CONFLICTS OF INTERESTS – NEW OBLIGATIONS AND RESTRICTIONS

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With the final version of the SRA Handbook now available, and currently before the Legal Services Board for approval, attention is turning to any new provisions that will change the way that solicitors operate. The most significant changes to be highlighted in the latest version of the materials are those concerning conflicts of interests, with particular issues arising from the familiar conflicts of acing for seller and buyer in the same property transaction, or for lender and borrower.

Certain obligations are elevated to the status of being (mandatory) outcomes. These include, at O(3.1) a requirement that '*you have effective systems and controls in place to enable you to identify and assess potential conflicts of interests*'. It seems to be the intention of the SRA that this should go well beyond the scope of the current obligations for '*management arrangements*' in rule 5 of the Solicitors' Code of Conduct 2007, and will certainly require more than the rudimentary '*box-ticking*' exercise performed along these lines in most firms – often at support staff level as little more than an administrative exercise in file opening.

The situation of '*own conflicts*' (ie those where the interests of the client are in conflict with the firm or one of its representatives) is covered at O(3.2). This requires the control systems to be '*appropriate to the size and complexity of the firm*'. This may necessitate – in larger firms in particular - an audit of external interests for all personnel within the firm, checks on joiners, and an obligation to notify and update any changes.

As to property conflicts it seems to remain the case that the mere act of representing buyer and seller in the same transaction is not inherently a conflict. Gone, however, are the specific exemptions found in the current rules 3.09-3.10 of the 2007 Code which many firms have relied upon to justify acting for both parties. Arguably there has been widespread bad practice on this, overlooking the fact that there was already a prohibition from acting where there was – on the facts – a conflict of interests. New provisions to explain the SRA's thinking on this issue include an '*indicative behaviour*' at IB(3.3) to the effect that it would be advisable to decline to act in such situations where '*there is a need to negotiate on matters of substance*', including the price. The warnings from the SRA are now much clearer: they state in their '*OFR at a glance*' summary that acting in such situations carries a high risk of conflicts and '*we would not expect firms routinely to act for seller and buyer*'. Such instances, they state, should be '*rare*', and are thus more likely to result in disciplinary action if a complaint or an investigation arises from such circumstances.

As to lender and borrower/purchaser situations the permission to act for both sides continues to be limited to standard loans, as opposed to those that are individual, and are seemingly limited by IB(3.7)(a) to properties to be used as the borrower's private residence. Judgment is again needed: it has still to be '*reasonable and in the client's best interests for you to act*'.

All in all there does seem to be hardening of attitude by the SRA to the issue of conflicts which they have described as '*a critical public protection*'. The clear advice will be to ratchet up the safeguards in most firms, establish a clear policy for high risk situations – property transactions most obviously - and proceed with caution. ■