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## So when did the fuss start?

- Always been a concern
- All professions struggling with public confidence
- Equitable Life saga
- World becoming more litigious
- Herbert Smith letter to the Actuarial Profession April 2004

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## Conflicts of Interest Basic Principle

- One individual or firm cannot act for more than one party where their interest conflict
- BUT
- That basic principle can be subject to rare exceptions

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## Actual Conflict

- Acting for two clients with opposing interests in the same matter.
  - E.g. acting for the seller and purchaser of a business
- Where you cannot fulfil the obligations to one client without failing your obligations to the other client

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## Potential Conflict

- Acting for two clients with different interests in the same matter
  - E.g. Acting for both the Trustees and Employer of a Scheme

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## How to deal with potential conflict

1. Don't act for two potentially conflicting clients
  - Unrealistic when the scheme rules make both the Company and Trustees seek advice from you.
2. Seek informed consent from both clients, ensure there is 'no inhibition' and no 'actual conflict'

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## Informed consent

- Clients must understand what is being done
- Preferably confirm informed consent in writing

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### No inhibition

- He must serve each as faithfully and loyally as if he were his only principal
- Must not allow the performance of his obligations to one principal to be influenced by his relationship with the other

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### When does potential conflict becomes actual conflict?

- Matter of judgement
- Can you reasonably foresee actual conflict

If in doubt seek legal and/or professional guidance

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### What do you do when potential conflict become actual conflict?

1. Make sure both sides know what you will do if it become actual conflict **before** you get there.
2. Consider if you can act as an 'expert valuer' only
3. One individual should cease acting for one client and preferably for both.

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## Expert Valuer

- Limited role where not negotiating for either party
  - E.g. 'The Actuary certifies is actuarially equivalent' in setting a factor
  - E.g. 'The Trustees shall augment the member's benefits at the request of the Employer subject to the Employer paying contributions as the Actuary determines are necessary to fund the cost of the augmentation.'
  - Possibly even if the actuary sets the contribution rate

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## Can one firm have different people act for two clients in actual conflict?

Maybe if

- Informed consent including expressly how confidential information is dealt with
- No inhibition
- Effective information barrier generally required

BUT

- Untested in law

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## Effective Information Barrier



- Ideally built into the firm's structure and not on ad hoc basis
- Physical separation of teams. Ideally separate offices or restricted access space
- Very few team members should possess the relevant information
- No access to each others files, computer records, post or faxes

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## Why are lawyers more concerned about conflicts than actuaries?

- Law Society professional conduct rules are much stricter
    - 'When acting for two clients.. and a conflict arises, the solicitor must **normally cease to act for both clients**. The solicitor may only continue to represent one client if not in possession of relevant confidential information concerning the other.'
- although proposal to relax somewhat

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## Actuarial Professional Conduct Standard - Conflicts

- 5.1 Clients are entitled to assume that **advice given by a member is unaffected** by interests other than those of the client ...
- 5.3 In the event of any such conflict...the clients involved must be **notified at the earliest opportunity**... if any advice ... is influenced by interests other than those of that client ...must be **disclosed** in the advice.

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## Confidentiality

- Duty of confidentiality to protect the client's interest
- Exceptions
  - Overruled by statutory provision
  - Contrary to the public interest
  - Has the client's express consent

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## Why is confidentiality difficult?

- Knowledge flows within a firm
  - It is assumed information is automatically known by the whole firm unless proved to the contrary
- Existing client vs Former client
  - No conflict - but confidentiality so need to seek consent of former client - or need information barriers as standard



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## Actuarial Professional Conduct Standard - Confidentiality

2.5.1 ...information acquired...is frequently confidential to the member's client or the member's firm. ...it **should not normally be disclosed unless consent has been obtained**...

2.5.2 There are...circumstances in which, ... a members might be **obliged to disclose** confidential information, ... by virtue of **statutory** or judicial authority ... or **free to disclose** if it is in the **public interest** ...or if it **for the member's own protection**... may wish to **seek legal advice** before invoking this provision.

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## Practical steps

- Make sure it is clear
  - when disclosure will occur, even against the interests of the client
  - when you can use confidential information in an anonymised context
  - how you deal with potential conflict
  - how you will deal with actual conflict
  - them agreeing to the appointment is informed consent in specific circumstances
  - when additional informed consent is required

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### Practical steps

- If you are personally both Scheme Actuary and advising the employer make sure it is clear that
  - you are advising both or are only expert valuer
  - what you are advising on
  - your primary duty is to the trustees
  - you will pass on information to the trustees
  - the employer should avoid passing you information it does not want passed to the trustees
  - that if actual conflict arises you will cease to act for the employer

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### Practical Steps

- Know and follow your own firm's procedures
- Know who your 'senior actuary' is
- If in doubt ask the profession
- If in doubt seek legal advice

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### Legal Summary

- If there is potential conflict get informed consent
- Personally resign at least one appointment if there is 'inhibition' or 'actual conflict'
- Where there is actual conflict separate individuals from the same firm may consider acting but get informed consent and information barriers

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### Practical summary

- Ensure no surprises for clients
- Think before you act
- If in doubt seek advice

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### So would you act for both?

1. You, as scheme actuary, are consulted by the employer regarding a transfer on a sale where the basis is unacceptable from a Trustee perspective. Do you work for the employer?
2. Scheme merger proposed. Do you work for the trustees and employer?

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### So would you act for both?

3. You are Scheme Actuary to two schemes that are about to merge. Can you advise both sets of trustees?
4. As Scheme Actuary you become aware that the Company is plotting 'dump' its pension liabilities and put itself into liquidation. Who can you tell? Who can you act for?

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So would you act for both?

5. You advise the employer and a colleague is Scheme Actuary you are both advising on a contribution rate that has to be agreed between Company and Trustees.  
Should you both act?

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Conflicts, Ethics and Commercial Reality  
Lynda Whitney

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