

ACTUARIES AND THE LAW (AM) CONFLICTS AND CONFIDENTIALITY (PM)

Staple Inn Hall, London
12th September 2006

Lawyers have identified two types of conflict scenarios:

- (1) In relation to transactions - where you find yourself on different sides
- (2) In relation to confidential information that is in your possession

Overview

- What the Law Society says about conflicts:
 - Rule 16D - transactions
 - Rule 16E – confidential information
 - Chinese Walls
 - Lawyers vs Actuaries
 - Other professions
 - Conclusion

When in doubt...

- Lawyers always consult the Guide to the Professional Conduct of Solicitors (the Guide)



The Accountant's Profession
Taking the Old into the New

Conflict Scenario 1: Rule 16D Transactional Conflict

- What the Guide says about:
 - Duty not to act
 - Exceptions to duty not to act
 - Conflict when already acting
 - Accepting gifts from clients
 - Public office or appointment leading to conflict waivers

The Accountant's Profession
Taking the Old into the New

Duty not to act

- You must not act if there is a conflict of interests, i.e.
 - You owe, or your practice 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
 - 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.

The Accountant's Profession
Taking the Old into the New

Exceptions to duty not to act

- You or your practice may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:
 - The different clients have a substantially common interest in relation to that matter or a particular aspect of it; and
 - All the clients have given in writing their informed consent to you or your practice acting.

Exceptions to duty not to act

- Your Practice may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:
 - The clients are competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s);
 - There is no other conflict, or significant risk of conflict between the interests of any of the clients in relation to that matter;
 - The clients have confirmed in writing that they want your practice to act in the knowledge that your practice acts or may act for one or more other clients who are competing for the same asset; and
 - Unless the clients specifically agree no individual solicitors acts for, or is responsible for the supervision of more than one of those clients.

Conflict when already acting

If you act, or your practice 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, you, or your practice, 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.

Accepting gifts from clients

- Where a client proposes to make a lifetime gift or a gift on death to, or for the benefit of:
 - You;
 - Any proprietor or employee of the practice; or
 - A family member of any of the above and the gift is of a significant amount in itself, or having regard to the size of the client's estate and the reasonable expectations of the prospective beneficiaries, you must advise the client to take independent advice about the gift, unless the client is a member of the beneficiary's family. If the client refuses, you must stop acting for the client in relation to the gift

The Accountants' Partnership
TRADING FOR THE ACCOUNTANTS' PARTNERSHIP

Public office or appointment leading to conflict

- You must decline to act where you, or another proprietor or employee in your practice, or a member of your family holds some public office or appointment as a result of which:
 - A conflict of interests, or a significant risk of a conflict arises; or
 - The public might reasonably conclude that you, or your firm had been able to make use of the office or appointment for the advantage of the client; or
 - Your ability to advise the client properly and impartially is inhibited

The Accountants' Partnership
TRADING FOR THE ACCOUNTANTS' PARTNERSHIP

Professional embarrassment

- How this may arise
- Ability to refuse the new instruction
- In possession of confidential information which would adversely affect the position of the new client if they had such knowledge.

The Accountants' Partnership
TRADING FOR THE ACCOUNTANTS' PARTNERSHIP

Another category not in the Guide

- Relationship conflict e.g. Pepsi v Coca Cola – adviser can only ever act for one of these competitors.

Conflict Type 2: Rule 16E Duty of Confidentiality and Disclosure

- Duty of confidentiality
- Duty of disclosure
- Duty not to put confidentiality at risk by acting
- Exception to duty not to put confidentiality at risk by acting – where client consent
- Exception to duty not to put confidentiality at risk by acting – where no clients consent

Duty of confidentiality

You and your practice must keep the affairs of clients and former clients confidential, except where disclosure is required or permitted by law or by your client or former client.

Duty of disclosure

- You must disclose to a client all information of which you are aware which is material to that client's matter, regardless of the source of the information unless:
 - There is a duty of confidentiality, referred to above which always overrides the duty to disclose; or
 - The following circumstances exist, as a consequence of which the duty does not apply:
 - Such disclosure is prohibited by law;
 - It is agreed expressly that no duty to disclose arises or a different standard of disclosure applies; or
 - You reasonably believe that serious physical or mental injury will be caused to any person if the information is disclosed to a client

The Accountants' Partnership
TAKING THE ACCOUNTANTS TO THE NEXT LEVEL

Duty not to put confidentiality at risk by acting

- If you hold, or if your practice holds confidential information in relation to a client or former client, you must not risk breaching confidentiality by acting, or continuing to act for another client on a matter where:
 - That information might reasonably be expected to be material; and
 - That client has an interest adverse to the first-mentioned client or former client, except where proper arrangements can be made to protect that information.

The Accountants' Partnership
TAKING THE ACCOUNTANTS TO THE NEXT LEVEL

Exception to duty not to put confidentiality at risk by acting – where clients consent

- You may act, or continue to act, in the circumstances otherwise prohibited by the above paragraph with the informed consent of both clients but only if:
 - The client for whom you act or are proposing to act knows that your practice, or a member of your practice holds, or might hold material information (in circumstances described in the above paragraph in relation to their matter which you cannot disclose; and
 - You have reasonable belief that both clients understand the relevant issues after these have been brought to their attention; and
 - Both clients have agreed to the conditions under which you will be acting or continuing to act; and
 - It is reasonable in all the circumstances to do so.

The Accountants' Partnership
TAKING THE ACCOUNTANTS TO THE NEXT LEVEL

Exception to duty not to put confidentiality at risk by acting – where no clients consent

- You may continue to act for a client if:
 - It is not possible to obtain informed consent from the client;
 - The client has agreed to your acting in the knowledge that such confidential information exists;
 - Safeguards which comply with the standards required by law at the time they are implemented are put in place; and
 - It is reasonable in all the circumstances to do so.

The Great Walls of China – the ‘solution’ to type 2 confidential information conflicts

- The principle
- How such safeguards operate in practice
- The Ashurst approach – transactional, as opposed to retainer based
 - Marks & Spencer experience: successfully prevented Freshfield’s from acting for both themselves and Revival Acquisitions (Philip Green) – not allowed even where conflict not restricted to the same transaction
- The importance of external perception

The Great Walls of China – the ‘solution’ to type 2 confidential information conflicts

- Novel approaches to construction
- Internal solutions
- External divides e.g. JLT “employer” company

The Great Walls of China – the ‘solution’ to type 2 confidential information conflicts

- The Bolkiah Case: Chinese walls rarely effective if organised on an ad hoc basis, as opposed to being part of the organisational structure of the firm
- (i) physical separation of departments
- (ii) educational programme
- (iii) strict and carefully defined procedures where the wall is crossed and maintenance of proper records
- (iv) monitoring by compliance officers of the effectiveness of the wall
- (v) disciplinary sanctions for breach

The Actuarial Profession
Taking the Act into the Main

Lawyers vs Actuaries

- Professional Conduct Standards, version 2.3 effective from 16 January 2006

5. Conflict of interest

5.1 Clients are entitled to assume that advice given by a member is unaffected by interests other than those of the client, taking account of any identifiable professional or legal duty of care of the client in respect of a third party.

5.2 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.

The Actuarial Profession
Taking the Act into the Main

Lawyers vs Actuaries

5.3 In the event of any such conflict or apparent conflict of interest, the client or clients involved must be notified at the earliest opportunity and if any advice given to a client is, or will be, influenced by interests other than those of that client or by any constraint other than that imposed by professional guidance, this must be disclosed in the advice.

5.4 If there might be a conflict between the interests of different clients or previous clients of the member or of the member's firm, the member must have proper regard to their respective interests and in particular must not communicate information within the member's firm which the member has reason to believe might harm the interest of any client or previous client.

The Actuarial Profession
Taking the Act into the Main

Lawyers vs Actuaries

5.3 In the event of any such conflict or apparent conflict of interest, the client or clients involved must be notified at the earliest opportunity and if any advice given to a client is, or will be, influenced by interests other than those of that client or by any constraint other than that imposed by professional guidance, this must be disclosed in the advice.

5.4 If there might be a conflict between the interests of different clients or previous clients of the member or of the member's firm, the member must have proper regard to their respective interests and in particular must not communicate information within the member's firm which the member has reason to believe might harm the interest of any client or previous client

The Actuarial Profession
Taking the Act into the Main

Other professions: Accountants

- The Institute of Chartered Accountants in England and Wales and the Association Chartered Certified Accountants Guidelines converge on:
- "Would a reasonable and informed observer, having knowledge of all relevant information, including safeguards applied, consider the conflict of interest as likely to affect the objectivity of members and firms?"

The Actuarial Profession
Taking the Act into the Main

Other professions: Estate Agents

- Duty merely to 'disclose'
- "There is no conflict. We act for both sides!"



The Actuarial Profession
Taking the Act into the Main

Rising profile

- The Good Old Days
- Captain Bob Maxwell – The Lawyers’ Friend
- Section 48 Pensions Act 1995
- Pensions Regulator
- Trustee Duties (Knowledge and Understanding)

The comparison

- Important to note the differences
- Underlying consistency of intent

Concluding remarks

- An area which can’t afford to be under estimated
- Evolving regulatory environment
- Solicitor’s practice rules heavily update in the area of conflict only a few months ago
- Myriad of approaches, structures and solutions
- Ultimately, a question of judgement

Successful identification, management and resolution of potential and real conflicts of interest must form a corner stone of your business

The Actuarial Profession
making financial sense of the future

The Actuarial Profession
making financial sense of the future

ACTUARIES AND THE LAW (AM)
CONFLICTS AND CONFIDENTIALITY (PM)

Staple Inn Hall, London
12th September 2006

(000000)
