



# TECHNICAL RELEASE

TECH06/14BL

**GUIDANCE ON MANAGING CONFLICTS OF INTEREST**

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This Technical Release reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies

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# CONTENTS

## PARAGRAPH

BACKGROUND	1
INTRODUCTION	2
CONFLICTS AND CLIENT CONSENT	5
COMPETING INTERESTS AND ADVERSARIAL INTERESTS	7
CONFLICT CLAUSE IN ENGAGEMENT TERMS	11
SAFEGUARDS AND INFORMATION BARRIERS	13
CONFLICT AND CONFIDENTIALITY CLAUSES IN ENGAGEMENT TERMS	17

## BACKGROUND

1. This Guidance was issued in May 2014 by the Business Law Committee of ICAEW on the implications of the decision in the English legal case of Prince Jefri Bolkiah vs. KPMG [1999] 1 All ER 517 ('the Bolkiah case'). It replaces TECH 04/00 '*Conflicts of Interest and Confidentiality*' which has been withdrawn.

## INTRODUCTION

2. The interests of members' existing clients, or the interests of an existing client and a former client, can conflict if they are or become competitors or adversaries. Members' responsibilities in relation to client confidentiality preclude the use of one client's confidential information for the benefit of another. The risk that client confidentiality might be impaired if members act or continue to act in cases of conflicting client interests can therefore present difficulties.
3. The House of Lords decision in the Bolkiah case ('the Decision') highlighted the responsibilities of UK members acting for clients with conflicting interests. This guidance is designed to assist UK members wishing to act in such cases in accordance with those responsibilities. In this guidance, references to members 'acting' for clients denote the provision of any services, whether or not of an advocacy or representation nature.
4. The Decision does not set out the only factors of relevance to UK members considering their responsibilities in this area. This guidance should therefore be read in conjunction with ICAEW's [Code of Ethics](#) and in particular Sections 221, 'Corporate Finance Advice', 220, 'Conflicts of Interest' and 140, 'Confidentiality'. Members who are auditors will also need to consider auditor independence and APB Ethical Standards, particularly ES 1(revised), '[Integrity, Objectivity and Independence](#)'.

## CONFLICTS AND CLIENT CONSENT

5. It is apparent from the Decision that members wishing to act for two existing clients with conflicting interests should avoid doing so without their informed consent. Consent is 'informed' where the client giving consent is aware of and can appreciate the context to the consent and the likely result of giving the consent.
6. The Decision clarifies that there is no continuing duty to defend or advance the interests of a former client. After an engagement or client relationship comes to an end, there is no need for the former client's consent to act for a client with conflicting interests. However, duties of confidentiality will continue and any measures agreed regarding client confidentiality should also continue.

## COMPETING INTERESTS AND ADVERSARIAL INTERESTS

7. It is unclear from the Decision whether a conflicting interest extends to clients who are not in a directly adversarial relationship but who are, for example, competitors in the same market. A competing conflict can arise where two unrelated clients operate in the same industry or market. An adversarial relationship between clients might arise in a transactional context where two clients are competing bidders for the same target, or where one client has launched a hostile bid to acquire another client, or in a litigation context where two clients are in dispute with each other. A duty of client confidentiality applies if members are acting in any conflicting situation.
8. The Decision recognises that clients are taken to consent, for example, to their auditors acting for clients who are in competition with each other, provided that the confidentiality of

information obtained from different audit clients is preserved. The Decision indicates also that acting for two clients with opposing or adversarial interests is not possible without each client's consent and subject to client confidentiality being maintained.

9. It would therefore be prudent for members to include in their engagement terms a clause which allows them to act at the same time for two clients with competing or adversarial interests, subject always to the implementation of measures designed to manage the conflict by keeping the clients' confidential information secure. A duty of client confidentiality will survive the ending of the engagement or client relationship. Members can obtain informed client consent to the continued application of such measures by clarifying in agreed engagement terms that measures to preserve client confidentiality will apply after the engagement or client relationship has ended.
10. Any such clause should be sufficiently informative to make each client aware that the member might act for a competitor or adversary and of the measures that the member will implement to preserve client confidentiality. Any such clause will however need to avoid requiring, for example, disclosure by the member of the nature of an adversarial conflict, since any such disclosure might itself give rise to a breach of confidentiality in respect of the adversary. In addition, any such clause needs to be prospective as well as concurrent, if the need for subsequent consent is to be avoided as and when a conflict arises.

## CONFLICT CLAUSE IN ENGAGEMENT TERMS

11. The benefit of a clause as described above is that it will enable members to demonstrate informed client consent in accordance with ICAEW's Code of Ethics and help deflect an attempt by a consenting client to persuade a court to intervene and restrain the member from acting. An example of a clause indicating that the member might act for two clients with conflicting interests is below:

### **Conflict**

'You agree that we reserve the right to act during and after this engagement for other clients whose interests are or may be competing with or adverse to yours, subject to the safeguards set out in the paragraph on Confidentiality.'

(See below for a clause on Confidentiality to accompany this Conflict clause)

12. A clause on Conflict in this form indicates to the client that while acting for the client and after the engagement or client relationship has ended, the member might act for another client who is a competitor or who is in an adversarial relationship. It does not however set out any measures or safeguards that will be implemented by the member to preserve client confidentiality and thereby protect the client's interests. Without expansion to deal with confidentiality the clause may not go far enough. In particular, it may not secure informed consent to the use of information barriers to manage an adversarial conflict. The clause is therefore linked ('subject to') to a separate clause on Confidentiality.

## SAFEGUARDS AND INFORMATION BARRIERS

13. The nature of the measures or safeguards required will be dependent on whether or not the conflict is competing in nature or adversarial. A competing conflict will not normally require the same safeguards as an adversarial conflict but measures to preserve client confidentiality will need to be taken for either conflicting situation. This guidance assumes that members will wish to secure informed client consent that covers both conflicting situations, even if there are no conflicts when engagement terms are agreed, in case they arise in future.

14. An information barrier that provides an effective safeguard for an adversarial conflict within a firm should, following the Decision, include some or all of the following characteristics:
- (i) the physical separation of different departments or engagement teams in order to insulate them from each other - this can extend to such matters of detail as dining arrangements;
  - (ii) an educational programme, normally recurring, to emphasise the importance of not improperly or inadvertently divulging confidential information;
  - (iii) strict and carefully defined procedures for dealing with a situation where exceptionally it is felt that the barrier should be crossed and the maintaining of proper records where this occurs to document why the barrier was crossed and what steps were taken to preserve the integrity of the barrier;
  - (iv) monitoring by compliance officers of the effectiveness of the barrier; and
  - (v) disciplinary sanctions where there has been a breach of the barrier.
15. Additionally, the Decision underlines that an effective information barrier needs to be an established part of the organisational structure of the firm, not created ad hoc. Physical segregation of different engagement teams within the same department will not necessarily provide an adequate safeguard for an adversarial conflict without additional measures being taken. Measures to preserve client confidentiality without additional safeguards might be enough for a competing conflict. The Decision states that a court is not likely to intervene in either situation unless there is a real risk of confidentiality being lost, not a fanciful or theoretical risk.
16. Where members are acting for two clients with conflicting interests with their consent, adequate steps should be taken to ensure that the confidential information held on behalf of each client is not transmitted to or used for the benefit of the other client. Where consent has been obtained to the use of information barriers to manage an adversarial conflict, it is not necessary for any information barrier to have all the characteristics set out above, but the member will need to implement an effective safeguard to manage the risk of confidentiality in the information obtained from each client being impaired.

## CONFLICT AND CONFIDENTIALITY CLAUSES IN ENGAGEMENT TERMS

17. In order to obtain informed client consent to the management of confidentiality where clients are competitors or to the use of information barriers where clients are adversaries, having indicated through the clause above on Conflict that a member might act for clients with competing or adversarial interests, members might like to introduce a clause into their engagement terms along the following lines, to accompany the clause above on Conflict.
18. Neither clause includes an undertaking to disclose any details of the nature of an adversarial conflict, to avoid placing the member in a position where confidentiality in respect of the adversary might be breached. The objective of the clauses in this guidance on Conflict and Confidentiality is to secure client consent having made the client aware of the context in which consent is sought and the likely result if consent is given. The context is the future possibility of acting for another client with competing or adversarial interests and the result is permission to do so provided that measures are taken to preserve confidentiality, with additional safeguards or information barriers being implemented for adversarial conflicts. The individual confirming consent for the client will be suitably senior so that the client is in a position to appreciate the implications of the consent given

### Confidentiality

‘We confirm that where you give us confidential information we shall at all times during and after this engagement keep it confidential, except as

required by law or as provided for in regulatory, ethical or other professional pronouncements applicable to us or our engagement.

‘You agree that if we act for other clients who are or become your competitors, it will be sufficient compliance with our duty of confidentiality for us to take such steps as we think appropriate, which may include taking the same or similar steps as we take in respect of the confidentiality of our own information, to preserve the confidentiality of information given to us by you, both during and after this engagement.

‘In addition, if we act for other clients whose interests are or may be adverse to yours, we will manage the conflict by implementing additional safeguards to preserve confidentiality. Safeguards may include measures such as separate teams, physical separation of teams, and separate arrangements for storage of and access to information.

‘You agree that the effective implementation of such steps or safeguards as described above will provide adequate measures to avoid any real risk of confidentiality being impaired.’

19. The member will remain liable, despite client consent to act in conflicting situations, for any actual breach of confidence that arises because confidentiality is not preserved, whether through an ineffective barrier or otherwise. Some clients or circumstances may require more details or additional safeguards. Even if informed client consent is obtained, in some cases members may feel that a conflict cannot be managed and that the member should withdraw from or decline an engagement giving rise to a conflict. However, securing informed consent to act for clients with conflicting interests and taking steps and implementing barriers to preserve client confidentiality in accordance with consent given should help to manage the risk of a client taking action against the member to prevent the member from acting, on the basis that adequate measures to manage a conflict by keeping confidential information secure have not been taken.

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