

managing

CONFLICT OF INTEREST

situations





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conflicts of interest are everywhere

Conflicts of interest can arise in any context – financial, political, social, moral or religious. Conflicts of interest can be potential or actual, obvious or hidden, anticipated or unexpected, direct or imputed. Conflicts of interest can surface before the lawyer is retained or sometime during the retainer. And they are becoming more and more prevalent in legal practice, irrespective of the size or practice specialty of a lawyer or his or her firm. In fact, conflicts which arise from acting for more than one party in a matter represent the second most frequent cause of claims against Ontario lawyers.

many factors contribute to this phenomenon

External factors that contribute to an increase in conflict claims include: Increased competition between lawyers and other professionals; increased consumerism; broadening definitions of legal duties; the movement of lawyers from firm to firm; the large size of some firms; and the development of more intricate inter-relationships of corporate clients as a result of mergers and globalization.

As well, internal factors, such as the nature of a lawyer's practice, involvement by fellow lawyers and staff in other legal matters, board memberships and lawyers' business investments affect this trend.

This booklet has several purposes:

- to inform you of the costly consequences of acting with a conflict of interest;
- to help you identify, check for and manage conflict of interest situations; and
- to offer some guidance on what to do if you find yourself in the thick of a conflict of interest mess.

identifying a conflict of interest situation

what is a conflict of interest?

A conflict of interest is a **compromising** influence that is likely to negatively affect the advice which a lawyer would otherwise give to a particular client.

A conflict of interest situation is a set of circumstances that is likely to affect adversely:

- the lawyer's **judgment** concerning a client or prospective client,
or
- the lawyer's **loyalty** in respect of a client or prospective client,
or
- the lawyer's **safeguarding** of interests of a client or prospective client.

Conflicts: The lawyer's Achilles Heel

What is it about a conflict of interest that is so bad? The answer is quite simple. Loyalty and independence of judgment are essential to the effective representation of a client. In fact, they are fundamental to the health of the lawyer/client relationship. Yet a conflict of interest may make it impossible to exercise the essentials of loyalty and judgment.

Therefore, identifying and checking for a conflict of interest situation need to be routine steps in every lawyer's practice. In fact, every time you have a new client or a new matter for an existing client, you should address the issue of the existence of or potential for a conflict of interest situation.

how to spot a conflict

The most claims-prone conflicts arise when:

- acting for more than one person on a single matter,
or
- acting for a client on a matter where the lawyer has a personal interest other than reasonable professional fees.

Acting for more than one person

It is not always readily apparent that a representation involves more than one person as a client. Some conflict situations are hidden, for example when dealing with members of a family or partners or shareholders in a business.

Appendix 1 – Checklist to Identify Conflicts Involving Multiple Interests lists questions you should be asking to help identify such a situation and whether or not it presents a conflict or potential conflict. You will also find a list of classic situations where representation of multiple parties should be avoided.

Acting when the lawyer has a personal interest

In very few instances is it safe for a lawyer to represent the interests of a client when the lawyer's own interest, financial or otherwise, is involved (other than the expectation of a reasonable fee).

Appendix 2 – Checklist to Identify Conflicts Involving Lawyer's Personal Interest lists questions you should be asking to help identify such a situation and whether it presents a conflict or potential conflict. You will also find a list of classic situations where representation of a client in the face of a personal interest should be avoided.

Other typical conflict situations

In addition to the situations listed earlier, typical conflict situations include:

- acting for one client against another client,
or
- acting for one client against a former client.

Either of these scenarios is usually best identified through a conflicts checking system, be it manual or computerized. Conflict checking systems are discussed in the next section: *Checking Systems for Conflicts of Interest*.

Some special cases

DECLINED REPRESENTATION

A conflict can also arise when a lawyer has declined to act for a party. It may be that after interviewing a potential client, you decide that you will not represent them. While you are deciding about your representation, you should take care that you do not receive any confidential information. Receiving confidential information can create obligations of confidentiality even if no lawyer/client relationship ultimately ensues; which in turn can prevent you from acting either for a new client or even for a current client at some point in the future.

Another problem situation occurs when someone connected with your client believes that you are acting for them too. When they later discover that you have not protected their interests, they complain.

Whichever the situation, documentation is critical. A non-engagement letter, also called a non-representation letter, should

be prepared either when you decline the opportunity to act for a prospective client or when you need to clarify that you are not representing someone who may be connected to your client.

Appendix 3 – Checklist for Non-Engagement/Non-Representation Letter contains a checklist of the key information which should be included in a non-engagement or non-representation letter.

IMPUTED CONFLICTS

A conflict of interest can be imputed to you although you may not have any direct involvement in the conflict or the representation.

Appendix 4 – Checklist to Screen Imputed Conflicts provides a brief overview of imputed conflicts and the use of “screens” or “walls” to manage such conflicts.

why a conflict matters

The consequences of a conflict of interest situation for the lawyer can be severe and costly.

For example, acting with a conflict of interest can result in civil liability for professional malpractice as well as disciplinary action by the Law Society for breach of Rule 5 and related Rules.

Some very serious consequences also flow from a proven claim in contract, tort or equity, including:

- disqualification from representation of one or more clients;
- forfeiture of fees charged; the inability to charge for work in progress and other time invested;



- a damage claim which may include punitive damages;
- embarrassment, inconvenience and aggravation of defending a malpractice claim or investigation; and
- lost time spent on defending a malpractice claim or investigation.

Some of these exposures are inevitable even if the claim is not successful.

To fully appreciate the consequences of conflict, and to understand what all of the information generated by conflicts of interest checking systems means, it is critical that lawyers are aware of the current legal standards regarding conflicts of interest.

Rules of Professional Conduct

Rule 5 of the Law Society's Rules of Professional Conduct states:

The lawyer must **not** advise or represent both sides of a dispute **and, save after** adequate disclosure to and with the consent of the client or prospective client concerned, **should not** act or continue to act in a matter when there is or there is likely to be a conflicting interest. *(emphasis added)*

Although the rule and its commentaries and related rules on confidentiality and disclosure seem simple enough, the number of conflicts-based claims and complaints against lawyers indicate that lawyers have difficulty applying the rules in practice because they either fail to recognize the situation or choose to ignore it.

Standard of care at common law

Usually, the standard of care imposed on lawyers in contract and tort is to act as a reasonably competent and diligent lawyer. In a professional liability claim, the allegation of a conflict of interest casts a very onerous burden of proof onto the lawyer to show that the client who now complains received the best possible advice which could have been obtained from a truly independent lawyer.

Fiduciary duty in equity

The fiduciary duty imposed on a lawyer, breach of which gives rise to very broad equitable relief, includes the obligations to provide full disclosure, to act with undivided loyalty and exclusivity, and to maintain the client's affairs in confidence. A lawyer's ability to meet these obligations is challenged when that lawyer is confronted with a conflict of interest situation; failure to manage the conflict likely will result in allegations that the fiduciary duty was breached, paving the way for a broadly based damage award.

checking systems for conflicts of interest

types of conflict checking systems

For the small office that does not have a complex client mix, a manual system based on index cards may still be adequate.

However, for most practitioners the better option is a computerized system that includes a relational database and strong management capabilities for changes and back up. A relational database can store and manage a large amount of information about individuals and their relationships to each other, including clients, lawyers and staff or third parties, predecessor firms, lateral hires, contract lawyers or branch offices.

when to use a conflict checking system

Certain points in time trigger the need for a conflicts check and additional input of data. Most data input and conflict checking occurs pre-engagement, on the first call or visit and before opening a file. Another trigger point is during the engagement when there has been some change in the matter, often unanticipated, such as when a new party becomes involved in the matter. The new data should be immediately inputted in the system and followed by a check.

essential elements of a conflict checking system

Appendix 5 – Checklist of Essentials of Conflict Checking Systems describes the key elements of a conflict checking system. Note that an effective system is more than a collection of index cards or a piece of computer software. Key to its success – and to the success of your firm – is a commitment to use the conflict checking system by every member of your firm.

managing a conflict of interest situation

Just because a name is identified in the conflict checking system does not mean a conflict exists. It does mean that the lawyer should fully evaluate the situation. There are a few common and key issues which should be addressed in any conflict of interest situation.

step one: the need for legal analysis

First and foremost, the lawyer must bring to the discussion with the client his or her own judgment about the propriety of acting in the face of the conflict. Clients cannot consent to certain conflicts of interest. The first branch of Rule 5 of the Rules of Professional Conduct describes a non-consentable conflict: "The lawyer must not advise or represent both sides of a dispute." The rationale for the prohibition is that the matter is contentious and the interests are clearly adverse.

In some situations you may need to decline the representation, even though your client could consent to having you act for more than one interest, simply because you cannot exercise your judgment independently with respect to the client's interests. Even a perception that your judgment will be influenced is reason enough to decline the representation.

The conflicts test, simply stated, is as follows:

- You cannot proceed to seek a consent to waive from the client, former client or third party and then represent them unless you believe that the representation of one client will not adversely affect the interest of the other client.
- You cannot act for a client where your own interest is involved unless you believe that the presence of your interest will not adversely affect the interest of that client. If you are in doubt, consult with a colleague or make a confidential inquiry of the Law Society's Practice Advisory Service.

step two: the need for adequate disclosure

If you believe that it is appropriate to seek your client's consent to waive the conflict, the next step is adequate disclosure to all of the parties who are affected by the conflict.

Components of adequate disclosure include

- a review and discussion of the nature and circumstances of the conflict;
- an explanation of the potential competing interests;
- a review of the reasonably foreseeable negative implications, including what will happen vis-à-vis future representation of one or all of the clients if a conflict arises; and
- the possible need for independent counsel. You need to anticipate misunderstandings by your clients and address them proactively.

As part of this discussion, you should also review the positive aspects of proceeding with the representation despite the existence of a potential conflict. A commentary on Rule 5 of the Rules of Professional Conduct directs the lawyer to consider the availability of the requisite experience and expertise in another lawyer and the extra cost, delay and inconvenience involved in engaging another lawyer who will not be familiar with the client and the client's affairs.

step three: the need for informed consent

Consent must be informed

Once adequate disclosure has been made, the affected parties or clients must decide if they are prepared to accept the lawyer's representation despite the burden of the conflict. This is also sometimes referred to as an informed waiver. The consent is informed only if it is given voluntarily and knowingly. Consent given by a client without these features is void and of no effect. If an informed consent is not forthcoming from the affected parties, then the representation is prohibited. Rule 5 of the Rules of Professional Conduct refers to the saving provisions of adequate disclosure and informed consent.

Consent must be put in writing

It is essential that the consent be in writing and executed by the client/s. In fact, the disclosure made by the lawyer, and on which the consent is based, should also be put in writing.

Remember, all clients or parties affected by the existence of the conflict must have adequate disclosure. The paper documenting the client/s' waiver of conflict must be tailored to each representation. No single format will do.

Recommend ILA

A further precaution is to encourage the client/s to seek independent legal advice with respect to the consent/waiver which they are giving. This approach may not prevent claims by angry clients, but does reduce their validity to a non-starter.

Appendix 6 – Checklist for Eliciting Consent to Waive Conflict provides a checklist for eliciting the consent of the client/s.

step four: the need for ongoing assessment

Lawyers need to be aware that conflicts can develop during the engagement, and that they need to assess situations for conflicts throughout the representation. Because these conflicts are outside the initial screening process, they often appear unexpected. Some, however, are foreseeable at the outset of the retainer.

Conflicts that arise subsequent to the retainer

UNEXPECTED CONFLICTS

Subsequent conflicts typically arise unexpectedly. Usual triggers are the addition of a new party to a transaction or lawsuit or the addition of a lateral hire who is personally disqualified from a matter in which the firm is engaged.

They can also arise in the case of a business transaction between lawyer and client who are business partners. Because of a pre-existing lawyer/client relationship (unknown to the lawyer), the client expects the lawyer to also act as a lawyer rather than solely as a business partner. These types of conflicts should be managed in the same way as suggested for initial conflicts.

PREVIOUSLY FORESEEABLE CONFLICTS

In some instances, subsequent conflicts were foreseeable. Typically, this type of conflict was identified prior to the engagement but did not involve a contentious matter; the conflict was managed with documented disclosure to the clients and their written waiver based on informed consent. Later, the conflict materializes and requires further management. The typical scenario is where previously aligned interests diverge, such as the individual interests of partners in a partnership.

Depending on just how contentious the matter has become, continued representation of some or all of the clients affected may or may not be possible.

Appendix 7 – Checklist for Managing a Subsequent Conflict reviews the steps to follow for management of the previously foreseeable conflict.

managing the conflicts mess

Occasionally a lawyer may miss all of the conflict signals and only come to appreciate the lurking harm when the situation is a veritable mess.

Appendix 8 – Action Plan to Contain a Conflicts Mess outlines a simple three-step action plan for managing this type of situation.

At a time when our profession is already facing the pressures of a changing practice climate, it is more important than ever for all lawyers to improve their relationships with clients. Conflicts of interest, however, present numerous challenges to effecting better client relations. What is at issue with respect to a conflict is the ability to give valuable legal advice and representation in circumstances where another interest compromises the loyalty and independent judgment which a lawyer is duty-bound to give to each client.

And so, it should not be surprising that the consequences of lawyers not identifying or not avoiding or not managing a conflict of interest situation are severe. And far-reaching too, since they affect not only the lawyers within the profession but also the public's confidence and perception of the legal system itself.

When all is said and done, the secrets to successful management of conflicts are quite basic: Be aware of your obligations; exercise good judgment; and communicate and document effectively.

As part of its commitment to provide Ontario lawyers with a responsive liability insurance program, LPIC seeks to ensure that lawyers understand both the risks of conflict of interest situations and the basics of conflict management. Our goal is to help lawyers better recognize conflict situations, follow the rules, and avoid the costly consequences which conflicts present.

checklist to identify conflicts involving multiple interests

Many situations involving multiple representation involve interests which are either divergent from the get go or will become so very early on in the matter. Whether or not the proceeding or matter is contentious, the fact that the interests are divergent means that you will not be able to align your loyalty and judgment in favour of each of the interests as is required of you. The reality is that it may be difficult to show that each client received the best possible advice that he or she would have received if the lawyer was acting for one party alone and did not have any responsibility to the client with the opposing interest. In the end, one or both of the clients may complain.

Therefore, you should not act! If in doubt, consult with a colleague or the Law Society's Practice Advisory Service at (416) 947-3369 or 1-800-668-7380.

Questions to help identify a multiple interest conflict

- What are all of the interests that must be considered during the representation?
- Is there anyone else who has anything to do with the subject matter of the representation? If so, what is their interest?
- Is more than one person relying on your advice? If so, for what advice?

checklist to identify conflicts involving multiple interests

- If someone attends with a relative or friend, does that relative or friend believe that you are representing their interests as well?
- Is someone other than the person affected by the subject matter of the representation paying for your fees?
- Where people are contributing to create a business, are their contributions different? Are their rights and obligations different?
- Where people have a common interest, are their bargaining positions unequal?
- To maximize the interest of one of the persons involved will the interests of another person be compromised or negatively affected?
- Will you have to keep secret any information from one of the participants that is material to your representation in the matter?
- Is there real potential for the parties to have a falling out in the future?

checklist to identify conflicts involving multiple interests

Examples of multiple interest situations to avoid at all costs

INTERESTS BETWEEN SPOUSES REGARDING

- family law matters e.g. marriage contracts, separation agreements, divorce, custody, property disputes, assets and obligations
- financial obligations e.g. loan or line of credit guarantees, mortgage for other than a joint benefit
- wills and estate planning matters e.g. imbalance in asset holdings or both are very wealthy or previous marriage and family relationships.

INTERESTS AMONG FAMILY MEMBERS REGARDING

- financial obligations e.g. loans, guarantees, security interests
- motor vehicle accidents e.g. involving a combination of negligent driver, owner and passenger
- estate and administrator
- guardian and ward
- trustee and beneficiary
- shareholders of a closely held company
- partners in a partnership.

checklist to identify conflicts involving multiple interests

Examples of multiple interest situations to avoid at all costs (cont'd)

COMMERCIAL INTERESTS REGARDING

- trustee and beneficiary
- landlord and tenant
- general partner and limited partner
- bond issuer and underwriter
- debtor and creditor e.g. mortgagor/mortgagee; assignor/assignee
- buyer and seller
- parties attempting to collect from one fund
- shareholders of a closely held corporation
- partners in a partnership
- the partnership and one or more partners

checklist to identify conflicts involving multiple interests

COMMERCIAL INTERESTS REGARDING (CONT'D)

- corporation and one or more individuals with an interest in the corporation
- individuals involved in a joint venture
- client and a competitor
- corporate legal counsel and as an officer and director of same company.

checklist to identify conflicts involving lawyer's personal interest

Lawyers who act for one or more clients in the face of a personal interest, financial or otherwise, are really fooling themselves. The exposure to a malpractice claim is inevitable if the client becomes unhappy about any aspect of the transaction. Even with a written waiver from the client in hand, the burden of proof regarding adequacy of disclosure and demonstrating exercise of good judgment will be most challenging.

Therefore, you should not act! If in doubt, consult with a colleague or the Law Society's Practice Advisory Service (416) 947-3369 or 1-800-668-7380.

Questions to help identify a personal interest conflict

- What is the client's interest?
- What is the lawyer's interest?
- Will maximizing the lawyer's interest negatively affect the client's interest? If so, you should not act.
- Will the lawyer always be able to place the interests of the client first? If not, you should not act.
- Is there potential for a falling out between the client and the lawyer in connection with the matter? If so, you should not act.

checklist to identify conflicts involving lawyer's personal interest

Examples of personal interest situations to avoid at all costs

- participating in a business transaction with a client
- having a personal or business relationship with another party interested in the representation or transaction
- acquiring an ownership or other interest in a matter adverse to a client
- purchasing real estate from a client
- taking a financial interest in a client matter other than reasonable fees
- creating a legal document wherein the lawyer is entitled to a beneficial interest e.g. being a beneficiary under a client's will which you have drafted
- having a personal, social or political interest in a client matter
- borrowing money from a client at the same time as providing legal advice and drafting documentation evidencing the loan and security therefrom.

checklist for non-engagement or non-representation letter

Purpose

The point of sending a non-engagement or non-representation letter is three-fold:

- to document that you are not representing a particular person;
- to advise the party to seek independent representation; and
- to confirm that you have not received any confidential information regarding his or her interests in the matter.

Without such a letter, the person can later allege that he or she relied on you for legal representation even though you provided none, or that you received confidential information which could prevent you from acting against the interests of that person in the future.

Contents of non-representation letter

Your letter should be clearly worded and address the following issues:

- Clearly confirm that the representation is declined and that there's no lawyer/client relationship; you need not set out your reasons for your decision.
- Return any documentation or other property obtained during the consultation.

checklist for non-engagement or non-representation letter

- Refer to the fact that statutes of limitations may apply to bar recovery if steps are not taken promptly to pursue rights or remedies. If a specific statute of limitations poses as an immediate problem, specific reference should be made to a need for the person to take urgent action.
- Advise the person to seek other legal counsel as soon as possible to pursue his/her rights.
- Take care not to express an opinion on the merits of the claim unless careful research has been conducted to support the position.

Once the letter has been sent, confirm and document that the person to whom the non-engagement letter was sent has in fact received your letter.

checklist to screen imputed conflicts

Imputed conflicts

Typically, imputed conflicts occur because you are in partnership or association with one or more other lawyers who have a direct conflict. The principle behind imputed conflicts is the imputation of information concerning a client or matter among all lawyers and staff in a firm. The merger of law firms or the lateral hiring of new partners and lawyers often create imputed conflicts which then need to be addressed. In certain circumstances, imputation of a conflict can also pertain to lawyers in work-sharing or space-sharing arrangements.

Screens/walls

In response to the court's imputation of conflicts, lawyers, particularly those in large firms, try to use physical procedural barriers called "screens" or "walls" to prevent one or more lawyers or staff from being exposed to information relating to a matter currently or formerly handled by other lawyers/staff.

Attempts to screen disqualified lawyers sometimes work to prevent the firm's disqualification. Imputation creates a rebuttable presumption of shared knowledge among lawyers and, accordingly, our courts tend to carefully scrutinize how the firm has implemented a particular screen when the issue is before them.

checklist to screen imputed conflicts

IS THE SCREEN/WALL EFFECTIVE?

Key factors in assessing whether the screen will be effective are:

- The size of the firm: The larger the firm, the less likelihood of contact by screened lawyers with non-screened lawyers.
- The physical layout of the office and proximity of lawyers and staff working on the matter to the screened lawyers.
- The file storage system, including the location of files relative to the location of screened lawyers, the ability to access files by screened lawyers, and various security measures in place to prohibit access.
- Timeliness of implementation of screen to ensure confidentiality of information.

Before attempting to use a screen to avoid disqualification, a review of and compliance with the guidelines developed by the Canadian Bar Association in its *Task Force Report – Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* is recommended. They have been reproduced here with the permission of the Canadian Bar Association.

checklist to screen imputed conflicts

CBA Guidelines

1. The screened lawyer should have no involvement in the current representation.
2. a) The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new firm.
b) No member of the new firm should discuss the current matter or the prior representation with the screened lawyer.
3. The current client matter should be discussed only within the limited group who are working on the matter.
4. a) The files of the current client, including computer files, should be physically segregated from the regular filing system, specifically identified, and accessible only to those lawyers and support personnel in the firm who are working on the matter (or require access for other specifically identified and approved reasons).
b) No member of the firm should show the disqualified lawyer any documents relating to the case.
5. The measures taken by the firm to screen the lawyer should be stated in a written policy explained to all lawyers and support personnel within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

checklist to screen imputed conflicts

6. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.
7. a) former client should be informed that the screened lawyer is now with the firm representing the current client.
b) The former client must be advised of the measures adopted by the firm to assure there will be no misuse of the confidential information.
8. It may prove helpful if the screened lawyer does not participate in the fees generated by the current client matter.
9. The lawyer's office should be located away from the offices of those working on the matter.
10. The screened lawyer should use associates and support personnel different from those working on the current client matter.
11. Every effort should be made to obtain the former client's consent to the new firm's representation. If that consent is given, it must be on the basis of a fully informed appreciation of the situation and only after receiving independent legal advice.

checklist of essentials of conflict checking systems

The underlying structure of a conflict checking system

A successful conflict checking system is an integral part of the law practice, and has the following criteria:

- It is integrated with other office systems.
- It is supported by a conflicts avoidance policy – e.g. no file is opened nor is work started on a file until a conflict check has been made and returns have been cleared.
- All members of the firm, lawyers and staff participate, with zero tolerance for opting out of the conflict checking system.
- Lawyers communicate within the firm regarding clients and potential clients.
- Client intake procedures exist for analysis of and decisions about new clients and new matters e.g. management must approve all new clients and matters before work begins.
- Education and training about conflicts and the firm's procedures are ongoing. As responsibilities for lawyers and staff differ greatly, separate training must be developed.

checklist of essentials of conflict checking systems

Information needs of a conflict checking system

Key to a successful conflict checking system is the information input process. Information entered into the system must be complete, consistent and comprehensive and should include data on:

- new, current and former clients
- family members and allies of clients
- one-time consultations
- people who have been denied representation
- the subject matter of representation
- all parties involved or connected with the matter, including their counsel, their relationship with the client and their role in the matter
- adverse parties in a litigation or transaction
- board memberships and organization directorships
- parent or controlling shareholder of the corporate client
- directors of the corporate client
- subsidiaries or affiliations of the corporate client
- trade names of the client
- partners of partnership client
- all lawyers and staff in the firm, including family members
- lawyers' significant investments in the client/s' business.

checklist of essentials of conflict checking systems

Using a conflict checking system

Even the most comprehensive conflict checking system can be ineffective if it is not used properly.

When checking for conflicts, you need to:

- Create procedures to require conflict checking and provide for easy access to data for everyone in office.
- Conduct a conflict check at key trigger points:
 - when the first request for services is received;
 - after the first meeting where more information about who is involved in the matter is obtained; and
 - during the engagement if a change occurs concerning the parties.

Note that other checks may be necessary depending on the practice specialty.

- Include a check of various alternative spelling options.
- Circulate an inquiry among lawyers and staff about a new prospective client or matter and ask if they know of the existence of any conflict.
- Assign responsibility for checking to someone and develop a method for recording that a check was done.

checklist of essentials of conflict checking systems

Follow-up procedures for a conflict checking system

To maintain an effective conflict checking system, the following follow-up procedures should be in place:

- Circulate a list of new files opened to all lawyers and staff as a further check or back up to the conflict checking process.
- Put a written record of the conflict check in the file:
Documentation is key.
- Assign a lawyer or committee to advise on conflict matters.
- Obtain management approval of board appointments whether or not a company is a client.
- Establish a procedure for retaining outside counsel – for both yourself and your clients – when difficult issues surface.
- Regularly review policies and procedures on conflicts, and check whether all lawyers and staff are implementing procedures.

checklist for eliciting consent to waive conflict

The need for informed consent

To elicit an informed consent to waive a conflict of interest, you are obliged to explain in plain language the circumstances of the conflict.

The explanation should include the following:

- a description of the subject matter of the service to be performed
- the nature of the conflict
- the clients or other parties affected by the conflict
- who you will represent and not represent
- the factors that create the conflict
- the implications of the representation on each of the clients
- the positive aspects to proceeding with the representation
- the things you will do and not do
- the potential, if any, for the interests to diverge in the future
- that the information received by each client cannot be held in confidence against the other
- if a screen mechanism is used explain the intended process and its intended protections of information.

checklist for eliciting consent to waive conflict

Document the consent to waive in writing

The written consent should take the form of a clearly worded letter and should include the oral disclosure suggested above. This approach leaves little room for argument later about the ambit of disclosure.

The letter should also include the following:

- an acknowledgment by the clients or parties affected that even though the representation may be potentially adverse, they are prepared to proceed with the representation for now;
- an outline of the process to be followed if the interests cannot be represented together in the future. Include whether your representation will continue for at least one of the parties in the future as well as your entitlement to retain fees in the event that one of the clients has to seek alternative representation;
- a statement that the clients have been asked to obtain independent legal advice with respect to the waiver being signed. If obtained, include a copy of the certificate; if not obtained, reference the client's election to proceed without independent legal advice.

Maintain file copies of the consent

Copies of the signed consent to waive should be kept by the person in the firm responsible for monitoring conflicts and in the file.

checklist for managing a subsequent conflict

The approach suggested for managing conflicts identified before the representation begins is equally appropriate for conflicts which arise unexpectedly and subsequent to the commencement of an engagement. Some additional questions, however, need to be considered when managing a previously foreseeable conflict; these are outlined below.

Previously foreseeable conflict of interest situations

- Review the disclosure document and written consent which was prepared in light of the acknowledged potential for conflict; it may be that you determined a plan of action back then that you will now implement.
- Consider whether the matter has become contentious, making representation impossible at least for some of the parties affected.
- Discuss with all clients and parties affected that the conflict previously warned about has now materialized; review the nature, extent and implications of this conflict.
- If it is still appropriate to continue the representation, prepare a new consent in writing which outlines your disclosure and have it executed by all affected parties.

checklist for managing a subsequent conflict

- If representation becomes limited to only one or two of the parties, prepare non-representation letters for those who are no longer being represented and direct them to obtain independent representation for the remaining portion of the matter.
- Suggest that the parties obtain independent legal advice with respect to the consent being executed.
- Be alert to future signs that the representation of one or all of the parties is no longer appropriate.
- Re-examine conflicts policies and procedures and incorporate any changes that might have become apparent as being necessary to avoid subsequent conflicts.

action plan to contain a conflicts mess

The failure to identify and manage a conflict when it arises whether initially, prior to the start of the engagement, or subsequently can result in a veritable mess.

Defining a conflicts mess

Just what is meant by a conflicts mess? Any situation where all of the following apply:

- you find yourself representing more than one interest;
- at least some of the interests have become adverse and contentious;
- at least one of the clients' interests is being preferred or perceived by another of the clients as being preferred.

Perhaps one or more of the clients are not aware of these circumstances. It may be too late to manage the conflict through the disclosure and consent approach. You feel boxed in and are not sure what to do. Your reaction may be to try to fix it yourself or alternatively to simply ignore the problem. Stop there. Consider, instead, the Three Step Plan.

action plan to contain a conflicts mess

The Three Step Plan

● Action #1 – Recognize It's Not Too Late

First, recognize that although adverse effects may already be in play, you may be able to minimize them. The earlier you react to have the situation addressed, the better.

● Action #2 – Consult With Someone

Next, recognize that the objectivity of another lawyer will be helpful. Review the situation with a colleague, your firm management or outside counsel. Or consult the Law Society's Practice Advisory Service on a confidential basis free of charge (416) 947-3369 or 1-800-668-7380.

● Action #3 – Do Not Continue To Act

Finally, recognize that you cannot continue to act. It is a huge mistake to try to deal with the conflict yourself. No matter how good your intentions or how objective you think you are, you will be challenged by the competing interests inherent in the conflict in what is, by now, a contentious and possibly acrimonious situation.

It is almost a certainty that at least one of the clients will blame his or her loss on your conflict of interest and connected failure to safeguard their interest. You should inform all of the affected clients of the conflict, that it may affect your ability to act in their interests, and that they each should seek their own independent counsel. In that way, you have done something to contain the damage.

About the Author:

This material was prepared for the Lawyers' Professional Indemnity Company (LPIC) by **Karen K.H. Bell**, Risk Management Counsel.

Ms. Bell is widely regarded as an expert in the areas of law practice management, dispute resolution and loss prevention. She has chaired the CBAO's Law Practice Management section, has taught practice management and professional responsibility in the Law Society of Upper Canada's Bar Admission program, and, as a commercial litigator and defence counsel for insurers, has developed an appreciation for the application and benefits of risk management to law practice and business. Formerly a litigation partner at a large Toronto law firm, Ms. Bell has established her own specialty practice as Risk Management Counsel.



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