

# MANAGE TO AVOID CONFLICT

Practices will find that policies to assist early detection of conflicts will pay dividends.

This is the last in a series of columns relating to four objectives in the Legal Services Board self-assessment audit for incorporated legal practices.

The practice management issues highlighted by these four objectives are particularly relevant for managing professional risk in all law firms.

Previously, this column has looked at the first three objectives: competent work practices to avoid negligence; effective, timely and courteous communication; and timely delivery, review and follow up of legal services to avoid delay.<sup>1</sup> The fourth objective is:

## Timely identification and resolution of conflicts of interest

The need to avoid conflicts of interest is obvious.

The *Professional Conduct and Practice Rules* prohibit acting in a conflict of interest situation and from a claims perspective, if you do act in a conflict situation you leave yourself exposed to the allegation that you preferred the interests of the "other client".

The issue is: how do you manage your practice so as to avoid conflicts of interest?

The key concept to consider for this objective is recognition that:

- conflicts can emerge in many areas and contexts, be they potential or actual; and
- conflicts can emerge
  - before or during an engagement;
  - may arise if acting against a previous client;
  - where acting for more than one client; and
  - where the solicitor prefers their interests over those of the client.

Any policy that your firm adopts needs to keep all of those issues in mind.

### At the beginning

Make sure the policy requires a conflict check before anything is done for the client.

This means it needs to be made clear to the client that you cannot accept the retainer until the conflict check is done. A number of questions should be considered when doing this initial conflict check.

For example:

- does your database enable you to plug in the name of the would-be client, the other party and any related entities to check if they are current or former clients?;
- do support staff do this checking, and if so how detailed are the instructions from the practitioner?;
- what happens if a match with an existing or former client comes up?;
- who decides if it constitutes a conflict and whether the firm can or can't accept the matter?; and
- is there a conflicts committee or partner who is the final arbiter?

### During a matter

It is often harder to remember to do conflict checks during a matter, but your policy needs to address the issue.

It would most often arise in litigation when a party is joined to the proceeding by someone else or where it is contemplated that you may need to join a party.

Canvass other scenarios where it is likely to occur and include them in your policy as reminders.

### Who is the client?

Acting for more than one client can give rise to a clear conflict.

In our experience this often happens when the practitioner does not truly understand who he or she is in fact acting for. For example:

- is it the company or is it the directors?;
- is it the joint venture vehicle or the individual joint venturer?; or
- is it the elderly client gifting their property to a family member or is it the recipient of the gift, or both?

Practitioners are reminded that under your policy of insurance, if you act for more than one party in a transaction for which there is a claim, your firm will be liable for a double excess.

A simple method of ensuring you know who you are acting for is to have file opening procedures that include a proper description of the client. This should focus the practitioner's mind on "who is the client".

A policy of ensuring the bills are always sent out in the name of the client and to the client is also helpful in keeping the paper trail consistently focused on who the client is.

It is often difficult to see when a conflict arises.

Sending staff to presentations or seminars about conflict of interest to keep the issue front of mind is a good strategy.

### The client you did not know about

A worse situation is when the unrepresented person in the transaction thinks you are acting for them as well.

Where there is an unrepresented party in the transaction, consider sending a letter clarifying that the firm is not acting for them.

You should bear in mind that lay people often think that because there is a solicitor involved in the transaction, that solicitor is also looking after their interests.

### Holding office may lead to conflicts

The last key concept is about being aware of potential conflict with a client's interests where a practitioner holds an office outside of the practice.

This requires a policy addressing whether or not practitioners can sit on boards and if so what boards.

If they do sit on boards, keep a register of those boards and include that in the conflict checks that are done.

### Conclusion

Investing the time now to put clear and well thought out policies and procedures in place will pay dividends later, saving the time, energy and cost in dealing with disgruntled clients and matters that have gone off the rails. ●

This column is provided by the **LEGAL PRACTITIONERS' LIABILITY COMMITTEE**. For further information ph 9672 3800 or visit the website [www.lplc.com.au](http://www.lplc.com.au).

1. "Management is real work", November 2009 *LIJ*, p73, "Manage to communicate", December 2009 *LIJ*, p70 and "Manage to keep your clients", Jan-Feb 2010 *LIJ*, p69.