THE CITY OF LONDON LAW SOCIETY

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Margaret Hope
Solicitors Regulation Authority
DX 19114 Redditch

By email (freedominpractice@sra.org.uk)

Dear Margaret

Re: Annex D ("Conflicts of interests models") of the SRA consultation "The architecture of change: the SRA's new Handbook"

This letter sets out the views of the City of London Law Society ("CLLS") on Annex D of the SRA Consultation on the implementation of outcomes – focused regulation and, in particular, the possible approaches on conflicts of interest.

The ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the SRA's consultation on conflicts has been prepared by the CLLS Professional Rules and Regulation Committee (the "PR&RC"). The PR&RC is made up of a number of solicitors from twelve City of London firms who have specialist experience in the area of the regulation of the profession. It is chaired by Chris Perrin of Clifford Chance who in 2000 also chaired the CLLS sub committee which recommended reform of the conflict rules and which led to the introduction of the current rules in 2006.

Our overriding view – and we believe it is one which is shared widely beyond the membership of the PR&RC – is that this is not the time for wholesale changes to the conflict rules. The current rules were introduced just four years ago after six years of review and debate. They are generally considered to be clear and solicitors have come to understand them and to understand how to apply them. The current rules replaced a regime which was confusing and unclear. Solicitors are naturally nervous about conflict rules because they are aware that if they misapply them, there are not only regulatory risks, but also serious exposure under the common law. They therefore like clarity and certainty in this important area of regulation.

In view of the above, any wholesale change would now be unfortunate, and a move to an outcome focused approach which (at least under some of the proposed models) leaves greater scope for interpretation is not what the profession generally wants. We would therefore suggest that none of the proposed models is selected and, instead, that the current conflict rules are retained in an annex to the

Code and treated as Rules. In the Code itself the required Outcome in respect of conflicts would simply be that the firm has procedures in place to ensure that it and its lawyers comply with the Rules in the annex. The approach would therefore be similar to that being proposed in relation to the Accounts Rules (Annex E), where, again, the profession has expressed the view that an approach based on the specific wording of rules is preferred.

As you are aware, we have previously advocated some reform to the current conflict rules whereby *"sophisticated clients"* might consent to a firm acting in circumstances amounting to a *"conflict"* as defined in Rule 3. While we continue to favour such a relaxation, and while we recognise that at least one of the models now being proposed would in effect bring about this change, we take the view that all the proposed models would create more wide-spread problems for the profession as a whole than this localised element of reform would justify.

For the reason outlined above, and generally, we do not believe that the current conflict rules are perfect. If our suggestion that none of the three models is adopted is accepted, we would also suggest that a working party be established to tidy up current wording and/or add further clarity through further Guidance.

The comments below on the three models set out in the consultation are made in case our primary recommendation is not adopted.

We note that the definition of conflict is largely unchanged. In that context, we assume that *"you"* in the first bullet of the definition and *"your"* in the second refers both to the individual solicitor and to his/her firm.

We also note that the definition of "conflict" in Chapter 14 can, "where the context permits, include prospective and former clients". It will be necessary to make it clear that the context of the conflict rules does *not* so permit.

The Outcomes in Model 1 do not permit the current exceptions to the Conflict Rules (see Rule 3.02 and 3.07-3.15). We support these exceptions and believe they are necessary to permit firms to advise in very many commercial situations now accepted in the market and often required by commercial clients. We therefore believe that Model 1 is unacceptable.

Model 2 would bring two changes to the current Rules, and it introduces a new concept of *"substantive client conflict of interests"* which would exist if there was dispute/litigation between two clients, and also if the firm was conducting negotiation on behalf of two or more clients. We are unclear what is meant by *"negotiation"* and whether it envisages just oral bargaining (the *"narrow interpretation"*). If it is not limited to this, any dealings on behalf of a client in the context of transactional work which are aimed at reaching agreement, including proposing amendments to a document would seem to be included (the *"wide interpretation"*). We have two points on the introduction of the *"substantive conflict"* concept:

1. Model 2 does not permit the current exception in Rule 3.02(1) where the firm would be involved in negotiations between the clients in a manner currently applicable to many commercial situations which have been accepted in the market and often required by commercial clients. We do not believe this limitation is acceptable even if the narrow definition applies.

2. If the narrow definition applies, the wording does permit firms to act for two or more clients who have a *"client conflict of interest"* provided they do not actively conduct oral negotiations on behalf of the clients. While this would be a relaxation of the current rules, it would lead to rather absurd situations where a law firm would brief one (or both?) client(s) on how to negotiate issues and then step out and leave them to it. Moreover, this would be the case for all clients, even unsophisticated ones who may well not be equipped to handle their own negotiations in this way.

While we can see that the definition of *"substantive client conflict"* seeks to preserve the current exception in Rule 3.02(2), we believe it is otherwise unacceptable. We also believe that while the current

Rule 3 definition of *"conflict"* closely reflects the definition which would also apply at common law, it would be confusing to introduce new definitions for *"substantive"* and *"non-substantive"* conflicts which have no equivalents at common law.

Model 3 represents a different approach and essentially gives effect to the common law. With some further elaboration, we believe this approach could work, and would offer the best solution. However, we would make the following four points:-

1. A further condition should be added, namely that the clients have not embarked on litigation or other form of dispute resolution.

2. We believe a wider restriction should be added to the effect that a client cannot consent to a firm acting in a case of client conflict unless the client demonstrates that he/she has taken separate legal advice on the conflict issue or has access to in-house counsel or is him/herself a qualified lawyer. We believe this is necessary to protect vulnerable clients and to ensure solicitors do not put pressure on such a client to obtain a waiver.

3. We think the reference to *"you"* in the second bullet point needs clarification. Wherever a firm acts under an exception to Rule 3.01, it is axiomatic that the individual solicitor acting for each client acts in the best interests of his/her client. However, it cannot be said that the overall/entire firm is acting in the client's best interest since it is also acting for another party. At present, the Core Duties in Rule 1 are directed at *"you"* and paragraph 1 of the Guidance makes clear this is a reference to the individual lawyer, not the firm, and use of the conflict exceptions do not therefore lead to a breach of the Core Duty. In contrast, the proposed Principles (and the corresponding requirements to *"act in the best interests of each client"*) are stated to apply to *"individuals and firms"* and to *"managers"* in a firm. It follows that it needs to be made clear that in the context of the conflict rules and where a firm legitimately acts for more than one client in relation to a matter, the *"you"* and the fourth *"Principle"* apply to the relevant individual lawyer acting for each client and not to the firm generally or any 'manager'.

4. It may be necessary to put some limit on a firm's ability to act for more than one defendant in criminal matters; we are not experienced in this field and merely raise it as an issue for others to consider.

We trust these are helpful comments. We take the view that if the wording in relation to conflicts is to be amended, it is essential that it is carefully thought through. We are concerned that the changes envisaged now are too rushed but are happy to work with the SRA in trying to find a solution which is both clear and useable.

Yours faithfully

David McIntosh
Chair
CLLS

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES AND REGULATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Chris Perrin (Clifford Chance LLP) (Chair)

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