
This guidance note is intended to help Costs Lawyers recognise and deal with any conflicts of interest that might arise in relation to their clients.

What are your obligations?

1. Principle 1 of the Costs Lawyer Code of Conduct requires you to act with honesty and integrity and maintain your independence.
2. Principle 3.1 states: “You must act at all times in the best interests of your client, except where this conflicts with your duty to act independently in the interests of the proper administration of justice or where otherwise permitted by law. You must act in the best interests of your client regardless of the consequences for your professional client or other intermediary. You must not permit a professional client, employer or any other person to limit your ability to fulfil this duty.”

Principle 3.1a states: “You must decline to accept an instruction from a client or, if you have already accepted an instruction, you must cease to act if:

- (i) it would not be in the client’s best interests for you to act;
- (ii) your own interests conflict with your duty to act in the best interests of the client in relation to the instruction, or there is a significant risk of such a conflict arising during the course of the instruction; or
- (iii) the client’s interests conflict with those of another client. You may, however, act if each client has substantially common interests and has given informed consent.”

3. A conflict of interest can arise between:
 - your interests and a client’s interests (Own Interest Conflict); or
 - the interests of two or more clients (Client Conflict).

Own Interest Conflict

4. A Costs Lawyer must not act if there is an Own Interest Conflict. This refers to any situation where your duty to act in the best interests of a client in relation to a matter conflicts with your own interests in relation to that or any related matter.

-
5. If an Own Interest Conflict arises, there are no exceptions to this prohibition against acting. Obtaining your client’s consent to act will not change the position. Similarly, advising the client to obtain independent advice will not allow you to continue to act once an Own Interest Conflict has arisen.

 6. Examples of factors that can give rise to an Own Interest Conflict are set out in the table below. This is not an exhaustive list.

| Factor | Example situation |
|--|---|
| A financial interest of yours or someone close to you. | A client asks you to represent them in costs proceedings against a company in which your spouse/partner owns shares. |
| A personal or business relationship of yours. | A client asks you to advise on a claim against a relative of yours, a friend of yours, or someone with whom you are involved with in a common financial enterprise. |
| Your role as an employee. | A client asks for advice in relation to a costs dispute involving your employer or a fellow employee. |
| Your own conduct. | The wrong advice has been given to the client or the wrong action taken on their behalf, and the client therefore has a potential claim against you. A conflict will not always arise in this situation (provided you have been transparent with the client as to your mistake) but can easily do so. If, say, the client’s position in costs proceedings has been prejudiced by you wrongly advising them not to pursue a particular issue, it would be unlikely that you could continue to advise them in those proceedings without a conflict arising between your interests and theirs. |

7. In relation to your role as an employee, it will normally be assumed that where the client’s interests conflict with your employer’s interests then they also conflict with your own interests, and you should therefore not act. If you act for a client whose interests conflict with your employer’s, there will be a clash between your obligation to fulfil the terms of your employment contract (for example, requirements to share all information with your employer, to further their

interests and to act in good faith towards them) and your duty to act in your client's best interests with undivided loyalty.

Client Conflict

8. The starting point is that you should not act if there is a Client Conflict. This refers to a situation where your separate duties to act in the best interests of two or more clients in the same or a related matter directly conflict.
9. In many cases the existence of a direct Client Conflict will be clear cut and you will not be able to act. Examples of such situations include:
 - Providing costs services to opposing parties in a costs dispute or other litigation.
 - Providing costs services to both an instructing solicitor and a third-party funder in negotiating funding terms for the same proceedings.
10. However, there will be less clear cut cases, particularly where the interests of two clients are in conflict regarding wider aspects of a matter, but the limited nature of your retainer as a Costs Lawyer means that you are nevertheless able to act for both. Indeed, there might be significant benefits for clients in instructing a single Costs Lawyer.
11. For example, the interests of joint defendants to proceedings might be in conflict regarding the apportionment of damages and costs, but those defendants could jointly instruct you in relation to total quantification of costs. As long as you are clear in your client care letter that you are not instructed to advise on the issue of how costs are to be apportioned, then it might well be appropriate to act for multiple parties.
12. Similar situations could arise where, for example:
 - A defendant has more than one insurer and there is a dispute as to which insurer is responsible for a claim. The same considerations as above would apply to allow you to act on a limited retainer for the insurers collectively.

-
- There is a dispute about how an estate or trust fund is to be distributed, and costs incurred in resolving the dispute and making the distributions are to be paid from the fund. You might be able to advise parties that were in conflict during the dispute if the only remaining issue is the level of costs that were properly incurred.

13. In any such case you should be clear with your clients about the nature and terms of the retainer, and what issues are included and excluded.

Determining whether there is a Client Conflict

14. Whenever you consider that there is a risk of Client Conflict you should ask yourself the following questions:

First, are you able to act independently in all the clients' best interests?

15. You will want to consider factors such as:

- The amount of negotiation needed between the clients on costs issues. The more there is to negotiate, and the less the clients have agreed in advance, the more likely it is that the clients will need separate representation.
- Whether there is any imbalance in bargaining power between the clients, or risk of undue duress, such that separate representation or advice is required.
- Whether you can put measures in place to effectively manage any risk of a conflict arising during the course of a matter.
- Whether the benefits outweigh the risks of you acting (including the risk of inadvertent disclosure of confidential information).

Second, have you obtained each of the clients' informed consent to act for all of them, including as to what information can be shared between them?

16. Principle 7.1 of the Code of Conduct is relevant here. It states: "You must keep the affairs of your client confidential unless disclosure is required or allowed by law or if the client consents in writing to disclosure, having had the consequences of such consent explained to them. You must ensure that your client is able, in your

reasonable opinion, to give informed consent to waiving their right to confidentiality.”

17. If you are not able to answer both these questions clearly in the affirmative, then you are likely to find yourself acting in conflict, and should refuse to act (or cease acting) for one or more of the clients.
18. Note that a conflict can also arise in a related matter. For example, clients may be involved in two sets of proceedings arising out of the same circumstances.

Costs Lawyers working in SRA authorised firms

19. If you work in a firm that is authorised and regulated by the Solicitors Regulation Authority (SRA), you will also be bound by the SRA Code of Conduct for Firms. This Code might prevent you from acting in circumstances where you have no personal Client Conflict (because you are acting for only one client) but where the firm itself has a conflict due to representation of another client by the firm. You should follow the guidance on the SRA website on conflicts of interests in such situations.
20. Similar principles will apply if you are employed by a firm that is authorised by one of the other legal services regulators.

Costs lawyers working in non-authorised firms

21. If you are working in a firm that is not authorised by any of the legal services regulators – such as a partnership or limited company formed by Costs Lawyers – then although you are bound as an individual by the conflict rules in the CLSB Code of Conduct there will be no equivalent firm-wide prohibition.
22. Thus, whilst you may be prevented personally from acting for clients A and B whose interests are in conflict, it may be possible for you to act for client A and for someone else in the firm to act for client B.

-
23. However, you will still only be able to act for client A if:
- You are able to act in their best interests (Principle 3).
 - You are able to protect client A's confidential information from client B and from the Costs Lawyer that is acting for client B (Principle 7.1). This will require the use of information barriers within the firm, which will effectively remove any real risk of information exchange. Information barriers might include:
 - systems to identify the potential confidentiality issue;
 - separate teams handling the matters, at all levels including non-fee-earning staff;
 - separate servers (and printers) so that information cannot be cross accessed;
 - information being encrypted and password protected;
 - individuals in the firm being aware of who else in the organisation is working on the respective matters so they know who they can and cannot discuss the matter with;
 - appropriate organisational policies and training for staff.
 - You are open with the clients about the situation and have obtained their informed consent to act (Principle 1).
 - There is no Own Interest Conflict arising from the fact that your firm or employer is acting for the other client. For example, if the relationship with client B is so important to the firm that you cannot in reality act independently for client A.

What do we mean in this guidance by the client's informed consent?

24. When this guidance refers to "informed consent", it means that the client must be informed of the risks of you continuing to act for them and the alternatives of seeking separate representation or advice, and must give their consent in that context. You are, of course, entitled to point out any benefits of you continuing to act. The client must also understand the extent to which their confidential information needs to be shared with the other client(s) in order for you to advise

all clients properly, and understand the impact of that, and then give their consent where necessary.

25. It is good practice to ensure that the client's informed consent is provided in writing so that you can demonstrate compliance with your regulatory obligations.

Client Conflict and former clients

26. Principle 3.1a applies to current, prospective and former clients. So, if the interests of clients A and B are in conflict in a matter, Principle 3.1a will prevent you from acting for new client B where you previously acted for client A in a related matter, unless the clients have substantially common interests and have given informed consent.
27. Your duty to protect client A's confidential information (Principle 7.1) also survives the end of the retainer. Therefore, if you obtained information through acting for client A (or otherwise received information that is confidential to client A), and that information is relevant to a matter involving client B, your duty of confidentiality to client A is likely to clash with your duty to use your knowledge to act in client B's best interests.
28. In this situation, unless you can obtain client A's informed consent to disclose the relevant information to client B, you cannot personally act for client B. However it may be possible for another Costs Lawyer in your firm to act for client B if measures are put in place to protect client A's information such that there is no real risk of disclosure to client B (see paragraphs 19 to 23 above).

END