Conflict of Interest

TSol
LAW AT THE HEART OF GOVERNMENT

Handling conflict of interest

Edition: 01 Author: C House August 2011

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Handling conflict of interest

As a general rule, a lawyer must not act for a client where there is a conflict of interest.

This Guidance supports our Conflicts of Interest policy. You can find the statement of this policy under "Core procedures and polices" on the quality compliance page of the Litigation Overview on our Intranet.

Part I: About conflict

WHAT WE MEAN BY "CONFLICT OF INTEREST"

A conflict of interest arises where you have a duty to act in the best interests of one or more clients and doing so for one can only be done at the risk of harming the best interests of another.

CONFLICT OF INTEREST, NOT EVIDENCE

Best interests often come to the fore if the representation of one client involves, or may involve, an attack on another. This sometimes leads to a misunderstanding that wherever two people's *evidence* conflicts, their *interests* conflict as well. Sometimes they will, but often they won't. We need to look at how their legal interests are bound up in those stories.

EXAMPLE

You and I are both accused of causing an accident at work at 6.30pm by knocking down a colleague in our haste to leave the building. I say we left the premises at 5.15 while you say we left at 5.30. All we have here is a conflict of evidence. Neither version of the time of departure points the finger of blame. But if my defence is that you alone ran into the colleague while yours is that I did, this is more than a conflict of evidence: it is a conflict of interest.

CONFIDENTIALITY VERSUS DISCLOSURE

However, conflict of interest can still *arise* out of evidence. There are duties of confidentiality and disclosure which every lawyer owes to each of his or her clients. Our professional duties are:

- on the one hand, to keep the affairs of each client and former client confidential *except* where disclosure is required or permitted by law or by the client;
- but on the other hand, to disclose to a client all the information we are aware of that is material to the matter on which we are acting for the client. The duty to disclose must be met *regardless of the source of the information.*

Sometimes one client's attack on another client's evidence or on their legal case will be materially assisted by facts about the other client known to us because we act for that client. To withhold that information from the first client will be a breach of duty to disclose. But to disclose without the consent of the second client will also be a breach of duty.

There is a clear tension between these duties. As soon as we find ourselves acting for two or more clients in relation to the same legal matter, we **know** that conflict is at least a *potential* issue. So, when we are asked to act for more than one client in a matter, we have to ask whether we can fulfil both these duties *while* acting in the best interests of each client.

The Solicitors' Code of Conduct makes it clear that where these duties come into conflict, the duty of confidentiality prevails over the duty of disclosure. In other words, we must protect confidentiality even if it means not making proper disclosure to another client. But that does not mean that we can simply compromise our duty to the second client. Where we cannot meet our duty properly then unless special circumstances allow us to withhold information we may have to cease to act for that client.

Part IV of this Guide tells you more about resolving conflicts.

ATTRIBUTED KNOWLEDGE WITHIN TSOL

When you work for an organisation like TSol, the question is not simply whether you *personally* are conflicted in relation to two or more clients but whether *the organisation* is. Every person and body we act for, from the Crown down, is a "client" *of the Treasury Solicitor.* We act in his name and on his authority. Unless special circumstances apply (information barriers, discussed elsewhere in this Guidance), the knowledge any one of us has is attributed to the organisation as a whole. This is frequently how the duty of disclosure we owe to one client will come into conflict with the duty of confidentiality we owe to another.

Part II: Conflict and our responsibilities

CONFLICT AND THE CROWN

Strictly, the Crown is not our client but our *employer.*

The Crown is indivisible for most purposes in law. The departments and agencies that make up Government, even those which have their own corporate identity, are seen as one aggregated whole: the Executive Crown. Because of this, there cannot be a conflict of interest in the legal professional sense in acting for two or more parts of it. When two departments disagree or appear to have competing interests, there are political (machinery of government) arrangements for resolving these difficulties. It would unacceptable for two limbs of government to be seen to be slugging it out in a public arena over a policy difference or a money claim and so the duty we owe *as public servants* is to help departments to resolve these differences.

But the Treasury Solicitor also acts for people and organisations who are not a part of the Crown: for example most non-departmental public bodies (NDPBs). When we do, there is a real risk that conflict in that legal professional sense could arise. We have a duty to assure ourselves that there is, and will be, no conflict of interest. If the risk is there, then we must take steps to eliminate it. This is principally addressed through our business rules.

THE BUSINESS RULES: WHO WE WILL ACT FOR

Crown and Non Crown
Crown clients ▶ all Secretaries of State and Ministers, ▶ their departments and ministries, ▶ all executive agencies of those departments and ministries, ▶ all other holders of public office under the Crown and their non-ministerial departments.
Non-Crown clients ▶ statutory offices holders and NDPBs which do not to act for the Crown, ▶ local government and international organisations, ▶ educational establishments, ▶ people/organisations doing contracted out work, ▶ their sub-contractors, ▶ individuals, such as civil servants and members of the armed forces, personally involved in litigation (i.e. not simply representing a department or minister)

Our purpose is to be the leading provider of legal services to Government. The Treasury Solicitor provides legal services to Departments of central government and to other publicly funded bodies in England and Wales and acts on behalf of the Crown to collect and maximise the efficient generation of income from Bona Vacantia assets (Framework Document 2008–2012). The arrangements for making decisions on new business are set out in guidance available on the TSol intranet.

Our responsibility is to ensure that the Crown's legitimate interests are upheld. In acting for non-Crown bodies our responsibility is to ensure that their interests are upheld without compromising our responsibility to Crown clients. Where there is a conflict our duty to the Crown has to take precedence.

PROFESSIONAL STANDARDS

We cannot protect the legitimate interests of the Crown (or any other body for whom we act) if our professional standing (our reputation) is compromised. Our reputation depends on giving a professional standard of service to anyone for whom we act and meeting in full the requirements of the legal professions. If putting the Crown's interests first means we cannot meet our service standard in relation to another client, we may need to accept that we cannot act for that other client, either in relation to particular matters or at all.

We also have an obligation when we do act 'to act with independence in the interests of justice'. Since January 2010, this obligation has becomes statutory. It is contained in section 193(5) and (6) of the Legal Services Act 2007:

"(5) A person who:

a) exercises before any court a right of audience; or

b) conducts litigation in relation to proceedings in any court, by virtue of this section has a duty to the court in question to act with independence in the interests of justice.

(6) That duty overrides any obligations which the person may have (otherwise than under the criminal law) if it is inconsistent with them."

Alongside these principles, we have a duty of care to our professional staff not to place them in circumstances of personal conflict with the rules of their professional bodies or with the standards of the Civil Service Code.

Putting all these obligations together has the following consequences.

ACTING FOR NON-CROWN PUBLIC BODIES

We must make clear to non-Crown clients (for example, in a service level agreement) that in case of conflict our duty to the Crown will take precedence. Our casework procedures must always include an opening assessment of the risk of conflict/confidentiality problems when acting for these clients where the Crown's interests are or may become engaged. If we continue to act in these circumstances, there must be a regular review of the risks to determine whether the client's interests are best served by our continuing to act and, with the client, to identify and take immediate steps for effective corrective action if our conclusion at any stage is that they are not. Where we are unable to act for a client because of our duty to the Crown we will help the client to find an alternative provider of legal services.

ACTING FOR INDIVIDUALS

We can act for individuals in inquisitorial proceedings (e.g. public inquiries) where they are giving evidence deriving from their official capacity unless and until it is clear to us that their legal interests and the Crown's are conflicted, and therefore that their interests are best served by independent representation. (See the section on Public Inquiries). In these circumstances we will help the individual to find an alternative provider of legal services.

We are not able to act for individuals in adversarial proceedings where they are a party and where we are also acting for the Crown or another client unless we are satisfied from the outset that there is sufficient common interest in the outcome of the proceedings and that their individual legal interests can be effectively protected and their best interests served by our representation. If we do act in these circumstances, we must follow the same procedures as set out above for non-Crown public bodies.

PUBLIC INQUIRIES

We have a duty in the public interest to endeavour to continue to offer our services so far as our service standard permits.The Council on Tribunals confirmed this in its advice to the Lord Chancellor on the conduct of public inquiries, following the report of Sir Richard Scott of his inquiry into "Arms for Iraq":

"To some extent, the Treasury Solicitor may also be in a difficult and embarrassing position vis à vis the inquiry, if he advised Ministers on matters which the inquiry is investigating. However, the Treasury Solicitor's traditional role in providing the inquiry with the necessary legal and administrative support is … an essential one."

Because of this, and because the inquisitorial process generally allows more leeway to argue that legal interests of witnesses are not so directly engaged in the proceedings, we will expect to take a more relaxed view of acting for individuals than we could in adversarial litigation.

The principal problem is that not only do we generally provide the dedicated support for the Inquiry itself but we may also find ourselves supporting one or more departments with interests in the subject matter of the inquiry *and* possibly a number of individuals, civil servants, members of the armed forces, members of the prison service and others who are called to give evidence to it. Such a level of competing interests in the context of adversarial litigation would not only raise the likelihood of conflict but also raise issues of the proper administration of justice. Inquiries can have an adversarial character even though they are constitutionally inquisitorial, if, say, the inquiry is into responsibility for an accident and allegations of blame may be being made or the way evidence comes out risks prejudicing a witnesses chances of a fair trial in subsequent proceedings.

EXAMPLE

TSol is asked to provide the Secretariat for a public inquiry into allegations of war crimes by British service personnel. The MoD also asks TSol to represent several of the personnel. In the run-up to the inquiry it becomes clear that two of these witnesses are intending to give evidence exonerating themselves but pointing the finger of blame at a third. Though the inquiry itself is not about blaming individuals, media attention is likely to prejudice the third witness' chances of a fair hearing if charges are brought against him as a result of the evidence.

It is vital, therefore, in relation to public inquiries that the issue of conflict is still considered at the outset and a judgment made as to whether individual interests can be adequately safeguarded if we act, and whether steps need to be taken to ring-fence or outsource some representation. This judgment must be kept under review throughout the course of the inquiry.

A CONFLICT COMMITTEE

Because of the importance of getting our handling of conflict issues right, the Treasury Solicitor has set up a Conflict Committee. The Committee (which is described in more detail below) is there to offer guidance to teams in difficult cases and to ensure that we handle the issues consistently well.

Part III: Identifying conflict of interest

THE TEST: APPRECIABLE RISK

When we come to consider acting for a non-Crown client, we need to ask ourselves whether there is an appreciable risk that agreeing to act will put us in the position of being duty-bound either

- to pursue an interest adverse to a Crown client or an interest of the Crown;
- to pursue an interest adverse to another non-Crown client for which we are acting;
- to attack the new client in order to assert or maintain an adverse interest of an existing Crown or non-Crown client;
- to disclose information derived from business we do for the Crown or another client to this new client; or
- conversely, to protect information we obtain from taking on this new client, being information of the kind that we may be duty bound to disclose to the Crown or another client.

ACTION POINT

Whenever you take on a new matter, whether for a new or an existing client, make a positive check to see whether TSol is acting for any other Crown or non-Crown client in relation to the same matter.

If so, make checks to see if there is a risk of conflict.

IDENTIFYING THE AREA OF POSSIBLE CONFLICT

As a precursor to any other action we take, we need to get a clear picture of what the possible areas of conflict are. It may be that when we have done this, we will be able to satisfy ourselves that the actual risk in the matter in hand is minimal. But even if it is not, it may help us to choose the best course of action to meet our obligations to the clients.

New clients: We always go through a process of checking compatibility with the business rules when considering whether to take on a new client. This gives us the opportunity to identify whether there is a risk of conflict if we take them on. The team leader whose task it is to submit the written case supporting the consideration is responsible for making the checks that will enable him or her to answer the conflict issue.

Existing clients, new matter: It will not always be the mere acceptance of a new client that will give rise to conflict. Sometimes, the interests of our established clients may come into conflict over a specific matter. For example, we may find ourselves acting for a department and for an NDPB sponsored by that department in an action in which they may be on opposite sides or, more likely, they are both defendants or respondents but their respective defences are to some extent at odds.

Wherever we find ourselves acting for more than one client in a single matter, we must, at the outset, check whether a conflict could arise from it.

EXAMPLE

The Secretary of State for House Building and the Brick Standards Commission, an NDPB sponsored by the Secretary of State are co-defendants in an action brought against them by a brick producer over the BSC's delays in inspecting his factory. The Secretary of State wants to argue that this is a matter of day-to-day running for which only the BSB is answerable. The BSC, however, wants to cite budgetary restrictions on recruitment of inspectors as the underlying cause of the delay.

There is a clear conflict of interest in TSol's acting for both defendants.

HOW TO CARRY OUT THE CHECK

For one acting caseworker to do this analysis in respect of both clients may bring about the very conflict that we are trying to avoid, for example, by putting him or her in possession of that material which, if disclosed to one of the clients would compromise the interests of the other. Therefore, when a possible conflict is identified, wherever practical, the analysis should be undertaken by a member of a team who is not acting for either client. This person will liaise with the Conflict Committee as necessary and report back to the acting caseworker(s) and their team leader(s) on the scale and magnitude of the potential conflict without going into evidential detail.

ACTION POINT

Once the possibility of a conflict of interest has been identified, a member of an unrelated team should be asked to consider the circumstances and report back to the team or teams acting for the clients in question.

The person carrying out the assessment must take care not to share any client information with the referring teams. His or her conclusion on the issue of conflict is all they should see.

Part IV: Resolving conflict of interest

IF YOU FIND CONFLICT

The simple solution once potential conflict has been identified is for us to cease to act for one or more of the clients. However that will not always be what our clients want. And it may not always be necessary. The Law Society recognises that there are circumstances in which, provided you take all the right steps, you can continue to act for clients. So, where our clients want us to continue to act for them, we need to see whether we can bring ourselves within the exceptions that will permit us to do so.

COMMON INTEREST

In Rule 3 of the Solicitors' Code of Practice 2007, it says that we may act for two or more clients 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 us acting]".*

In October 2011 the 2007 Code will be replaced by the 2011 Code but this concept of "substantially common interest" will continue to apply. In the new Code, we are told:

> *"where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if:*
>
> *a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;*
>
> *b) all the clients have given informed consent in writing to you acting;*
>
> *c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and*
>
> *d) you are satisfied that the benefits to the clients of you doing so outweigh the risks;"*

The 2011 Code defines "substantially common interest" as:

> *"a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the clients and a strong consensus on how it is to be achieved and the client conflict is peripheral to this common purpose"*

For help with "informed consent", see below.

CONSENTS TO NON-DISCLOSURE

The duty of confidentiality owed to a client is paramount (this duty is bound up with the concept of legal professional privilege, about which guidance is available elsewhere). The only exceptions are where the law permits or requires disclosure or your client permits it.

The question therefore is how we can reconcile our duty of *disclosure* which we also owe to our clients, with the duty of confidentiality.

The general position is that we must not act where we would put that confidentiality at risk.

But the Solicitors' Code (both 2007 and 2011) allows us some leeway.

To begin with, you have a duty to disclose to your client information of which you are aware which is material to the client's matter unless:

- the disclosure is prohibited by law;
- we have expressly agreed with our clients that a different standard will apply; or
- we reasonably believe that disclosure would injure somebody (for example, if we disclosed an address, the person who lived there would be the victim of attack).

And the Code says you *can* act, with the informed consent (see below) of *all* the parties provided your client knows that you, or we, hold information we are not going to be able to disclose to them and understand the implications of this and the conditions under which you will be acting.

INFORMED CONSENT

Informed consent means that we have given them sufficient information to enable them to understand the conflict issue and how their interests may be affected.

MAKING SURE THE CONSENTS ARE IN PLACE

If we are going to rely on this exception to the duty not to act, we must make sure of those consents and not proceed on the assumption that we will get them. It is therefore a priority both to seek the consents and to pursue responses from the clients.

ACTION POINT

Client consent only protects us if it is informed and has been given in writing.

Copies of the letters and the clients' responses must be lodged on the respective case files. Caseworkers must tell their team leader and any other caseworker acting for one of the clients immediately the client responds, whether the client consents or not.

ACTION POINT

Caseworkers and team leaders must ensure that clients understand what is being asked of them and that their written consent to act is lodged on the case file.

PROTECTING CONFIDENTIALITY: INFORMATION BARRIERS

Properly established and maintained information barriers (Chinese walls) may offer a solution to a potential conflict problem by ensuring that no confidential information leaks from one acting caseworker to another.

The information barrier (a term to be preferred over "Chinese wall") is a device for preventing the transfer of confidential material from one client (the term "client" here should be read as embracing both "client" in the formal sense and those people whose interests we may have been instructed to represent), or their representative, and another client. The aim is to defeat conflict by ensuring that no-one with a duty to disclose material to their client comes into possession such of such information in circumstances where they are they are duty bound to treat is as confidential to another client.

Organisations such as ours have real difficulty with information barriers however because of the concept of "attributed knowledge" (knowledge which Lawyer A is assumed to have because Lawyer B, in the same firm, has it). Information will move around inside our organisation, particularly up and down the chain of command. Unless we can be satisfied that all effective measures have been, and will be, taken to ensure that no disclosure of information from within the barrier to someone outside the barrier will occur we cannot use an information barrier to resolve a possible conflict.

A practice of "self-denial" in relation to obtaining information is not going to be enough on its own. An effective barrier is one that will ensure that even accidental disclosure (conversation overheard, leakage through higher management discussions, shared facilities, etc) is ruled out.

THE LAW SOCIETY'S STANDARDS

The Law Society does not lay down rigid rules for the operation of information barriers but it has described six steps that "would normally be necessary" and other steps that may be essential in some cases.
The **six necessary steps** are:

- that the client who or which might be interested in the confidential information acknowledges in writing that the information held by the firm will not be given to them;
- that all members of the firm who hold the relevant confidential information ("the restricted group") are identified and have no involvement with or for the other client;
- that no member of the restricted group is managed or supervised in relation to that matter by someone from outside the restricted group;
- that all members of the restricted group confirm at the start of the engagement that they understand that they possess or might come to possess information which is confidential, and that they must not discuss it with any other member of the firm unless that person is, or becomes, a member of the restricted group, and that this obligation shall be regarded by everyone as an ongoing one;
- that each member of the restricted group confirms when the barrier is established that they have not done anything which would amount to a breach of the information barrier; and
- that only members of the restricted group have access to documents containing the confidential information.

The following additional precautions **may** need to be taken:

- that the restricted group is physically separated from those acting for the other client, for example, by being in a separate building, on a separate floor or in a segregated part of the offices, and that some form of "access restriction" be put in place to ensure physical segregation;
- that confidential information on computer systems is protected by use of separate computer networks or through use of password protection or similar means;
- that the firm issues a statement that it will treat any breach, even an inadvertent one, of the information barrier as a serious disciplinary offence[1];
- that each member of the restricted group gives a written statement at the start of the engagement that they understand the terms of the information barrier and will comply with them[2];
- that the firm undertakes that it will do nothing which would or might prevent or hinder any member of the restricted group from complying with the information barrier;
- that the firm identifies a specific partner or other appropriate person within the restricted group with overall responsibility for the information barrier;
- that the firm implements a system for the opening of post, receipt of faxes and distribution of email which will ensure that confidential information is not disclosed to anyone outside the restricted group.

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1 TSol has not taken this step but individual lawyers need to be aware that they may be in danger of professional disciplinary action if they fail in their professional duty to their client.

2 Again, TSol has not yet made the making of a written statement a requirement but the Team Leader will be expected to ensure that all those working within the barrier have read, understood and accepted their duties in relation to maintaining the barrier.

SASU: A SPECIAL CASE OF AN INFORMATION BARRIER

Within TSol there exists a unit called the Special Advocates Support Office (SASO) whose function is the instructing of special advocates, appointed by the Attorney General, and supporting them in their work and facilitating the administration of the special advocate system.

The special advocates (SAs) are retained to assist in the hearing of cases which turn in part on information that is so sensitive (in terms of national security) that it cannot even be shown to the non-governmental parties to actions. The SAs are appointed by the Attorney General but their task is to represent the party whose interests are affected by this material. They alone are given sight of it and will handle arguments relating to it in closed hearings.

Although SASO is physically located within the premises of the Treasury Solicitor at One Kemble Street, it has a well-established information barrier between itself and the teams around it and is for all practical purposes a separate entity. It is itself split into a "closed team" which deals with the SAs and an "open team" that communicates with the party's ordinary representative in the case.

SASO has completely separate document-handling, communication, storage and technology facilities. The four lawyers who carry out casework on cases in which the SAs are instructed do not carry out any work for any other part of TSol. The fifth lawyer provides the management links for the team. He may report to the Attorney General but only in relation to open issues in matters where SAs are instructed. In addition, in order to protect the independence of the SASO team, there are conflict checks to ensure that other members of the private law team do not act in cases which are in any way relevant to SASO.

The circumstances in which SAs need to be appointed inevitably mean that it is not possible to comply to the letter with the Law Society's guidelines, above. However, this arrangement has recently been commented on with approval by the Supreme Court[3].

INFORMATION BARRIERS INTO PRACTICE

For those teams other than SASO, Annex B sets out a Standard Protocol to be observed when setting up an information barrier and practical guidance about setting up and operating one. The guidance cannot be followed blindly. Every time you consider setting up an information barrier, even if you are using the strategies and practices that have been successful elsewhere, you must test it to see if it will be effective in your case. If you have any doubt then consider other options, such as offering the client the services of the Conflict Panel.

WHEN ALL ELSE FAILS: INSTRUCTING A PRIVATE FIRM

Even where common interest, consent or information barriers appear to offer a solution, we still have a professional duty to consider whether it is *reasonable* for us to act. If we do not feel we can serve the best interests of a client by acting, we should withdraw from acting.

We cannot just walk away and leave the client high and dry. We need to think about what other solution we could offer.

Our policy is that we should offer clients a managed externally sourced alternative. In short, we should aim to find the client a private firm to act on their behalf. The client is not obliged to take up our offer but we should bring it to their attention.

LitCat is a list of private law firms that has been drawn up so that we can offer a managed alternative to clients in cases where we do not think we are best placed to act for them directly. We should offer this service to clients where conflict prevents us from acting. If we cannot find a LitCat firm that seems appropriate to the client's needs we should seek to identify other firms that are.

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[3] See the judgment of Lord Mance in Home Office v Tariq [2011] UKSC 35 (a link to the decision in available in the Conflict Area if the Intranet).

It is important, particularly when finding external legal representation in the context of public inquiries that the firms should have experience in the fields in which our clients are active and a good general understanding of the way Government works. We should ensure that the fee rates are reasonable.

This means that where we cannot act ourselves we can still offer a quality assured service at arm's length that will protect public funds.

This service is not there for our Crown clients to use directly. It is *our* job to serve them. It is there for non-Crown bodies and for occasions where a department or agency wishes to provide legal support for one of its employees and conflict means we cannot do the job ourselves.

Clients cannot, of course, be required to take up this service.

If a client takes up an offer to instruct an external solicitor, you will manage the billing and quality assurance but there will be a direct relationship between them and the solicitor. **We must not allow ourselves to be used to second guess legal advice or handling decisions** because this would bring us into too close a relationship with the evidence and arguments that underpin the conflict issue. But we will offer the client the benefit of our expertise to advise on any service level issues or billing concerns. And it will be important that we get feedback from the client on the service they receive.

When we have had to put measures in place in any case, it is vital that we make a record of what we have done, including how we have explained the situation and the steps to the clients. And it is equally vital that we monitor the measures taken for effectiveness.

WHOSE DUTY IS IT ANYWAY?

So, whose job is it to do what to make these steps effective? In the next three sections, we look at the role of the Team Leader, the Caseholder and the Conflict Committee.

THE TEAM LEADER

If we are to manage conflict successfully, your role will be vital:

- in making sure you and your team understand how conflict may arise and what the procedures are for dealing with it;
- in making sure that your team carry out their conflict assessments and reviews;
- in supporting your team when they come to you with conflict issues; in devising handling strategies where conflict is identified;
- in ensuring that the agreed strategies are properly implemented. You will have to make sure that information barriers are fully respected; and
- in keeping the rest of TSol fully and regularly informed of the issues that have arisen in your area.

You will need to know not only who your own clients are but also which teams deal with related clients. You will have to keep aware of new business and how it may affect the business of your team. And when it falls to you to make a recommendation as to whether TSol should take on a new client, you will need to carry out a check for possible conflict.

ACTION POINT FOR TEAM LEADERS

With every potential new client, carry out a check for possible conflict with other clients – yours and others in TSol and record your findings in the new business proposal.

Make it your business to be aware of the whole client base of TSol so that you can identify conflict risks.

You will need to keep conflict visible within your team as a possible issue. Make sure that each new member of your team covers conflict as an induction topic. Maybe make it a regular item at the team meeting. Build contacts with other team leaders so as to increase your chances of identifying conflicts or learning about successful or unsuccessful strategies for handling it.

ACTION POINT FOR TEAM LEADERS

Keep the risk of conflict visible within your team, even if you only have one "client". Regular raising of it as an issue will help ensure that it is in everyone's thoughts when they carry out their work. Awareness at this level is key to our protection.

If a conflict issue does arise, it is vital that you act on it urgently. You may need to consult the Conflict Committee. A *proforma* submission is available in the Conflict Area of the Intranet to help you present your case in the best way.

You will also have a key role with your clients. Clients are naturally looking for us to provide solutions, not problems, and something like conflict is likely to strike them as an esoteric nuisance rather than a danger that affects both us and them. If we are to carry them with us, we need to ensure that they understand the significance of conflict and the need to resolve it. We need to be clear about the steps we must take and the reasons for them. And we need to show them that we have their best interests at heart. Make sure you tell the client relationship manager what has happened. He or she may have an important role to play in helping you resolve issues with your client.

There is a leaflet available from the Conflict Area and there are some template letters to help you and your caseholders communicate with your clients and obtain the necessary consents. And within these pages you will find guidance on handling client issues.

Once a month, take stock of any new business and any new conflict issues that have arisen in your area and of any developments on existing issues. Make a report to your Division Head about them and copy this to the client relationship managers involved and to the Client Committee. If you have no new issues or developments to report, make a report that says so.

THE CASEHOLDER

As the Caseholder, you are in a key position when it comes to monitoring and identifying the risk of conflict arising in relation to your cases. It is vital to all of us, therefore, that you consider the issue at the start of proceedings and keep returning to it as the case progresses. Active management of the issue is our best defence against getting caught out.

When you get a new case, as you are reading yourself in, ask yourself whether it could give rise to a conflict of interest. In nine cases out of ten it will be clear that there is no risk and you can record that conclusion on the papers. If you have any doubt at all, however, raise it with your team leader straight away. It is not important whether you are right or wrong. What is important is that we have the earliest opportunity to check it out.

ACTION POINT FOR CASEHOLDERS

Whenever you take on a new matter, whether for a new or an existing client, make a positive check for possible conflict issues.

Your team leader may decide to involve the Conflict Committee and you may be asked at short notice to help with the provision of a submission to the Committee.

If your team leader thinks there is no problem but you feel strongly that there may be, you must say. There are serious professional issues at stake. You will not be penalised for pursuing your concerns in a responsible and professional way.

If it is decided that despite the risk of conflict we should continue to act for your client and the other client identified with the risk, your team leader will work out with you handling strategies for the case to eliminate the risk. The arrangements will be recorded on the file and signed off by the team leader and you. Please take an active part in this process and, again, if you have concerns about the strategy, let your team leader know at once.

Keep the conflict issue under active consideration as long as your case is live. If later you think the strategy is not working or if a new consideration materialises that you think may affect things, or if you come under pressure to set the protective measures aside, consult your team leader immediately. Never just set the a greed processes aside.

ACTION POINT FOR CASEHOLDERS

Record you conclusions as to conflict on the case file each time you consider the issue, whether you decide there is or is not a risk. Record any action taken to support the consideration and every action taken as consequence of the conclusion reached.

Stick to the agreed strategy.

THE CONFLICT COMMITTEE

Because it is so important that we act consistently and effectively in the handling of conflict issues, we have set up a Conflict Committee to guide and advise us when the issue comes up.

You can see the purposes, membership, business objectives and operational details of the Committee in the Conflict Area on the Intranet. Annex A gives some pointers as to how to and when to consult.

Where we think that we have identified a conflict or potential conflict issue, it is vital that we take action quickly. Do not put off contacting the Committee. The sooner they are involved, the sooner we can find out if there is a problem and, if there is, find a way to resolve it that serves everybody's best interests.

All communications with the Conflict Committee should be marked "Protect: Client Conflict" and care should be taken to ensure that people are copied in only on a need-to-know basis.

LOOKING AFTER THE CLIENT

We work in partnership with all our clients. Partnership requires trust. Trust is easily undermined where one party to the relationship thinks that its interests are being subordinated to the interests of the other or where the behaviour of the other appears obstructive or self-protective.

We have already seen that to serve the Crown well we have to maintain our professional reputation at a high level. By the same token, we must reflect our clients as model litigants. But all too easily, an abstruse consideration such as conflict, which appears only to make difficulties for the client, can drive a wedge between us and that wedge will be highly detrimental to the partnership.

So we must take the time to explain not only what conflict is and how it arises but why we must take it seriously and resolve it. And the steps we establish and take for dealing with it have to take into consideration the best interests of the client.

Clients need to be aware of conflict as an issue *before* it becomes an issue for them in fact. Then we will not have to waste time getting them on board. If possible, contingency arrangements should be in place between us and the client so that if an issue does arise we can move with the least effort into resolution.

A leaflet has been produced with the purpose of preparing the ground with the client over conflict. You will find the leaflet in the Conflict Area. Particularly if your client is one whose issues have in the past given rise to conflict handling problems, you should consider whether to make this leaflet the centrepiece of a workshop with the client to achieve a common understanding and coherent practices.

When a conflict issue does arise, make sure you explain it to the client and discuss with the client the options for dealing with it. Don't take the client for granted, leave them in the dark or hang them out to dry. The trust lost if we do may prove very hard to recover.

Team leaders must ensure that client relationship managers are kept up-to-date with all conflict issues affecting the clients they work with. They may have an important role to play in resolving issues positively.

ACTION POINT

Keep your client informed. If conflict could be an issue,
find the time early on to explain it and how we can deal with it.

Annex A: Consulting the Conflict Committee

1. The Conflict Committee is there to provide advice on the handling of conflict issues and to secure, so far as possible, a consistent and defensible response wherever the risk of conflict arises.
2. It is not mandatory for Division Heads or Team Leaders to consult the Committee. Whether to do so is a matter of judgment for which the responsibility lies with the officer(s) concerned. However, the duty to record a conflict issue and the action taken in respect of it (which lies with the Team Leader(s) involved) arises *whether or not* the Committee is consulted.
3. The Committee will need to be aware of sufficient of the circumstances giving rise to concern about conflict to enable them to assess the type and degree of risk. They do not need to be furnished with original documents in the first instance.
4. In cases of immediate urgency, the members of the Committee should be alerted to the existence and significance of the issue by e-mail. A submission setting out the issue in greater detail should follow as soon as it can be prepared.
5. In all cases, a submission should be produced following the structure of the proforma provided in the Conflict Area of the Intranet. The submission should focus as succinctly as possible on the conflict issue itself and the matter on which the Committee's advice is sought. The Committee may call for further elucidation.
6. The submission should reach the Committee within 48 hours of the issue arising. The aim of the Committee will be to address the issue within 24 hours of receipt and to provide an initial response within a further 24 hours.
7. It is the professional duty of the Division Head, Team Leader and caseworkers involved to resolve the conflict issue. The Committee's function is advisory and is not to take responsibility for the issue out of the hands of those who have the conduct of the case.

Annex B: Information Barriers

THE STANDARD TSOL INFORMATION BARRIER PROTOCOL[4]

To ensure that we meet the standards set out above, the Treasury Solicitor has authorised the following Standard Protocol to be deployed whenever an information barrier needs to be established.

This Protocol may be supplemented as the needs of the individual case demand. A supplemented protocol will be known as a Special Protocol and must afford at least the level of protection provided by the Standard Protocol. All supplements to the Standard will be put in writing and appended to the Standard.

Every person within TSol assigned to work within the information barrier and every person in the chain of command supervising the group that operates the information barrier or supervising work for a client who might be interested in the information protected by the barrier needs to understand the protocol that applies to the operation of the barrier and to comply rigorously with its requirements.

STANDARD PROTOCOL

1. The fundamental purpose of an information barrier is to protect the confidential information contained within it. Every process or operation taken within and around the barrier must meet that purpose.
2. No information barrier shall be set up without the written consent of both the client whose work will be carried out within it and of any other client who has or may have an interest in the confidential information to be protected by the barrier. In the latter case, the consent must expressly acknowledge that confidential information will be withheld from the consenting client.
3. Where an information barrier is to be set up:
   a. one person of appropriate grade and experience must be nominated to head the group within the barrier (the "group leader");
   b. a list must be maintained by that person of every person assigned to the group, including date of assignment to the group and, where appropriate, date of leaving the group;
   c. every person assigned to the group, including the group leader, must be immediately provided with a copy of this protocol (or if a Special Protocol is adopted in place of the Standard, that protocol and will be expected to comply with it.
4. The group leader will have responsibility and authority to take all reasonable steps to maintain the integrity of the information barrier within the group.
5. The Head of Litigation, in the case of an information barrier relating to a non-employment matter, or the Head of the Employment Group, in the case of an information barrier relating to an employment matter, will have responsibility and authority to take all reasonable steps to maintain the integrity of the information barrier outside the group.
6. Those members of staff identified as working within an information barrier:
   a. must have no involvement with, or carry out any work for, any other client who might have an interest in confidential information protected by the barrier; and
   b. must not, except with the direct and express authority of the Head of Litigation, in the case of an information barrier relating to a non-employment matter, or the Head of the Employment Group, in the case of an information barrier relating to an employment matter disclose or discuss any of that confidential information with any member of TSol outside the barrier.

[4] This Protocol does not apply to SASO, which has its own procedures.

7. No person in the chain of command above a person working within an information barrier must:
   a. require that person to act in disregard of rule 6 above:
   b. require that person to disclose to any person outside of the barrier confidential information protected by the barrier;
   c. with the purpose of persuading that person to act in breach of rule 6 or to disclose confidential information, take or threaten to take any action detrimental to that person's interests.
8. No person outside of the chain of command above a person working within an information barrier must:
   a. request information relating to the work falling within the information barrier;
   b. request that person to carry out work for any other client; other than through a person who is both within that chain of command and outside the group working within the barrier.
9. Any breach of rules 6 and 7 above may constitute a professional disciplinary offence, and may, if the circumstances appear to the Treasury Solicitor to warrant it, be reported to the relevant professional body.
10. Adequate accommodation and resources will be deployed by the Department as the need is demonstrated:
   a. to ensure that work involving relevant confidential information is carried out in a physical environment capable of securing the confidentiality of the information;
   b. to ensure that that the systems by and through which the information itself may be stored and processed are capable of securing the confidentiality of the information.
11. At any time after an information barrier has been set up, if it appears to the group leader that either:
   a. the information barrier cannot be effectively maintained; or
   b. the client's best interests cannot be adequately met by with the information barrier in place; he or she must make his or her concerns known to his or her line manager.
12. On being informed by the group leader, the line manager must take immediate steps, which may involve consulting the Conflict Committee, to examine the concerns and to take appropriate action in the light of them. Such steps may require the cessation of work for the client, for another client or for both clients.
13. No decision shall be reached to cease working for a client without consulting the client in question. But the client's desire that the work should continue will not be a sufficient justification for doing so.
14. All action under Rules 11 to 13 must be expedited.

PRACTICAL STEPS TOWARDS SETTING UP AN INFORMATION BARRIER

- An information barrier should only be set up if the teams acting for the affected clients are satisfied that the best interests of those clients can be served by that means.
- Step 1 will therefore be to identify the affected clients and their interests.
- Step 2 will be for the Team Leaders of the teams involved to meet to consider whether an information barrier can, and should, be set up and maintained.
- In the event of doubt or disagreement, the issue should be placed before the relevant Division Head and the Conflict Committee should be consulted.
- If an information barrier is to be proceeded with, the relevant team leader or division head should determine with his or her Head of Division what the group within the barrier will require by way of:
  - personnel
  - accommodation and
  - resources, including IT, and whether any additions are required to the Standard Protocol.
- The relevant client relationship manager(s) or team leaders should explain to the respective clients what is proposed, the service implications for them and the need for their written consent. The explanation should be followed up in writing and their consent in writing to the arrangements sought.
- **Only when every client involved has given their written consent**, should an information barrier be established. If any consents cannot be obtained in the time required, alternative arrangements to the setting up of a barrier **must** be made.
- Work within the information barrier cannot commence until accommodation, resources and personnel are at least adequate to safeguard the confidential information involved. It will be the responsibility of the Division Head within whose chain of command the information barrier is to be established to secure this level of provision and to give the go-ahead only when it has been reached and all relevant consents obtained.
- A memorandum should be submitted to the Conflict Committee by the Division Head recording the circumstances that have given rise to the need for the information barrier, the obtaining of all relevant consents and staff signatures and the arrangements, the personnel assigned to the group within the barrier and the arrangements made to support them.