

# **Global Conflicts of Interest Standards - Bringing Confidence to the Users of Surveying Related Activities**

**Nigel Sellars, England**

**Key words:** Conflict, Interest, Confidentiality, Transparency

## **SUMMARY**

Conflicts of interest cut across the surveying profession regardless of geography or specialism. If conflicts arise and are not appropriately identified and managed, the integrity of the profession and those in it are at stake. What constitutes a conflict, and when should a professional step aside from acting, or proceed with appropriate management systems in place? There are no currently agreed global principles in this area.

Robust professional standards facilitate public confidence in those they employ not to mention surveying related professionals and firms to be competitive in their marketplaces. Without public confidence in the professionalism of those providing surveying services, the long-term value of surveyors and those acting within this industry will be jeopardised.

It is important that practitioners in this sector continue to provide an environment allowing new firms to be established and new practitioners to enter the profession. Existing practitioners also need to be allowed to grow, innovate and continue to provide a range of competitive services to those who need them. At the same time, consumer protection and the confidence in the profession are critical.

The object of the exercise is to give confidence to the users of surveying related services, especially regarding concerns over perceived and actual conflicts of interest. Without a standardised, high level approach – the chances of public confidence being undermined are high. A working group has formed to look at this issue and to propose a standardised approach to the identification and handling of conflicts of interest. This paper provides some helpful definitions, suggested mandatory requirements for surveyors and associated commentary as to how to achieve the mandatory requirements.

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## 1. CONFLICTS OF INTEREST

### 1.1 Suggested mandatory requirements

a) No surveyor or surveying firm shall advise or represent a client where doing so would involve a Conflict of Interest or a significant risk of a Conflict of Interest; other than where all of those who are or may be affected have provided their prior Informed Consent. Informed Consent may be sought only where the surveyor or surveying firm is satisfied that proceeding despite a Conflict of Interest is:

i) in the interests of all of those who are or may be affected and

ii) is not prohibited by law,

and that the conflict will not prevent the surveyor or surveying firm from providing competent and diligent advice to those that may be affected.

b) Every surveyor shall:

i. identify and manage Conflicts of Interest and

ii. keep records of the decisions made in relation to whether to accept (and where relevant, to continue) individual professional assignments, the obtaining of Informed Consent, and any measures taken to avoid Conflicts of Interest arising.

c) Every surveying firm shall have in place effective systems and controls appropriate to the size and complexity of their business to enable them to ensure that the firm and its employees comply with the mandatory requirements.

## 2. CONFIDENTIAL INFORMATION

2.1 Surveyor and surveying firm must maintain confidentiality of Confidential Information unless disclosure is required or permitted by law, or the surveyor or surveying firm concerned can demonstrate that the relevant party consented to the disclosure before it was made.

2.2 Every surveying firm shall have in place effective systems and controls appropriate to the size and complexity of the firm.

## 3. DEFINITIONS USED

3.1 The key terms have the following meanings.

3.2 '*Conflict of Interest*' means:

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a. a situation in which the duty of surveyor or a surveying firm to act in the interests of a client or other party in a professional assignment conflicts with a duty owed to another client or party in relation to the same or a related professional assignment (a '*Party Conflict*')

b. a situation in which the duty of an surveyor or a surveying firm to act in the interests of a client in a professional assignment conflicts with the interests of that same surveyor or within a surveying firm (an '*Own Interest Conflict*')

c. a conflict between the duty of an surveyor or within a surveying firm to provide material information to one client, and the duty of that surveyor or within a surveying firm under to another client keep that same information confidential (a '*Confidential Information Conflict*').

3.3 '*Confidential Information*' means: confidential information, whether held or disseminated electronically, verbally or in hard copy, related to and obtained during the course of a professional assignment.

3.4 '*Information Barrier*' means: the physical and/or electronic separation of individuals (or groups of individuals) within the same firm that prevents confidential information passing between them.

3.5 '*Informed Consent*' means: consent given willingly by a party who may be affected by a Conflict of Interest

#### **4. GENERAL COMMENTARY NOTES**

4.1 These commentary notes are advisory in nature, and contain general guidance on how to adhere to the mandatory professional statement.

4.2 The most important reason for avoiding conflicts of interest is to prevent anything getting in the way of your duty to advise and represent each client objectively and independently, without regard to the consequences to another client, any third party, or your own interests and that the clients and in turn the public can be confident you are doing so.

4.3 Consumer protection and the development of the profession for public advantage are at a surveyors' core. Accordingly, when you are applying it in practice, you should not interpret the guidance in a narrow or purely technical manner. You should always consider whether your proposed course of action might:

- reasonably be perceived to imply a lack of integrity:
  - cause embarrassment to your profession or
  - mean that you are unable to advise and represent each client objectively and independently.
- If there is a material risk of your proposed course of action having such an effect, you must not proceed.

4.4 This guidance does not allow you to choose whether you can proceed despite a Conflict of Interest or a significant risk of one: it prohibits you from proceeding, unless you obtain prior Informed Consent from all affected parties.

4.5 Where a Conflict of Interest or a significant risk of one exists, you should only consider proceeding with the work (and seek Informed Consent in order to proceed) if you are satisfied that all of the relevant clients' (or other parties') interests will be served by you doing the work (as opposed to another firm doing it). You should not seek Informed Consent in order to proceed because your firm's interests are served by doing so. Obtaining Informed Consent is a process that requires proper consideration, professional judgement, and careful execution with every affected party.

4.6 One of the greatest challenges in acting with a Conflict of Interest is predicting with certainty what the effect of that Conflict of Interest, even if managed carefully, might have on your ability to advise and represent each client. This uncertainty reinforces the importance of considering carefully whether it is prudent to decline the assignment in question rather than seeking Informed Consent to proceed.

4.7 Even where a Conflict of Interest (or a significant risk of a Conflict of Interest) does not exist at the outset of a professional assignment, it can arise during the lifetime of a professional assignment. This means that the guidance must be considered and applied – and appropriate records made - not only when new professional assignments are being considered, but also as professional assignments progress.

## **5. COMMENTARY NOTE ON RECORD KEEPING**

5.1. All firms are required to maintain records showing their compliance with the guidance. This requires records to be maintained showing both:

- i. consideration and implementation of systems and controls appropriate to the firm and
- ii. the observance of those systems and controls within the context of individual professional assignments.

5.2 Individual surveyors do not have to vet or implement the systems and controls of their firms, but they should each satisfy themselves that their own firm has a system in place which allows them to meet their obligations under this guidance.

5.3 The factors that influence what systems and controls are appropriate for each firm and the level of resource that each firm should commit to these functions include:

- i. the size of the firm
- ii. the complexity of the firm's structure and
- iii. the number of areas of practice in which the firm provides services.

5.4 As firms and markets change, the effect of the guidance is that the systems and controls must be monitored and updated. Records should be maintained to show that process of monitoring and updating.

5.5 Firms and individual surveyors may be required to make available for inspection by relevant regulatory bodies the records required by this guidance.

## **6. COMMENTARY NOTE ON CONFLICTS WHERE INFORMED CONSENT WILL NOT (OR MAY NOT) BE ENOUGH**

6.1 In a professional assignment that is contentious (or has a reasonable prospect of becoming contentious), Informed Consent is unlikely to be an adequate basis on which to manage a Party Conflict. In a contentious matter, the existence of a Party Conflict will usually mean being unable to proceed with both relevant professional assignments.

6.2 It will not be possible to overcome the existence of a Conflict of Interest or a significant risk of one by getting Informed Consent where the potential appointment is subject to a specific statutory or regulatory regime.

6.3 It will not be possible to obtain Informed Consent for an individual surveyor taking professional assignments that conflict with each other.

## **7. COMMENTARY NOTE ON INFORMATION BARRIERS**

7.1 Agreeing to put an Information Barrier in place may assist a client or other party to give Informed Consent to a Party Conflict, or it may assist in resolving a Confidential Information Conflict; but on its own, an Information Barrier will not be a solution to a Conflict of Interest. Informed Consent must still be obtained from all affected parties in order to comply with the requirements in this guidance.

7.2 Save for one situation, consent should be obtained from all parties affected when an Information Barrier is put in place. That is the situation where the conflicting duty for which the Information Barrier is put in place is the duty pursuant to this guidance to protect the Confidential Information belonging to a person or company that is no longer a client of the firm concerned. In that situation, the firm's duty to preserve the past client's confidentiality will remain in place pursuant to any applicable common law principles.

7.3 If an Information Barrier is part of a solution that a regulated firm agrees with two or more clients so as to obtain Informed Consent, the onus will be on the firm and the surveyors involved to ensure that it works in practice, not just that it should have worked in theory. This means that before treating this as a solution to a Conflict of Interest, those individuals and the firm should be sure it will work; not merely that they have taken 'reasonable steps'. To do this effectively, they will need to consider and understand the details about how their office works in practice: reporting and management lines, who sits where, the use of typing resource and printers, and access to email and other electronic resources.

7.4 Because the primary obligations in the professional statement are obligations of individual surveyors as well as firms, it is important that the individuals who are involved in implementing an Information Barrier satisfy themselves individually that the Information Barrier will be effective, rather than delegating that responsibility to colleagues, or to a central management function.

7.5 Putting an effective Information Barrier in place requires consideration of the position of all individuals within the firm who might have access to information: not just those who are surveyors.

## **8. COMMENTARY NOTE ON CONFIDENTIAL INFORMATION**

8.1 The duty of confidentiality is not only confined to clients where there is a current fee-earning relationship, but also to previous clients and even potential clients. The duty to a client is continuous and ongoing. Over time, the potential relevance of information and the potential for a conflict arising will decrease, but there is no fixed period that can be used to determine whether the duty of confidentiality still creates a conflict with the general duty in a subsequent instruction. The nature and extent of the information held will be a key determinant of whether it is possible to act for another client. In addition, the nature of the original professional assignment and the time that has elapsed since undertaking the assignment will also be relevant.

8.2 Often, if a new professional assignment has to be declined because of a Conflict of Interest, a surveying firm or surveyor may have learned something from that approach that will be of interest to another client. That information will almost invariably be Confidential Information, and it cannot be passed to the other client, even if that client would be very interested to hear it.

## **REFERENCES**

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## **BIOGRAPHICAL NOTES**

As part of the Professional Groups and Forums team at RICS, Nigel sits on a number of commercial property-related panels whose function is to shape industry best practice, raise standards and develop policy. He also has joint responsibility for (and input into) the guidance notes, journals, articles and forums produced and managed by these groups.

Nigel comes from a valuation background, having previously worked at Deloitte LLP. He has experience in valuation for secured lending, risk management and governance. Nigel has experience in the financial modelling of institutional investment in the residential sector and development/estate regeneration advice.

He is keen to drive standards within the industry and raise the profile of the RICS with the membership.

Nigel has been previously involved with the RICS in a number of different guises; as a former RICS Matrics UK Chair (2013-2014), the Matrics global representative on RICS International Governing Council (2013-2014) and the Matrics representative on the RICS Nominations Committee (2011-2013).

## **CONTACTS**

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