

# Institute of Actuaries

Client Care for Consulting Actuaries

15 March 2005

Conflicts of Interest

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Part I: The main layers of regulation

Part II: Examples of where conflict can occur

Part III: The future

# Part I: The Main Layers of Regulation

- Caselaw
- Statute
- Professional Code

## Caselaw

- A conflict arising from a firm having acquired confidential information in relation to a former client
- A conflict between 2 or more existing clients

## Lord Millett in *Prince Jefri Bolkiah v KPMG*

- *Where the court's jurisdiction is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which exists between solicitor and client comes to an end with the termination of the retainer. Thereafter, the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continued duty to preserve the confidentiality of information imparted during its subsistence*

## Mr Justice Collins in *Marks and Spencer v Freshfields*

*“So far as confidential information is concerned, [there] is obviously a huge amount of confidential information within Freshfields in relation to Marks and Spencer’s affairs through acting for it over the three years, some of which may be material to the bid, if only to be discarded. I cannot see, even with a firm the size of Freshfields, that effective information barriers can be put in place given the very large number of people involved, even on the two matters.”*

## Primary duty is to preserve confidential information

- Chinese walls need to be erected
- Need to be put in place at the outset
- Must be an established approach – not an ad hoc arrangement
- Good internal conflicts system in place.

- Physical separation of the various departments in order to insulate them from one another
- A recurring education programme to teach people about the meaning of confidential information
- Strict procedures for dealing with instances of where the wall may be crossed and how to record it
- Monitoring by compliance officers of the effectiveness of the arrangements
- Disciplinary sanctions in the event of a breach



- The interested client acknowledges in writing that the confidential information held by the firm will not be given to them
- The members of the firm who hold the confidential information (“ the restricted group”) are identified and have no involvement with the client
- No-one in the restricted group is supervised or managed by someone outside the restricted group

- All members of the restricted group acknowledge their duties and responsibilities
- When the barrier is established each member of the group acknowledges that they have not done anything that would amount to a breach of the barrier
- Only members of the group have access to the documents containing the confidential information

## Lord Millett in *Prince Jefri Bolkiah v KPMG*

*“.... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. He cannot without the consent of both clients act for one client whilst his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation. That is not to say that such consent is not sometimes forthcoming or that in some situations it may not be inferred.”*

Cannot act for both “without the consent of both clients”:

- informed consent
- must still act in best interests of client – consent does not undermine this duty
- confidential information

## Part I: The main 3 layers of regulation

- Caselaw
- **Statute**
- Professional code

## Statute

- S47 Pensions Act 1995
- Regulation 5 Scheme Administration Regulations 1996
- Immediate notification of conflict

## Professional Code

### Section 5

*“If there is or might appear to be a conflict of interest between two or more clients of a member or of the member’s firm, or a conflict between a client and the member or the member’s firm, the member must consider the nature and extent of the conflict and whether it is such as to make it improper for the member to give advice to one or more of the clients involved in the conflict”.*

## Professional Code

- Herbert Smith Advice (April 2004)
- Morris Report (Dec 2004)



- *“ Do pension scheme trustees have the expertise and information to question and challenge the advice of the Scheme Actuaries? In the absence of effective challenge from the trustees are Scheme Actuaries effectively making policy decisions by default on the distribution of benefits between different generations of pensioners and on funding strategies?”*

- *“To whom should the Scheme Actuary be accountable? What will be the effect of the intended removal of the minimum funding requirement on the potential for conflicts of interests if the same Scheme Actuary is advising both the trustees and the pension scheme sponsor? Is there a need for a separation of these roles?”*

- *“Is the Profession’s past record of 17 complaints over 15 years a sign of a successful profession or an indication that monitoring and disciplinary procedures were not effective”!*

## Interim Morris Report - 4 Options

- 1 the actuary advises both employer and trustees unless **the actuary** considers there is a conflict
- 2 The actuary advises both unless the **trustees** deem there to be a conflict
- 3 The role of advising employer and trustees **is separated in defined circumstances** eg on a wind-up
- 4 The role of advising employer and trustees **is separated at all times**

- Profession's Response (February 2005)
- Opra's Response (February 2005)

## Part II: Examples of where conflicts can occur

- Funding
- Investment Strategy
- Mergers

## Funding

- The Trustee
- The Employer
- Joint
- The Actuary

- What assumptions should be used?
- Does the Actuary take into account the financial interests of the Employer?
- Should the Actuary be taking a cautious approach?



## Scheme specific funding S229

- any decision as to the methods and assumptions to be used to meet the liabilities
- any matter to be included in the statement of funding principles
- any provisions relating to a recovery plan
- any matter to be included in the schedule of contributions

- open in all his communications and discussions with the Employer
- tell the Employer that, whatever briefing it gives the Scheme Actuary, must be shared with the Trustees
- the Scheme Actuary must own the process and take an assertive role

## Investment Strategy

- Traditional tensions between Employer and Trustee
- Winding up Regulations and Pensions Act 2004 – new powers to Trustees
- Same principles – openness, transparency

## Mergers

- Must have the informed consent of all the parties
- Must ensure that sufficient Chinese walls are in place to ensure there is no risk of confidential information passing over the wall
- The Actuary must genuinely be able to act in the best interests of his client

## Part III: The Future

- Need for openness
- Preparing for conflict
- The Morris Report
- Greater pressures from the Pensions Act 2004