

# Model Article on Conflict of Interests

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1. Except as otherwise provided in paragraph 4, a lawyer may not assist or act on behalf of two or more clients if there is a conflict between the interests of those clients. A lawyer may not assist or act on behalf of a client if there is a conflict between the interests of his or her client and his or her own interests or if the lawyer had handled the matter as a public servant, or as a judge, an arbitrator or mediator, or in the capacity of resolving disputes in any other form of alternative dispute resolution, or in any other comparable capacity.

**This obligation also applies whenever there is a significant risk of a conflict of interests.**

*General remark: A lawyer devoted only to act in the best interest of his/her client, free of any conflicting interests, is indispensable for the trust of the client in his/her lawyer; also in the public perception, a lawyer is expected to avoid even the slightest appearance of representing conflicting interests. Therefore, it is a widely accepted key principle of the lawyer's profession that a lawyer has to avoid representing conflicting interests of his/her clients. Only a lawyer free of conflicting interests is able "to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs" (cp. ECJ, C-550/07 (Akzo Nobel), Note 42). The Conflict of Interest-issue is closely linked to other central key principles of the legal profession, such as confidentiality and independence.*

*Para 1 describes the general principle: a lawyer is not only excluded to assist a client if there actually is an existing conflict of interests but also if there is a significant risk that a conflict of interest may arise in the future. "Significant" risk means that a (future) conflict of interests is likely. For that reason, according to paragraph 3, the lawyer has the duty to assess a conflict of interest at all time.*

*It is of no relevance, if the conflict arises between the interests of the clients or between the interests of the client and those of the lawyer.*

*However, one should bear in mind that under this clause not all and any (potential) conflicting interest exclude a lawyer from representing one or more clients: for example, in a client-lawyer relationship there are inherent conflicting interests, f.e. with respect to the fees, the content of the engagement contract, the response time, etc. Thus follows that with respect to a conflict with personal interests of a lawyer, a lawyer is not allowed to assist a client if the personal interests of the lawyer are or might be affected by those interests of the client which ought to be represented/defended by the lawyer by performing his/her duties under the mandate with the client. Such a conflict may arise for example, if the lawyer shall assist the client in a dispute with a company in which the lawyer holds a significant share or if the lawyer shall represent a client to*

*obtain a building permission on a property which is adjacent to a property belonging to the client's wife who raises objections against the building project*

*The same is true with respect to conflicting clients' interests: if f.e. a law firm represents two clients which are competitors, there can be a wide variety of conflicting clients' interests which do not per se exclude the law firm to continue represent these two competitors. With respect to conflicting interests between two or more clients, a lawyer is precluded from assisting two or more clients only if the conflict arises in connection with those interests which ought to be represented by the lawyer. Thus follows that a lawyer cannot represent the plaintiff and the defendant in the same court case. Moreover, a lawyer who assisted client A in contract negotiations with client B cannot represent client B against the former client A in a dispute which arises out of this contract, even if this dispute arises only several years later. On the other hand, a lawyer can represent two competitors in non-related matters against third parties, f.e., a lawyer is allowed to represent two competitors in a case challenging the validity of a national statute which is of relevance for both competitors or to collect money for both competitors from third parties. A lawyer can be allowed to represent client B against client A in a matter which is not related with another matter in which the lawyer is or was representing client A, however, subject to the lawyer complying with all his/her other duties, esp. the confidentiality obligation.*

*By using the broad terms "assist or act" it is made clear that any kind of representation by a client is covered, be it litigation/arbitration or out-of-court representation.*

*The second sentence of para 1 contains a non-exhaustive list of examples of conflicts of interests: in all these cases the lawyer is not allowed to assist a client.*

*Apart from para 4, lit. (b), this clause does not provide for an exemption if the clients waive a conflict by giving their "informed consent".*

**2. A lawyer may not assist or act on behalf of a client if this conflicts with a duty which he or she owes to a former client.**

*Para 2 underlines the close relationship of the conflict-of-interest issue with the other duties of a lawyer, esp. the confidentiality and the independence, be it a deontological obligation or a contractual obligation. To be free from a conflict of interests is a necessary but not the only condition for a lawyer to act or to assist a client. Cp also Article [●] on Confidentiality which contains a corresponding provision.*

**3. The lawyer has the duty to assess the risk of a conflict of interests at any time.**

*Bearing in mind the importance of the principle that a lawyer has to act free of any conflicts of interest as defined under para 1, para 3 obliges a lawyer to continuously monitor if a conflict arises. Generally spoken, the lawyer is more qualified than a client to assess the risk of conflicts-of-interests and to recognize any such conflict. Consequently, the lawyer has the duty to assess the (risk of) conflicting interests not only once, before accepting a mandate, but also during the mandate.*

*There can be various reasons that a conflict arises only later on, whereby it is irrelevant, if the reason derives from the sphere of the client, from the sphere of the lawyer or from new developments in the matter: f.e., a change of the majority shareholder in a client may cause a conflict with another client of the lawyer; or a lawyer, representing client A in court proceedings against B, joins another law firm which represents B in these court proceedings; or, a law firm*

*represents client A in criminal proceedings, during these proceedings it evolves that an employee of the law firm is involved in this criminal act.*

**4. A lawyer may assist or act on behalf of two or more clients in situations of conflict of interests or potential conflict of interests only if:**

- (a) the different clients have a common interest in relation to that matter; and**
- (b) the clients have given their informed consent; and**
- (c) the duty of confidentiality is not put at risk; and**
- (d) the lawyer considers that the conflict of interests or potential conflict of interests does not prevent him or her from acting in the best interests of all such clients.**

*A conflict of interest is much broader than a conflict. Having a common interest in a certain matter does not mean that the individual interests of a person involved cannot conflict with the individual interest of another person involved.*

*This f.e. is almost always the case when two or more persons want to make a contract. The contract is meant to regulate the conflicting interests of the parties involved. The parties that make a contract certainly also have a common interest, but this does not exclude that they also have in that same matter personal interests that might be conflicting with the personal interests of the other. In general one can say that the individual rights of a contracting party are better served by being defended by a lawyer that has only to care for the individual rights of his or her client. But sometimes the involved parties only seek a balance between their individual rights and they trust that a common lawyer will seek this balance and the common interests of both clients.*

*Parties with conflicting interests in litigation do not have this common interest. A lawyer can never defend parties with opposing interests in litigation. Parties in a conflict might have a common interest to resolve the conflict in an ADR. A lawyer acting as a dispute resolver is however not acting as a lawyer.*

*The 4 conditions have to be realized before a lawyer can act for persons with conflicting interests:*

- a) There has to be a common interest.*
- b) There has to be an informed consent.*
- c) Even when a) and b) are realized the lawyer cannot act when this would mean that he has to disclose confidential information, or when the knowledge of confidential information that he or she cannot disclose prevents him or her from acting in the best interest of all the parties involved.*
- d) A lawyer that acts for more than one party must defend equally the rights and interests of all the parties involved. If the conflict between these interests prevents him or her from doing so, he or she cannot accept the case or has to cease acting.*

*All of this section of the Model Code of Conduct has regard to the basic principles set out in Paragraph 1. In most ordinary circumstances it will not be possible for the same lawyer or law firm to advise two or more clients in relation to the same matter. It will never be possible for a lawyer or law firm to act for any client where the own interests of the instructed lawyer or law firm conflict with those of the client.*

*The rule is designed to avoid conflicts of interest, to ensure that those entitled to truly independent advice understand this and are empowered to receive it. Furthermore, the rule seeks to avoid*

*circumstances which might prejudice professional secrecy and / or place legally privileged or simply confidential information at risk.*

*Para 4 sets out to deal with those rare circumstances when it may be possible for a single lawyer or law firm to act for more than one party in the same matter.*

*It must be stressed that the ordinary and simple position is that it would not be right to do so (and indeed some member bars and law societies have regulatory rules prohibiting such actions – NB nothing in this Para obviates the needs for member bars and law societies to comply with regulations or statutes applicable in their own jurisdictions).*

*Para 4 can take effect only in situations where the best interests of two or more clients with their informed mutual understanding and continuing consent outweigh the risks arising from a conflict of interest.*

*Para 4 creates an obligation to monitor the balance between the best interests of the clients and the risks or implicit risks in continuing to act where there may be a conflict or where professional secrecy, legally privileged communications or simply confidential information may be placed at risk. It is imperative that lawyers who seek to act in such circumstances review the best interests of the clients on a continuing basis and cease to act pursuant to Para 4 as soon as that monitoring shows the mutual benefit of the clients is no longer outweighed.*

- 5. If a conflict of interests arises in the course of the conduct of matters for two or more clients or the conditions of paragraph 4 are no longer met, a lawyer must cease to act for all these clients in those matters.**

*Para 5 is the necessary consequence of para 3 and makes clear that a lawyer must be free of any conflict of interests from the beginning until the very end of the mandate.*

*Whenever later on such conflict of interests arises the lawyer must cease to act for all clients in all matters which give rise to the conflict of interest: thus follows that the lawyer is not allowed to cease to act only for one of the affected clients and to continue to assist the other client.*

- 6. Lawyers practising in the same firm or lawyers and other professionals practising in the same firm are considered as one single entity for the purpose of complying with their duty not to act when there is a conflict of interests.**

*Para 6 applies the foregoing provisions in para 1 – para 5 to lawyers practicing in associations. Thus follows for example that a law firm shall cease to act when there is such a conflict of interest between two clients of the law firm, even if different lawyers in the law firm are handling the cases for each of the client.*

*This principle also applies to multidisciplinary partnerships (MDP); the lawyers in such MDP's, therefore, are responsible to safeguard that all members of the partnership, also those of the other profession, observe this rule.*