interests which are in conflict, this can only be undertaken when there is informed consent of both clients. ICAEW has issued a Technical Release (TECH 06/14) discussing the consequences of the case managing conflicts and obtaining consent.⁸
18. The identification of a conflict, therefore, should nearly always be followed by seeking informed consent, though how specific that consent will need to be will vary with the nature of the engagement – this is discussed further in paragraphs 21 and 22 below. Acting in such circumstances without seeking consent is envisaged in the Code as being justifiable only in limited circumstances. These are discussed in the Code,⁹ where there are client confidentiality issues specific to the engagement. Examples of engagements where such circumstances may arise include work for a client in respect of a prospective hostile takeover of another client, and forensic work for a client in respect of a fraud in which another client may be involved. Effective safeguards would still need to be applied in such situations (see paragraphs 25-27 below), or the work declined.
19. It is unlikely that there would be a valid reason for not obtaining consent in situations where the conflict is between the client's interests and the member's own interests.
20. Where consent has been sought and has not been given, the member cannot be engaged to act for both parties.
21. There is no formal definition of informed consent, but the situation may be considered similar to the concept of 'informed management' included in the FRC Ethical Standard for auditors. In essence, being 'informed' means:
 - having a decision maker with ostensible authority, who is sufficiently free from a conflict of interests to be able to represent relevant stakeholders, and able to appreciate the context of the consent; and

⁵ <https://www.icaew.com/technical/ethics/icaew-code-of-ethics/icaew-code-of-ethics>.

⁶ *Ibid.*

⁷ <https://www.icaew.com/-/media/corporate/files/members/regulations-standards-and-guidance/ethics/corporate-finance-helpsheet.ashx?la=en>.

⁸ <http://www.icaew.com/-/media/corporate/files/technical/technical%20releases/legal%20and%20regulatory/tech%2006%2014bl%20conflicts%20of%20interest%20and%20confidentiality.ashx>.

⁹ R310.12 <https://www.icaew.com/technical/ethics/icaew-code-of-ethics/icaew-code-of-ethics>.

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- in circumstances where there is a genuine choice, providing the decision maker with enough information to be able to take a reasonable decision.
22. A conflict only arises when the member's ability to act loyally for his or her client is, or might reasonably be perceived to be, affected – the simple fact that two clients might be rivals whose interests are commercially opposed does not create a conflict unless that is directly relevant to the work required of the accountant. Where there is a conflict that is relevant to the engagement, the accountant needs to be satisfied that acting, notwithstanding conflicting interests, would not impact on the member's integrity and objectivity. Then, on request for consent to act, the client needs to be similarly satisfied in order to give that consent. The information provided should allow the client's decision to be based not on the detail of the work for the other party, beyond a general understanding of the nature of it, but on what the member is going to do to safeguard against the threat to integrity and objectivity (see below).
23. If the client will not give consent without knowing more than the member can reveal, then there will not be consent and the work cannot be undertaken. The opportunity to act for parties whose interests conflict with each other or the member, is not a reason for breaching the fundamental principle of confidentiality.
24. On occasion the act of enquiring into whether or not a conflict of interests may exist, may itself run the risk of breaching confidentiality: for example, potential transactions involving listed entities where there is the risk of disclosure of inside information, or confidential transactions (or proposed transactions) where the act of enquiry could tip off a third party about the existence of the transaction (or proposed transaction). Members should take great care when making such enquiries not to breach confidentiality.

ADDRESSING THREATS

25. Where there is an actual or perceived threat that needs to be addressed, either the threat needs to be eliminated or appropriate and effective safeguards need to be applied to reduce threats to an acceptable level, as well as obtaining informed consent. If they cannot be applied, the work should not be undertaken. Articulating the safeguards should be part of the information provided to obtain informed consent. Examples of measures to address threats given in the Code can broadly be analysed into three types:
- Enhanced work and/or performance of work by different individuals/teams, and the setting up of information barriers between them;
 - review/approval of the member's work by someone in the firm who is independent of the issue;
 - disclosure to and/or consultation/review with appropriate second or third parties.
26. All of these may be relevant in the context of a conflict of interests. Where the issue is a potential conflict between clients, information barriers are particularly important. The Code discusses conflicts safeguards, as does the verdict in the Prince Jefri case referred to above. The types of safeguard, with particular reference to information barriers, can be summarised as:
- the separation of the relevant departments/personnel, which will involve separate teams and may involve physical, electronic and other barriers to information flow; and
 - an organisational structure to limit access to information. This might include, for example:
 - policies and procedures limiting access and emphasising the importance of not divulging confidential information;
 - confidentiality agreements signed by staff involved;
 - procedures for dealing with situations where barriers may need to be crossed and for keeping records;
 - monitoring of the effectiveness of barriers and other safeguards; and
 - disciplinary sanctions where there has been a breach.

27. It is not necessarily the member's role to eliminate the conflict between the parties, but to ensure that relevant stakeholders have suitable access to information and advice. The guidance on corporate finance engagements suggest that it may be appropriate to advising the clients to seek additional independent advice.¹⁰ This will be particularly relevant where it has not been possible to apply other measures comprehensively.
28. The nature of the role or engagement is likely to make a difference to the actual and perceived threats that need to be considered and/or the safeguards that might need to be applied. Set out below are examples of considerations that might apply in particular situations where the member faces a conflict, or has to address the potential consequences of conflicts within an organisation.
- a) **Acting for competing parties** – A member firm may be acting for more than one party trying to acquire the same third party. Considerations similar to those in the MBO example below apply, as the member is acting for more than one party. There also needs to be careful consideration of confidentiality duties and effective safeguards, including separate teams and effective information barriers, and consent would normally be needed. See above for a discussion on the nature of the consent.
 - b) **Advice to companies with different relevant stakeholders** – A member could be acting for more than one company in a group, with different stakeholders in each, and be involved in an arrangement for transferring assets or liabilities between these entities at amounts which may not be at fair value. Safeguards in this situation would be likely to include clarifying for whom the member is acting (and in some cases who is not being acted for), confirming the instructions with appropriate individuals without conflicts (for example, a director who is not connected to any other party), and could include advising those charged with safeguarding the interests of the respective stakeholders (the directors of the various legal entities) to seek independent advice from, for example, another professional who does not have a potential conflict.
 - c) **Insolvency** – A member engaged in insolvency practice is invited to handle an administration process for a struggling business, where parties connected to the business have indicated an interest in acquiring the business shortly after it is put into administration – a 'pre-pack'. This example is also considered in the supplementary public interest guidance in a wider context but the consideration here is conflict of interests, whether actual, or perceived by a hypothetical reasonable and informed third party. UK law provides that at the very least an administrator should not unduly harm the creditors' interests, but for an insolvency practitioner there may be at least a perception of a conflict of interests when assets are sold via a pre-pack, with the practitioner being seen to be favouring one party in breach of his or her duty to the creditors. Creditors may not initially have sufficient information to judge whether their interests were best served by the sale. If there is, for example, a pre-existing personal relationship between one or more of the acquiring parties and certain individuals in the member's firm or team, information barriers, change of personnel or review of work by another may be necessary. As regards disclosure, disclosure of the connection between the purchaser and the company and the extent of the member's involvement to creditors may be a suitable safeguard depending on the circumstances, and is required by Statement of Insolvency Practice 16 in any event. The member could also consider seeking to be appointed by the Court (rather than using the out of court route to be appointed as administrator) as, although the Court will not seek to second guess the administrator's commercial judgement, it will decide whether the appointment of an administrator is an appropriate course of action – which is, in essence, acting as the reasonable and informed third party on behalf of the creditors collectively.
 - d) **Probate** – A member may be asked to act for an executor with whom the member has a separate business relationship. The executor is also one of several beneficiaries of different parts of the estate. The member needs to consider if they can act objectively

¹⁰ <https://www.icaew.com/-/media/corporate/files/members/regulations-standards-and-guidance/ethics/corporate-finance-helpsheet.ashx?la=en>.

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as the role as an executor is to manage the estate for the benefit of the beneficiaries as a whole. As well as obtaining consent, the member needs to be very clear with all beneficiaries who he or she is acting for and on what basis. Further guidance is available for ICAEW members on conflicts in probate issues on the ICAEW website.¹¹

- e) **Pension funds** – A trustee of a company pension fund may also be an employee of the company. If the member is receiving instructions from a person in such a position (or indeed giving instructions while holding such a position), there needs to be consideration given to whether there is a conflict of loyalties, which would compromise the objectivity of those issuing the instructions. Safeguards might include confirming the instructions with others in authority that are not in a potential conflict position, such as the other trustees.
- f) **Management Buyouts (MBOs)** – In such a situation, the same management personnel can often be acting for both sides, as potential acquirers and providers of information to and on behalf of the potential sellers. Potential conflicts can be safeguarded by making it clear to all parties, including in the engagement letter, who the client is and the scope of the member's duties, and ensuring that the instructions clearly reflect the intentions of the client.

DOCUMENTATION

- 29. Where there are ethical considerations to be assessed and they are not self-evident, members are strongly encouraged to document the reasoning and other evidence which supports the evaluation of threats and safeguards. The act of documenting can help with the identification and thinking through of ethical issues, and the documentation helps to preserve the consideration applied. This can mitigate the risk of any subsequent challenge from regulators and others. In particular, where consent has been obtained orally, it is advisable to document that fact.
- 30. That said, the Code does not generally require documentation of considerations, except in respect of certain audit and fee-related matters. It follows that a lack of documentation does not of itself create a threat to compliance with the fundamental principles, or mean that a relevant consideration or action has not happened. Not documenting the steps which have been taken cannot therefore in itself amount to misconduct.

¹¹ <http://www.icaew.com/en/technical/ethics/ethics-helpsheets/ethical-considerations-for-probate-practitioners>.

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