Application made by the Solicitors Regulation Authority Board under Part 3 of the Schedule 4 to the Legal Services Act for approval of an amendment to rule 4 of the Solicitors Code of Conduct 2007.

The nature of the application

1. The application concerns an amendment to rule 4 of the Solicitors Code of Conduct 2007 and the associated guidance. The amendment rule as made by the SRA Board with the amendments in revision mode is attached as **Annex 1**. The amended guidance which accompanies the rule is attached at **Annex 2**. Full details of the amendments, including the reasons for the change, the consultation process and an analysis of the risk is set out in the paper which was considered by the SRA Board at its meeting on 4 May. This is attached at **Annex 3**. Attached at **Annex 4** is rule 4 in its current form.

Background

2. Rule 4 concerns the duty of confidentiality and how clients' confidential information must be protected. Details of the current regulatory arrangements governing the duty of confidentiality are as follows:

    (i) Rule 4 requires firms to keep the affairs of their clients confidential (unless the law requires or permits disclosure or the client consents).

    (ii) 4.03 protects confidential information which is particularly at risk. It does this by preventing a firm from acting for client A when the firm holds confidential information for client B which is material to client A's matter and where client A has an interest adverse to client B (usually where A is in dispute with B).

    (iii) 4.04 and 4.05 allow a firm to put in place an information barrier to protect client B's confidential information so that it can act for client A in the circumstances otherwise not allowed under 4.03. 4.04 permits this where both clients consent and agree the arrangements for protecting client B's information. 4.05 permits this without client B's consent where the firm is already acting for client A when the adversity becomes apparent, provided an information barrier which complies with the common law can be put in place. The common law lays down stringent requirements for the separation of information and personnel within the firm and information about what is required is set out in the guidance to rule 4 (paragraphs 41 – 44). The common law requirements set such a high test that it will usually only be very large firms with sophisticated IT systems and the ability to operate ring fenced teams that can take advantage of this exception.

The proposed change

3. The proposed amendment to rule 4 will allow a firm *to accept*, as well as *complete*, instructions for client A under the terms of 4.05. The rule was originally drafted in this way in 2006 but a last minute amendment by the Law Society's Council restricted its use to situations where the firm was already acting for client A. This was on the basis that it would be disruptive for client A to instruct another firm when their matter was partially completed but otherwise client B's consent should be required. Large firms have always argued, and the SRA Board now accepts, that it is unnecessarily restrictive to prevent firms accepting instructions without client B's consent if client B's information can be protected to the very high standard required by the law.

4. The request for the change is made on the following basis:

- it will bring the rule into alignment with the law;
- only large firms with sophisticated IT systems which can "ring fence" teams and their work and where separation of personnel is possible will be able to comply with the very high standards required by the common law for the use of information barriers;
- where there is a direct conflict between clients in a matter or related matter firms will be governed by rule 3 which deals with conflicts of interest and generally prevents them acting;
- it will prevent unnecessary restrictions on the freedom of clients to instruct the firm of their choice;
- it will prevent clients instructing firms tactically to limit the choice of legal representation to their market sector rivals; and
- the rule prevents firms in this country acting in situations where other professional advisers and overseas law firms are permitted to act.

The benefit the change will bring will be to sophisticated clients and the firms that act for them. It will enable clients much more freedom to instruct the firm of their choice with the expertise they require. Large firms which have expertise in a particular industry will attract clients which are competitors. Those clients will usually negotiate terms of business with their solicitors which make it clear the circumstances in which they would permit/prevent them acting for their competitors. Where they are permitted to act or where no restriction has been expressed the change will allow the use of information barriers.

The only risk to clients is that confidential information might leak. No system for protecting confidential information can rule out this risk entirely but the courts have set a very high standard to ensure that this risk is minimised. IT systems for the total separation of client's information and its use within a firm have been developed by specialised providers based on the legal requirements. These have been used by large firms for some years without apparent problems.

There have been two consultations on the proposed change (see paragraph 10). There were just 3 out of 38 respondents who were against the change following the first consultation and 4 out of 28 following the second consultation. However, the consultations also asked for views on a possible change to rule 3 and some of those responding did not express any view on the rule 4 changes but concentrated on the other proposal. (The rule 3 proposals were not proceeded with).The vast majority who expressed a view were nevertheless in favour. A selection of comments from those opposing the rule 4 change appear below:

- "We consider the best protection for clients is to require that where the firm no longer act for the old client that there has been a period of time between ceasing to act for the old client and starting to act for the new one"
- "I see no reason to change rule 4".
- "Our main concern is that this (the proposal) could encourage a more cavalier approach to conflict of confidentiality situations and result in firms taking on matters, which, if we were informed, we would not wish them to take on. Information barriers …should not be regarded as a fail safe in such scenarios."

No change was made to the draft rule following the consultations because the vast majority of respondents (including in-house legal teams) were in favour of the draft as presented and felt that the protections were adequate.

The regulatory objectives – how and why the change will promote, be neutral towards or be detrimental to each of the regulatory objectives

5. The amendment is largely neutral in relation to most of the regulatory objectives. It is beneficial in terms of access to justice in that it gives clients wider choice in terms of the firms they can instruct. It also supports the professional principles in that the use of a common law compliant information barrier will ensure that the affairs of clients are properly protected to the standards required by the law.

The better regulation principles and section 28 of the Act

6. The change represents a more proportionate approach to the protections applicable to the duty of confidentiality by allowing firms to act in circumstances where they are able to protect clients' information through the use of a common law compliant information barrier. The change also ensures that the rule is only targeted at preventing firms from acting in cases where the level of risk to confidential information is sufficiently high to require regulatory intervention.

The desired outcome of the alteration and how it will be assessed

7. The outcome will be assessed through a number of ways which include monitoring visits, supervision arrangements with firms (particularly City firms) and complaints. The SRA is currently working with City firms to become better informed about their systems and procedures, especially those related to risk management, and to work with them to identify possible risks to, for example, confidential information. Relationship managers have been appointed to take this work forward and this will be an ongoing process.

The extent to which the proposed alteration affects areas regulated by other approved regulators

8. This is only likely to affect the Bar Standards Board because the amendment affects situations where there is adversity between clients which, as the guidance to the rule states, is intended to mirror what is considered adverse for the purposes of the common law. This is where a party is, or is likely to become, the opposing party on a matter. The Bar Standards Board was consulted on the change and had no comment on the proposed amendment rule.

When will the amendment be implemented?

9. The amendment will be implemented as soon as approval is received from the LSB.

Full details of all consultation processes undertaken and responses received

10. A first consultation was held in relation to the policy of making the change between mid December 2008 and 31 March 2009. A subsequent consultation seeking comments on the draft amendment rule was held between 18 December 2009 and 12 February 2010. The consultations appeared on the SRA's website and were referred to in SRA e-mail updates to subscribers. Reports on the responses to both consultations appear on the SRA's website at

www.sra.org.uk/sra/consultations/conflict-confidentiality-rules-proposed-amendments-december-2008.page and www.sra.org.uk/sra/consultations/conflict-confidentiality-december-2009.page. A list of 2300 stakeholders were contacted direct by email. We also contacted direct groups representing consumers who are likely to be affected by the change (large corporations) such as the GC100 (which represents in house counsel to the FTSE 100 companies) and the Law Society's Commerce and Industry Group (in house lawyers working in commerce and industry) to seek their views.

Other explanatory material.

11. There is no further explanatory material that the SRA would wish to submit.

The contact details for this application are as follows:

Bronwen Still
Head of Policy
Solicitors Regulation Authority
Ipsley Court
Berrington Close
Redditch
Worcestershire
B98 OTD
Tel: 020 7320 5652
e-mail: bronwen.still@sra.org.uk

Rebecca Maxim
Policy executive
(same address)
Tel: 01527 517141(ext 3394)
Email: rebecca.maxim@sra.org.uk

Annex 1

[Draft] Solicitors' Code of Conduct (Confidentiality and Disclosure) Amendment Rule [2010]

Rule dated [date of approval by the Legal Services Board], commencing [date of approval by the Legal Services Board],

made by the Solicitors Regulation Authority Board under sections 31, 79 and 80 of the Solicitors Act 1974 and section 9 of the Administration of Justice Act 1985

with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007,

amending the Solicitors' Code of Conduct 2007.

1. The Solicitors' Code of Conduct 2007, Rule 4.05 (Exception to duty not to put confidentiality at risk by acting – without clients' consent), be amended as follows:

4.05 Exception to duty not to put confidentiality at risk by acting – without clients' consent

You may act, or continue to act, for a client ~~on an existing matter, or on a matter related to an existing matter,~~ in the circumstances otherwise prohibited by 4.03 above without the consent of the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, confidential information which is material to your client (in circumstances described in 4.03) but only if:

(a) it is not possible to obtain informed consent under 4.04 above from the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material confidential information;

(b) your client has agreed to your acting in the knowledge that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, information material to their matter which you cannot disclose;

(c) any safeguards which comply with the standards required by law at the time they are implemented are put in place; and

(d) it is reasonable in all the circumstances to do so.

2. This Amendment Rule shall come into force on [date of approval of the Legal Services Board].

Guidance to rule 4 – Confidentiality and disclosure

Introduction

1. This rule draws together, and describes the interaction of, the obligations created by the duties of confidentiality and disclosure. It also reinforces the common law duty whereby you and your firm must not put confidential information obtained from one client or former client at risk by acting adverse to the interests of that client or former client in a matter where the confidential information would be material. The rule also establishes that where a conflict between these duties arises the duty of confidentiality is paramount. The rule does recognise that confidential information can be protected by the use of information barriers with the consent of the client and, in very limited circumstances, without that consent.

2. The rule should be read in conjunction with rule 3 (Conflict of interests) as there are important cross-references contained in both the rules and the guidance.

The duty of confidentiality – 4.01 – general

3. Rule 4.01 sets out your fundamental duty to keep all clients' affairs confidential. It is important to bear in mind the distinction between this duty and the concept of law known as legal professional privilege. The duty of confidentiality extends to all confidential information about a client's affairs, irrespective of the source of the information, subject to the limited exceptions described below. Legal professional privilege protects certain communications between you and your client from being disclosed, even in court. However, not all communications are protected from disclosure and you should, if necessary, refer to an appropriate authority on the law of evidence.

4. The duty of confidentiality continues after the end of the retainer. After the client dies the right to confidentiality passes to the personal representatives, but note that an administrator's power dates only from the grant of the letters of administration.

5. Information received in the context of a joint retainer must be available between the clients. They must, however, all consent to any confidential information being disclosed to a third party. Information communicated to you when acting for one of the clients in relation to a separate matter must not be disclosed to the other client(s) without the consent of that client.

6. If you obtain information in relation to a prospective client you may still be bound by a duty of confidentiality, even if that prospective client does not subsequently instruct your firm. There may be circumstances, however, where you receive information where there is no real or genuine interest in instructing your firm and that information is unlikely to be confidential.

Insolvency

7. If a client becomes insolvent you will need to consider to whom you owe a duty of confidentiality. To some extent this will depend on whether your client is a company or an individual and you will need to refer to the relevant statutory authority, such as the Insolvency Act 1986. Where a statutory power overrides confidentiality you should consider carefully to what extent it is overridden. It may, for example, require you to disclose only certain categories of information or documents. You should ensure that any disclosure you make is strictly limited to what is required by the law.

Specific instances where confidentiality is required

8. (a) You must not disclose the contents of a will, even after the death of the testator, other than to, or with the consent of, the executor(s), until probate has been obtained.

(b) You must not disclose the address of a client without the client's consent.

(c) Where a lender asks for a conveyancing file and you have kept a joint file for both borrower and lender clients, you cannot, without the consent of the borrower, send the whole file to the lender, unless the lender can show to your satisfaction that there is a prima facie case of fraud. If the client does not consent, you should send only those parts of the file which relate to work done for the lender.

(d) You cannot, without the consent of the relevant client (or, if applicable, its administrator or similar officeholder), sell book debts to a factoring company because of the confidential nature of your bill. If your firm grants, as security to a lender, a charge over your firm's book debts, you need to ensure that you protect clients' confidential information should the lender need to enforce the security. Further advice on this issue can be obtained from the Professional Ethics Guidance Team.

(e) You should only share office services with other businesses if confidentiality can be ensured.

(f) If you outsource services such as word processing, telephone call handling or photocopying you must be satisfied that the provider of those services is able to ensure the confidentiality of any information concerning your clients. This would normally require confidentiality undertakings from the provider and checks to ensure that the terms of the arrangements regarding confidentiality are being complied with. Whilst you might have implied consent to confidential information being passed to external service providers, it would be prudent to inform clients of any such services you propose to use in your terms of business or client care letters.

Disclosure of confidential information in exceptional circumstances

9. Despite your duty of confidentiality you may be required to disclose confidential information in certain circumstances. A number of statutes empower government and other bodies, for example HM Revenue and Customs, to require any person to disclose documents and/or information. In the absence of the client's specific consent, you should ask under which statutory power the information is sought, consider the relevant provisions and consider whether privileged information is protected from disclosure. You should only provide such information as you are strictly required by law to disclose.

10. There are reporting requirements in relation to money laundering which override the duty of confidentiality and these are set out in the Proceeds of Crime Act 2002, the terrorism legislation and the Money Laundering Regulations 2007. These often require difficult judgements to be made as to whether or not a situation has arisen which would require you to report information to the relevant authorities. You should, however, always be mindful of the importance of your duty of confidentiality to your client. If you are uncertain as to whether you should report confidential information

you should consider seeking legal advice or contact the Professional Ethics Guidance Team for advice.

11. The Freedom of Information Act 2000 applies to the majority of public bodies and to local authorities. This Act establishes a right to know the content of records held by certain public bodies subject to certain exemptions such as legal professional privilege. The legal professional privilege exemption is conditional and can only be relied upon where the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In some cases, disclosure of matters which are on legal files may be required by law under the Act. The Information Commissioner's website provides Awareness Guidance upon this area of the Act.

12. You may reveal confidential information to the extent that you believe necessary to prevent the client or a third party committing a criminal act that you reasonably believe is likely to result in serious bodily harm.

13. There may be exceptional circumstances involving children where you should consider revealing confidential information to an appropriate authority. This may be where the child is the client and the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another adult against a child but refuses to allow any disclosure. You must consider whether the threat to the child's life or health, both mental and physical, is sufficiently serious to justify a breach of the duty of confidentiality.

14. In proceedings under the Children Act 1989 you are under a duty to reveal experts' reports commissioned for the purposes of proceedings, as these reports are not privileged. The position in relation to voluntary disclosure of other documents or solicitor-client communications is uncertain. Under 11.01, an advocate is under a duty not to mislead the court. Therefore, if you are an advocate, and have certain knowledge which you realise is adverse to the client's case, you may be extremely limited in what you can state in the client's favour. In this situation, you should seek the client's agreement for full voluntary disclosure, for three reasons:

    (a) the matters the client wants to hide will probably emerge anyway;

    (b) you will be able to do a better job for the client if all the relevant information is presented to the court; and

    (b) if the information is not voluntarily disclosed, you may be severely criticised by the court.

    If the client refuses to give you authority to disclose the relevant information, you are entitled to refuse to continue to act for the client if to do so will place you in breach of your obligations to the court.

15. You should reveal matters which are otherwise subject to the duty to preserve confidentiality where a court orders that such matters are to be disclosed or where a warrant permits a police officer or other authority to seize confidential documents. If you believe that the documents are subject to legal privilege or that for some other reason the order or warrant ought not to have been made or issued, you should normally, without unlawfully obstructing its execution, discuss with the client the possibility of making an application to have the order or warrant set aside. Advice may be obtained from the Professional Ethics Guidance Team.

16. Occasionally you may be asked by the police or a third party to give information or to show them documents which you have obtained when acting for a client. Unless the client is prepared to waive confidentiality, or where you have strong prima facie evidence that you have been used by the client to perpetrate a fraud or other crime and the duty of confidence does not arise, you should insist upon receiving a witness summons or subpoena so that, where appropriate, privilege may be claimed and the court asked to decide the issue. If the request is made by the police under the Police and Criminal Evidence Act 1984 you should, where appropriate, leave the question of privilege to the court to decide on the particular circumstances. Advice may be obtained from the Professional Ethics Guidance Team.

17. Certain communications from a client are not confidential if they are a matter of public record. For example, the fact that you have been instructed by a named client in connection with contentious business for which that client's name is on the public record is not confidential, but the type of business involved will usually be confidential.

18. You may reveal confidential information concerning a client to the extent that it is reasonably necessary to establish a defence to a criminal charge or civil claim by your client against you, or where your conduct is under investigation by the SRA, or under consideration by the Solicitors Disciplinary Tribunal.

19. In the case of a publicly funded client, you may be under a duty to report to the Legal Services Commission information concerning the client which is confidential and privileged.

Duty to disclose information to a client – 4.02

20. You have a duty to disclose all information material to your client's matter. Your duty is limited to information of which you are aware (and does not extend to information of which others in your firm may be aware) but is not limited to information obtained while acting on the client's matter. You will not be liable, therefore, for failing to disclose material information held by others within your firm of which you were unaware. There are, however, some circumstances where you should not disclose material information because it is not in the best interests of your client to do so or because disclosure is prohibited by law. These include situations where:

    (a) disclosure may be harmful to the client because of the client's physical or mental condition;

    (b) the provisions in the money laundering legislation effectively prohibit you from passing information to clients;

    (c) it is obvious that privileged documents have been mistakenly disclosed to you; or

    (d) you come into possession of information relating to state security or intelligence matters to which the Official Secrets Act 1989 applies.

21. Rule 4.02 also prevents you from disclosing information where this would breach your firm's duty of confidentiality to another client. The duty of confidentiality will always override the duty of disclosure.

22. You cannot, however, excuse a failure to disclose material information because to do so would breach a separate duty of confidentiality. Unless the retainer with the

client to which the information cannot be disclosed can be varied so that the inability to disclose is not a breach of duty (see note 25 below), you should refuse the instructions or, if already acting, immediately cease to act for that client. Any delay in ceasing to act is likely to increase the risk that you are liable for breach of duty.

23. You should not seek to pass the client to a colleague (who would not be bound by the same duty because he or she is personally unaware of the material information) unless the client agrees to this, knowing the reason for the transfer and, if you have already started to act for the client, agreeing that you are released from your duty to disclose up to the time when you personally cease to act for the client on that matter. Further, you should consider carefully whether, even if these conditions are satisfied, it is appropriate for any members of your firm to act. A firm which holds information which it cannot convey to a client but which, if known to that client, might affect the instructions to the firm in a material way will usually be in an invidious position and quite possibly unable to act in the best interests of the client - see rule 3 (Conflict of interests). See also note 15 of the guidance to rule 3.

24. The rule does not define "information which is material to that client's matter" but it must be information which is relevant to the specific retainer with the client and not just information which might be of general interest to the client. The information must also be more than of inconsequential interest to the client. It must, therefore, be information which might reasonably be expected to affect the client's decision making with regard to their matter in a way which is significant having regard to the matter as a whole.

25. The duty outlined above reflects and builds on the fiduciary duty which exists at common law. As 4.02(b)(ii) makes clear, however, you or your firm can expressly agree a different degree of duty. For example, a client might wish to instruct you because it knows that you act for other entities which operate in the same market and because it knows that you, therefore, understand the market. The client would not be surprised that you hold material market intelligence of a confidential nature from such other clients, and would not expect you to divulge it. The client might, therefore, agree that the usual duty to disclose would not apply.

Duties of confidentiality and disclosure conflicting – 4.03

26. Rule 4.03 sets out the duty not to put confidentiality at risk by acting for a client where to do so might put at risk the confidential information held by your firm for another client (or former client). The rule makes clear that the relevant circumstances of risk arise where:

    (a) the confidential information "might reasonably be expected to be material" to the client for whom you wish to act; and

    (b) the work for the client for whom you wish to act would be adverse to the interests of the client or former client to whom the duty of confidentiality is owed.

    The effect of note 26(b) is that you can act if the confidential information your firm holds is not reasonably expected to be material to your new client or is reasonably expected to be material to your new client but the interests of the clients are not adverse. The confidential information would, however, have to be protected and you and your firm would be answerable in law and conduct if it leaked.

27. The rule does not define adverse interest, but the intention is to mirror what is considered adverse for these purposes at common law (see *Bolkiah v KPMG* [1998] UKHL 52; [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215 and subsequent cases). Essentially, adversity arises where one party is, or is likely to become, the opposing party on a matter, whether in negotiations or some form of dispute resolution. For example, if your firm acted for a client in a criminal case in which the client was convicted of assault and the client's wife, unaware of the conviction, then wished you to represent her in divorce proceedings you would have to refuse the instructions. The confidential information held about the husband would be material to her case and, if so, her interests would be adverse to his.

28. In contrast, action which seeks to improve the new client's commercial position as against others generally within a particular sector would not be "adverse" to the interests of another client which is one such competitor. This should be the case even if there might be some risk that such a market competitor might seek to challenge the activities of the client before, for example, the competition authorities.

29. There may, however, be some circumstances where you are permitted to act under 4.03 but where other considerations will prevent you from doing so. It might be that you personally have confidential information from another client/former client which would be material to the new instruction but, since the instruction would not be adverse to the other client/former client, 4.03 does not bite. In this situation, the duty of confidentiality conflicts with your personal duty to disclose, and you should therefore not act, unless the new client has expressly agreed a lesser duty of disclosure (4.02(b)(ii)).

30. You may act, or continue to act, despite the prohibition in 4.03 if the confidential information can be protected through the use of appropriate safeguards in the circumstances set out in 4.04 and 4.05, and as more fully explained in the following guidance notes.

Acting with appropriate safeguards (information barriers) – 4.04 and 4.05

31. Rule 4.03 sets the basic standard that you should not normally act on a matter where material confidential information is held elsewhere in the firm and where the matter would be adverse to the interests of the client/former client to whom the duty of confidentiality is owed. To act in these circumstances might increase the risk that the confidential information could be put at risk. The firm can act if the confidential information is not material to the instructions. For guidance on the meaning of "material" see note 24 above.

32. Rules 4.04 and 4.05 set out two situations where you can act even when material confidential information is held by another member of the firm. Both recognise ~~for the first time~~ that it can be acceptable to use information barriers. The first situation is where the party to whom the duty of confidentiality is owed consents. The second situation is where ~~you are already acting and~~ consent has not been given or cannot be sought.

33. Where the client consents as envisaged by 4.04 there is scope for more flexibility in the arrangements for the information barrier as the safeguards can be discussed with, and agreed by, the client. It is important, nonetheless, that the safeguards are effective to avoid a real risk of disclosure. A firm will be liable if confidential information does leak in breach of that agreement.

34. Rule 4.04 requires "informed consent" and one of the difficulties with seeking such consent of the client is that it is often not possible to disclose sufficient information about the identity and business of the other client without risk of breaching that other client's confidentiality. You will have to decide in each case whether you are able to provide sufficient information for the client to be able to give "informed consent". Every situation will be different but generally it will be only sophisticated clients, for example, a corporate body with in-house legal advisers or other appropriate expertise, who will have the expertise and ability to weigh up the issues and the risks of giving consent on the basis of the information they have been given. If there is a risk of prejudicing the position of either client then consent should not be sought and you and your firm should not act. It may, however, be possible to give sufficient information to obtain informed consent even if the identity of the other client(s) and the nature of their particular interest(s) are not disclosed. Wherever possible you should try to ensure that the clients are advised of the potential risks arising from your firm acting before seeking their consent.

35. In the case of sophisticated clients (such as those referred to in note 34 above) only, it may be possible to seek consent to act in certain situations at the start of and as a condition of your retainer and to do so through standard terms of engagement. For example, a sophisticated client may give its consent in this way for a firm to act for a future bidder for that client if, when the bidder asks the firm to act, a common law compliant information barrier is put in place to protect any of the client's confidential information which is held by the firm and which would be material to a bidder.

36. Where the client does not consent or does not know about the arrangements, an extremely high standard in relation to the protection of confidential information must be satisfied. In this situation, as has been demonstrated in recent case law, the client can have the firm removed from acting with all the attendant disruption for the other client, if there is shown to be a real risk of confidential information being leaked.

37. Where your firm holds material confidential information you may ~~not without consent take on new instructions adverse to the interests of the client or former client to whom the duty of confidentiality is owed (4.04). However, where you are already acting and discover that your firm has - or comes to possess - such information, you may continue to~~ act ~~on that matter, or a related matter,~~ in circumstances where the party to whom the duty of confidentiality is owed refuses consent or cannot be asked (4.05). This may be because it cannot be contacted or because making the request would itself breach confidentiality. You should always seek consent when you can reasonably do so.

38. Where under 4.04 your firm has erected an information barrier without the consent of the party to whom the duty of confidentiality is owed, the firm should try to inform that party as soon as circumstances permit, and outline the steps which have been taken to ensure confidentiality is preserved. If some material points (such as the name of the client to whose matter the confidential information might be relevant, or the nature of that matter) still cannot be divulged for reasons of confidentiality and it is reasonably supposed that that party would be more concerned at news of your retention than if fuller details could be given, it might be appropriate to continue to wait before informing that party. There may be circumstances, however, where it is impossible to inform that party.

39. Where two or more firms amalgamate, or one firm takes over another, the new firm needs to ensure that this does not result in any breach of confidentiality. If the firm holds confidential information that is material to a matter being handled for another client, the firm must be able to ensure that the confidential information is protected

by ceasing to act for both clients, or ceasing to act for the client to whom the information is relevant, or by setting up adequate safeguards in accordance with either 4.04 or 4.05.

40. Confidential information may also be put at risk when partners or staff leave one firm and join another. This might happen where, for example, an individual joins a firm which is acting against one of the individual's former clients. An individual joining a new firm could not act personally for a client of the new firm where to do so would put at risk confidential information which he or she personally possesses about a client of the previous firm. In addition, the individual and the firm which the individual is joining must ensure that adequate safeguards are put in place in accordance with 4.04 or 4.05 to ensure that confidential information held by that individual is safeguarded.

Safeguards for information barriers

41. Rigid safeguards for information barriers have not been enshrined in the rules. Where 4.04 applies (i.e. consent has been given), it is for the firm to agree the appropriate safeguards, but it would normally be necessary to satisfy note 44 (a) to (f). Some of note 44 (g) to (n) may also be applicable. Where 4.05 applies, the firm must satisfy the requirements of common law and at least most, if not all, of note 44 (a) to (n) might be essential.

42. If, at any stage after an information barrier has been established, it becomes impossible to comply with any of the terms, the firm may have to cease to act. The possibility of this happening should always be discussed when instructions are accepted so that the client is aware of this risk, or addressed with reasonable prominence in standard terms of engagement.

43. Firms will always need to consider whether it is appropriate in any case for an information barrier to be used, and also whether the size or structure of a firm means that it could not in any circumstances be appropriate. It is unlikely that, for example, safeguards could ever be considered adequate where:

    (a) a firm has only one principal and no other qualified staff;

    (b) the solicitor possessing, or likely to possess, the confidential information is supervised by a solicitor who acts for, or supervises another solicitor in the firm who acts for a client to whom the information is or may be relevant; or

    (c) the physical structure or layout of the firm is such that confidentiality would be difficult to preserve having regard to other safeguards which are in place.

44 The following note 44 (a) to (f) would normally be appropriate to demonstrate the adequacy of an information barrier when you are proposing to act in circumstances set out in 4.04. It might also be appropriate to agree some or all of note 44 (a) to (f) where you are acting with consent in accordance with 4.05:

    (a) 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;

    (b) 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;

(c) that no member of the restricted group is managed or supervised in relation to that matter by someone from outside the restricted group;

(d) 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;

(e) 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

(f) that only members of the restricted group have access to documents containing the confidential information.

The following arrangements may also be appropriate, and might in particular be necessary where acting in circumstances set out in 4.05:

(g) 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;

(h) that confidential information on computer systems is protected by use of separate computer networks or through use of password protection or similar means;

(i) 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;

(j) 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;

(k) 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;

(l) that the firm identifies a specific partner or other appropriate person within the restricted group with overall responsibility for the information barrier;

(m) that the firm provides formal and regular training for members of the firm on duties of confidentiality and responsibility under information barriers or will ensure that such training is provided prior to the work being undertaken; and

(n) that the firm implements a system for the opening of post, receipt of faxes and distribution of e-mail which will ensure that confidential information is not disclosed to anyone outside the restricted group.

"*Member*", in the context of this note, applies to principals and all staff members including secretaries, but does not apply to any staff member (not having any involvement on behalf of any relevant client) whose duties include the maintenance of computer systems or conflict/compliance procedures and who is subject to a

general obligation of confidentiality in relation to all information to which he or she may have access in the course of his or her duties.

This guidance should not be read as a representation that compliance with note 44 (a) to (n) above will necessarily be considered sufficient at common law.

45. Where a firm proposes to erect an information barrier (whether under 4.04 or 4.05) it must first inform the client for whom it acts - or wishes to act - on the matter to which the confidential information might be material. The firm should not act - or continue to act - without that client's consent, with that client understanding that the firm holds information which might be material and which will not be communicated to it; see 4.04(1)(a) and 4.05(b). Although the rule does not require consent to be in writing, it is recommended that this be obtained for evidential purposes to protect both your client's position and your own position.

SRA BOARD
4 May 2010

CLASSIFICATION - PUBLIC

Duty of Confidentiality – Amendment Rule

Summary

1. This paper invites the Board to amend rule 4.05 of the Solicitors Code of Conduct 2007 as set out in the [Draft] Solicitors' Code of Conduct (Confidentiality and Disclosure) Amendment Rule [2010] at **Annex 1**. The current rule 4 is attached in its entirety at **Annex 2**. Amended guidance to the rule is attached for noting at **Annex 3.**

Background

2. Rule 4 deals with protecting confidential information. The key requirement is that firms, and individuals within those firms, must keep the affairs of their clients confidential. The rule, at 4.03, deals specifically with one situation where confidentiality is particularly at risk and prohibits firms acting where that situation arises. In a nutshell, 4.03 prevents a firm acting for client B if:

   - that firm holds confidential information for client A; and
   - A's information is reasonably expected to be material to B's retainer; and
   - in relation to the instructions from B, those instructions are likely to be adverse to A's interests.

   Adversity would arise if B was likely to be in dispute with A.

3. There are two exceptions to the 4.03 prohibition which are set out at 4.04 and 4.05. The first is when both clients give informed consent and agree the measures to protect the confidential information which is at risk. The second is when it is not possible to get the informed consent of the client whose information needs to be protected, but the firm has already started acting for the new client when the problem becomes apparent. In these circumstances, the rule allows the firm *to continue* acting provided an information barrier that meets the very stringent common law requirements is put in place.

4. The proposed change, which is reflected in the Amendment Rule, was initiated by the City of London Law Society (CLLS) and has been agreed by the Standards Committee following two consultations. It extends this second exception to allow firms *to accept* instructions in the knowledge that it may not be possible to get informed consent from the client whose information requires protection. This could be because it is no longer possible to contact the client or because it is not possible to give sufficient information to the client to get "informed consent" because of the duty of confidentiality to the new client.

5. The proposed change is subject to the condition that the common law requirements concerning information barriers are complied with. For this reason, 4.05 would remain an exception which would be restricted to firms capable of having institutionalised structures and systems for putting these barriers in place. Generally, this would be City firms. It benefits their clients by preventing the clients' freedom to instruct the firm of their choice from being unnecessarily restricted by a firm having to decline to act where it would be in a position to put in place a legally compliant information barrier.

The consultation process

6. There have now been two consultations on rules 3 (conflicts of interest) and 4 on changes which were proposed by the CLLS. The initial consultation considered the policy issues, including the risks and benefits, affecting the proposals. In the light of the responses and the significant support for the changes to both rules 3 and 4, it was decided to proceed with a second consultation inviting views on draft rules. Following the second consultation, which ended in mid-February 2010, the Standards Committee decided not to proceed with the changes to rule 3 where the responses raised serious questions concerning the associated risks. Despite the impending move to an outcomes focused Code in the latter half of 2011, it was felt that the rule 4 change removed an unnecessary restriction on when clients could instruct firms and should go ahead. It was also a relaxation which was in line with an outcomes focused approach as it gave firms greater flexibility to decide when they could properly use information barriers. Further, the change would align the rule with the law.

7. Most of those responding to both consultations tended to concentrate on the rule 3 proposals. In relation to the second consultation, 14 of the 28 responses failed to comment in any way on rule 4. Of the remainder, 10 were in favour and 4 against. There were some minor drafting points made, particularly on the subject of whether it was intended that the exemption could be used by firms when the client whose information was being protected expressly refused consent. (It could, but that would largely be a commercial decision for the firm.)

The risk of making the change and how this is dealt with

8. The risk of making the change is that one client's confidential information could leak within a firm to another client where it could be used by that other client against the first client's interests. However, rule 4.05 already permits information barriers, where the confidentiality of one client would otherwise be put at risk, to allow a firm *to complete* a matter for another client without the informed consent of the first client whose information has to be protected. This is on the basis that the stringent common law requirements that firms have to comply with are sufficient to protect confidential information in this high risk situation that the prohibition in 4.03 was designed to deal with.

9. At the time that rule 4 was made in 2006 it was decided, however, that firms should not be allowed *to accept* instructions without informed consent from the client whose information was being protected, even if the firm could put a legally compliant

information barrier in place. This was because it was felt that the client whose work was partially completed could be put at much greater disadvantage by being forced to instruct another firm than the potential client for whom no work had been undertaken which was merely denied the firm of its choice.

10. The regulatory argument in support of the change is that if the legal requirements can be met it is illogical to have a distinction which allows a firm to complete instructions but not accept instructions using an information barrier. Further, since the courts laid down clear markers as to what was required in terms of an information barrier, large firms have adapted their structures and procedures to comply with the law. In this way, the risks have been reduced further.

Recommendations

11. That the SRA Board makes the [Draft] Solicitors' Code of Conduct (Confidentiality and Disclosure) Amendment Rule [2010] in the terms set out in Annex 1.

Annex 1	The [Draft] Solicitors' Code of Conduct (Confidentiality and Disclosure) Amendment Rule [2010]
Annex 2	Rule 4, Solicitors' Code of Conduct 2007
Annex 3	Associated guidance to rule 4

Author	Bronwen Still
Date	16 April 2010

This paper is for decision

SRA BOARD
4 May 2010

Annex 2

Introduction

Rule 4 sets out provisions for dealing with the protection of clients' confidential information and the duty of disclosure owed to clients.

Rule

4.01 Duty of confidentiality

You and your firm 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).

4.02 Duty of disclosure

If you are a lawyer or other fee earner you must disclose to a client for whom you are personally acting on a matter, whether individually or as one of a group, or whose matter you are personally supervising, all information of which you are aware which is material to that client's matter regardless of the source of the information, subject to:

(a) the duty of confidentiality in 4.01 above, which always overrides the duty to disclose; and

(b) the following where the duty does not apply:

(i) where such disclosure is prohibited by law;

(ii) where it is agreed expressly that no duty to disclose arises or a different standard of disclosure applies; or

(iii) where you reasonably believe that serious physical or mental injury will be caused to any person if the information is disclosed to a client.

4.03 Duty not to put confidentiality at risk by acting

If you are a lawyer or other fee earner and you personally hold, or your firm 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:

(a) that information might reasonably be expected to be material; and

(b) 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 in accordance with 4.04 and 4.05 below.

4.04 Exception to duty not to put confidentiality at risk by acting - with clients' consent

(1) You may act, or continue to act, in the circumstances otherwise prohibited by 4.03 above with the informed consent of both clients but only if:

(a) the client for whom you act or are proposing to act knows that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material

information (in circumstances described in 4.03) in relation to their matter which you cannot disclose;

(b) you have a reasonable belief that both clients understand the relevant issues after these have been brought to their attention;

(c) both clients have agreed to the conditions under which you will be acting or continuing to act; and

(d) it is reasonable in all the circumstances to do so.

(2) "Both clients" in the context of means:

(a) an existing or former client for whom your firm, or a lawyer or other fee earner of your firm, holds confidential information; and

(b) an existing or new client for whom you act or are proposing to act and to whom information held on behalf of the other client is material (in circumstances described in 4.03 above).

(3) If you, or you and your firm, have been acting for two or more clients in compliance with rule 3 (Conflict of interests) and can no longer fulfil its requirements you may continue to act for one client with the consent of the other client provided you comply with 4.04.

4.05 Exception to duty not to put confidentiality at risk by acting – without clients' consent

You may continue to act for a client on an existing matter, or on a matter related to an existing matter, in the circumstances otherwise prohibited by 4.03 above without the consent of the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, confidential information which is material to your client (in circumstances described in 4.03) but only if:

(a) it is not possible to obtain informed consent under 4.04 above from the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material confidential information;

(b) your client has agreed to your acting in the knowledge that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, information material to their matter which you cannot disclose;

(c) any safeguards which comply with the standards required by law at the time they are implemented are put in place; and

(d) it is reasonable in all the circumstances to do so.

4.06 Waivers

In spite of 22.01(1) (Waivers), the Solicitors Regulation Authority Board shall not have power to waive any of the provisions of this rule.

SRA BOARD
4 May 2010

Board/committee risk assessment

Summary of issues for consideration

(What are the key issues arising from this paper/proposal/strategy?)

The amendment to rule 4 would widen the circumstances in which firms would be able to use common law compliant information barriers.

Report is for

☐ Noting/information ☒ Decision ☐ Approval

Business/operational risk

(What are the risks and benefits of proceeding with this paper / proposal / strategy?)

Failure to proceed with the amendment may undermine the SRA's relationship with the City of London Law Society (CLLS) as the Standards Committee's decision to proceed with the change is in the public domain.

Finance

(What are the financial implications?)

None apparent.

Communications

(What are the communications implications?)

We will publicise this change in the legal media, through our website, and in Regulation Update.

Equality and diversity implications

(What are the potential implications/impact on equality, diversity and human rights?)

There are none apparent as this is a change which will affect sophisticated clients and large firms and which reflects the law.

Author Bronwen Still

Date of report/paper being drafted 16th April 2010

Introduction

Rule 4 sets out provisions for dealing with the protection of clients' confidential information and the duty of disclosure owed to clients.

Rule

4.01 Duty of confidentiality

You and your firm 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).

4.02 Duty of disclosure

If you are a lawyer or other fee earner you must disclose to a client for whom you are personally acting on a matter, whether individually or as one of a group, or whose matter you are personally supervising, all information of which you are aware which is material to that client's matter regardless of the source of the information, subject to:

(a) the duty of confidentiality in 4.01 above, which always overrides the duty to disclose; and

(b) the following where the duty does not apply:

(i) where such disclosure is prohibited by law;

(ii) where it is agreed expressly that no duty to disclose arises or a different standard of disclosure applies; or

(iii) where you reasonably believe that serious physical or mental injury will be caused to any person if the information is disclosed to a client.

4.03 Duty not to put confidentiality at risk by acting

If you are a lawyer or other fee earner and you personally hold, or your firm 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:

(a) that information might reasonably be expected to be material; and

(b) 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 in accordance with 4.04 and 4.05 below.

4.04 Exception to duty not to put confidentiality at risk by acting - with clients' consent

(1) You may act, or continue to act, in the circumstances otherwise prohibited by 4.03 above with the informed consent of both clients but only if:

(a) the client for whom you act or are proposing to act knows that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material information (in circumstances described in 4.03) in relation to their matter which you cannot disclose;

(b) you have a reasonable belief that both clients understand the relevant issues after these have been brought to their attention;

(c) both clients have agreed to the conditions under which you will be acting or continuing to act; and

(d) it is reasonable in all the circumstances to do so.

(2) "*Both clients*" in the context of means:

(a) an existing or former client for whom your firm, or a lawyer or other fee earner of your firm, holds confidential information; and

(b) an existing or new client for whom you act or are proposing to act and to whom information held on behalf of the other client is material (in circumstances described in 4.03 above).

(3) If you, or you and your firm, have been acting for two or more clients in compliance with rule 3 (Conflict of interests) and can no longer fulfil its requirements you may continue to act for one client with the consent of the other client provided you comply with 4.04.

4.05 Exception to duty not to put confidentiality at risk by acting – without clients' consent

You may continue to act for a client on an existing matter, or on a matter related to an existing matter, in the circumstances otherwise prohibited by 4.03 above without the consent of the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, confidential information which is material to your client (in circumstances described in 4.03) but only if:

(a) it is not possible to obtain informed consent under 4.04 above from the client for whom your firm, or a lawyer or other fee earner of your firm, holds, or might hold, material confidential information;

(b) your client has agreed to your acting in the knowledge that your firm, or a lawyer or other fee earner of your firm, holds, or might hold, information material to their matter which you cannot disclose;

(c) any safeguards which comply with the standards required by law at the time they are implemented are put in place; and

(d) it is reasonable in all the circumstances to do so.

4.06 Waivers

In spite of 22.01(1) (Waivers), the Solicitors Regulation Authority Board shall not have power to waive any of the provisions of this rule.