

CONVEYANCING SERIES 2022

Mastering the essentials

Conveyancing and conflict

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Thought

Have you checked for conflict?

Quotes

Grub first then ethics. Bertolt Brecht

For a lawyer to represent two or more clients with conflicting interests threatens client loyalty. Gino Dal Pont

CPD information

1 CPD Ethics and professional responsibility

0.5 CPD Practice Management

For all queries relating to CPD rules please refer to the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*. Information can also be found [here](#). LPLC does not keep records of practitioner CPD.

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Five key points

- Establish a formal process to deal with potential conflicts
- Know the rules
- Know the common law
- Think about whether there might be community concern about your conduct
- Use a checklist to be aware of conflict issues.

Introduction

The duty to avoid conflicts of interest is one of many ethical obligations imposed on the legal profession.

To properly understand these ethical obligations we need to remind ourselves of where ethics are derived from.

In his text *Lawyer's professional responsibility*, Gino Dal Pont explains that ethics come from, morality, professional responsibility, honesty, integrity and utilitarianism.

What LPLC sees every year is claims where there are allegations about conflict of interest made against practitioners. Particularly in relation to conveyancing matters. Some claims are about conflict between current and former clients, some relate to concurrent conflicts and others are self-interest conflicts.

Some common themes from our claims data include:

- Staff forgetting to check for potential conflict at the start and during a matter
- An increase in the potential for conflict during lockdown
- Taking on staff who bring with them the potential for conflict
- Failure to establish an effective information barrier

Compliance with the spirit and letter of the rules materially reduces the risk of a conflict claim.

However, LPLC often becomes aware of practitioners overlooking or ignoring the requirements of the rules.

Some of these issues arise because of inadequate training about how to identify and deal with potential conflicts.

Zoom poll

Have you received formal training about identifying and dealing with conflict?

- a) Yes
- b) No

Core conflict principals

There are a number of core conflict principals that need to be properly understood to have the best chance to avoid a conflict.

- No divided loyalties

If clients have conflicting interests then practitioners have conflicting duties.

- No personal gain at client's expense

If the practitioner has a personal interest in a client matter then they have a self-interest conflict.

- No other conflicting duties

Examples include, duty of confidentiality owed to former clients versus duty of loyalty to current client who could benefit from the confidential information and the duty practitioners owe to the court and the administration of justice versus the duty to follow a client's instructions to lie to, or mislead, the court.

In addition to knowing the core conflict principals it is also important to understand:

- the sources of practitioner's ethical obligations; and
- consequences of breach of ethical obligations.

Your comments

Sources of ethical obligations

Fiduciary duties of trust, confidence and loyalty

- Protect or advance the client's interests.
- No divided loyalty or double employment without consent.
- Keep confidences not to disclose or misuse.
- Make relevant knowledge available.
- No self-interest conflict.
- No unauthorised profit other than a reasonable fee.

Legal profession regulation and professional standards

For example, the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

Contractual obligations relating to conflict

- Terms of client retainer confirming or modifying fiduciary duty.
- Professional indemnity insurance policy.

Duty of care/liability in tort for harm done by acting in a position of conflict

- Standard of care of truly independent representation.

Consequences of breach of ethical obligations

Professional indemnity claims

- Deterrent excess.
- Higher premium.

Conduct complaints and disciplinary action

- Strike off, fine and/or reprimand.

Restraining orders

- Disqualified from representing one or more clients.
- Adverse personal costs order.

Client relationship and reputational damage

- Loss of future work and opportunities.

Productivity drain

- Fee refunds and write-offs.
- Investigation and defence time.

Personal stress

- Worry, inconvenience and aggravation.

Reflecting on the sources and consequences of a breach of an ethical obligation, gives a clear understanding as to why it is important that law firms have in place office policies about ethical issues like dealing with any conflict of interest.

Zoom Q & A

What processes do you have in place in your office to avoid a conflict?

Your comments

Legislation

[Legal Profession Uniform Law Application Act 2014 \(Vic\)](#) (Uniform Law)

Schedule 1 of the Uniform Law defines professional obligations to include obligations in connection with conflicts of interest. See section 6.

The Uniform Law authorises the Legal Services Council to make Uniform Rules at section 419. Sections 259 and 423 provide that the Uniform Rules may make provision with respect to conflict.

[Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#) (rules)

Depending on the circumstances there are a number of rules that apply in relation to dealing with conflicts of interest including rule 10, rule 11 and rule 12.

See below for more details about these rules.

[Sale of Land Act 1962 \(Vic\)](#)

Practitioners and conveyancers are prohibited from acting for both vendor and purchaser under a terms contract. See section 29W.

Rule 10 – former clients

Practitioners need to be aware of their ongoing duties to former clients, particularly the duties of confidentiality and loyalty.

Rule 10 imposes an obligation to avoid conflicts between the interests of current clients and the interests of their former clients.

A practitioner or law practice cannot act in a matter where a former client's confidential information could be material and detrimental to the former client's interests if disclosed, unless:

- the former client has given informed consent to the practitioner or law practice; or
- an effective information barrier has been established.

Former client includes clients of the practitioner in their present and past law practices, and clients of the practitioner's colleagues in the present law practice and their past law practices.

How would you ever know this information unless you routinely ask new clients and all your colleagues and how do you ask without tainting yourself with confidential information? And how do you obtain consent to the services from the former client while maintaining the confidentiality of the proposed new client?

Rule 11 – concurrent clients

Under rule 11, if a practitioner or law practice chooses to act for multiple parties in a matter, they must first formally advise all clients of the arrangements and all clients must give their informed consent. If a conflict arises between the duties owed to different clients, they must cease acting for one or both clients immediately.

Practitioners should avoid acting for more than one client in a matter.

Rule 11 prevents a practitioner or law practice acting for a client in a matter where another client's confidential information could be material and disclosure of the information detrimental to the other client's interests, unless:

- both clients have given informed consent to the practitioner or law practice or
- an effective information barrier has been established.

While informed consent is not defined, it likely means being specific about the name of the client and the services to be provided to the other client. It is generally regarded as including the nature and consequences of the conflict, the right to alternative representation, how confidential information will be protected, triggers for actual conflict and consequences such as withdrawal.

Practitioners need to be mindful of the client's capacity to consent. Undue influence and mental capacity may mean that consent cannot be given.

The requirement for an information barrier would seem to rule out an individual acting for both parties to a transaction unless the parties agreed to a no secrets engagement in which case there would be no confidential information requiring the protection of an information barrier.

If you are considering using an information barrier you should consult the Law Institute of Victoria's Information Barrier Guidelines. You can find the guidelines [here](#).

Based on the LPLC claims information it seems that conflict risks are more pervasive than practitioners think, as identifying and dealing with any conflict is missed in the assessment of concurrent relationships.

Rule 12 – self-interest conflict

Rule 12 prohibits practitioners acting where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate, except as permitted by the rule. Under the rules, associates can include:

- principals, partners, directors, officers, employees and agents of the practitioner's law practice
- a corporation or partnership in which the practitioner has a material beneficial interest
- members of the immediate families of the practitioner and of the partners and directors of the solicitor's law practice.

You need to be alive to the possibility of a conflict of a client's interests with the interests of anyone deemed to be your associate. If you become aware of a conflict, you must stop acting.

Rule 12 also contains specific provisions about:

- borrowing money from clients and former clients
- drawing a will appointing the lawyer or an associate as executor
- drawing a will or other instrument under which the practitioner, their law practice or an associate could receive a substantial benefit other than any proper entitlement to executor's commission and proper fees

- receiving a financial benefit from a third party in relation to any dealing where the practitioner represents a client or from another service provider to whom a client has been referred by the lawyer
- acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client.

Your comments

Common Law

The Uniform Law says that in considering whether a practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the rules apply in addition to the common law. See section 297 of schedule 1 to the Uniform Law.

It follows that practitioners must look at the common law in addition to the rules.

Here are some examples of common law issues:

- Acting without instructions
- Acting for lender and borrower
- Acting for land developer and purchaser

For an example of a breach of the common law where a lawyer acted without instructions see *Victorian Legal Services commissioner v Logan (Legal Practice)* [2017] VCAT 189. In this case proceedings were issued without instructions.

Also refer to sections 296 - 298 of schedule 1 to the Uniform Law.

Section 297 contains a definition of professional misconduct which at common law includes acting without instructions.

Given that the 2005 Professional conduct rules contained some express prohibitions to avoid practitioners acting in conflict, one argument is that those prohibitions are now part of the common law.

For example, the 2005 Professional conduct rules prohibited a practitioner from acting for a land developer and any other party. Refer to the old rules 8.7 and 8.8 of the [Law Institute of Victoria Professional Conduct and Practice Rules 2005](#) which you will find on the LIV website in the ethics hub.

Your comments

Some conflict cases

Judges take a keen interest in cases involving allegations of breach of fiduciary duty by officers of the court so expect your conduct to come under close scrutiny if you are ever involved in a conflicts case.

In the case of *Dale v Clayton Utz (No. 2)* (2013) VSC 54, the plaintiff successfully obtained an injunction refraining Clayton Utz from continuing to brief a barrister who the plaintiff had previously sought advice from on some matters now the subject of the proceeding.

Note at para 146 the comment that:

'.....A perception of conflict may arise, even where it is established that confidential information has not been obtained (or the information has subsequently lost its confidentiality) or where there is no real and sensible possibility of the misuse of that information....'.

In conflicts cases where restraining orders are sought or challenges made to information barriers, the courts seek to balance the public interest in the administration of justice and the client's interests in their choice of lawyer. Courts are alive to allegations of conflict being made against an opponent for tactical reasons and there have been mixed outcomes for the allegedly conflicted lawyers in these kinds of cases.

Even where conduct was not found to be improper, courts have been critical of lawyers for their imprudence in acting or continuing to act in matters where there are conflict issues.

In *Pyramid Building Society (in liq) v Rick Nominees Pty Ltd and Pyramid Building Society (in liq) v Meeral Pty Ltd*, unreported SCV (2162 & 2231 of 1992), Justice Byrne said:

'..How many cases like this need to come before the courts before solicitors appreciate the folly of acting for more than one party in the most innocent appearing of transactions? Judges for nearly a century have inveighed against the practice ... I am entirely unimpressed with the argument that in a friendly and uncomplicated conveyancing transaction of whatever kind, it is proper for a solicitor to act for more than one party because no conflict is apprehended. Lawyers are in a better position than others to know that in the friendliest of partnerships, commercial dealings and marriages there is always the prospect of discord and conflict ...'

Also noteworthy are the comments in Full Court of the Federal Court in *Commonwealth Bank of Australia & Anor v Smith & Anor* (1991) 102 ALR 453 at 477:

'...Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that, by reason of multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other. Thus, it has been said, after ample citation of authority, that where an adviser in a sale is also the undisclosed adviser of the

purchaser, an actual conflict of duties arises ... In such a case, it is not to the point that the fiduciary himself may not stand to profit from the transaction he brings about between the parties. The prohibition is not against the making of a profit ... but of the avoidance of conflict of duties

See also *Trade Practices Commission v CC (NSW) Pty Ltd (No 3)* (1994) 125 ALR 94, per Hill J at 105:

'...[T]he conflict is so acute that mere disclosure to the parties of the conflict and authorisation that the conflict continue even where the parties are given the opportunity to seek independent legal advice on the question of authorisation, cannot solve the problem. Mere consent of the parties to the continuation of a conflict is not enough. There must be informed consent in the real sense of those words ...'.

In *Law Society of NSW v Harvey* [1976] 2 NSWLR 154 at [171], Street CJ expanded on the nature and extent of the disclosure required to be made in the following terms:

'...It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead...'.

Although it does not happen very often, some conveyancing matters can become litigious and end up in court and there may even be an allegation of negligence and allegations about conflict as part of the proceeding.

In a negligence claim for breach of the duty of care, a whiff of conflict of interest can complicate the defence of the claim. A client can point to the conflict and argue its interests were subordinated to another's interests. The conflict may not be material to the acts of negligence alleged but will be closely considered against professional standards. If the conduct is serious enough, the judge may refer the conduct to the Victorian Legal Services Board and Commissioner.

And it probably goes without saying that courts are invariably unsympathetic to lawyers who show loyalty to their own self-interest.

Your comments

Some conflict complaints

Clearly conflict issues can end up before the courts such as where one practitioner is seeking an injunction to refrain another practitioner from acting.

Failing to deal with any potential conflict of interest issues may also result in a complaint to the Legal Services Commissioner.

Legal Services Commissioner v Spaulding (Legal Practice) [2015] VCAT 1243 is one such example of where a practitioner acted in a family law matter despite a conflict of interest arising from having previously acted for the husband and wife jointly.

In *Legal Services Commissioner v Hession (Legal Practice)* [2010] VCAT 1328 the Legal Services Commissioner received a complaint a practitioner had a conflict and should not continue to act.

The practitioner acted in two matters. The first matter related to a dispute between Sandra, John and Ann on the one hand and Colin on the other. It was alleged that Colin, over a lengthy period, had used monies belonging to his mother for his own purposes. John's complaint was that Mr. Hession was acting for Colin and for Mrs. Daley's estate in relation to the dispute, and therefore had conflicting interests.

The case of *Law Society of NSW v Harvey* [1976] 2 NSWLR 154 is a reminder about the need for practitioners to never let their own interests conflict with the client's interests.

The practitioner was a director and shareholder of three property investment companies and his clients often, at his suggestion, lent money to these companies for investment purposes. Notable, the clients were not advised to obtain independent legal advice.

The court observed that where there is any conflict between the client's and practitioner's interests, the duty of the practitioner is to act in perfect good faith and to make full disclosure of their interest including disclosure of any material circumstances. As a result of not doing that, the practitioner was struck off the roll of practicing solicitors.

In *Guss v the Law Institute of Victoria* [2006] VSCA 88 the practitioner acted for their spouse in Supreme Court litigation and had knowingly and deliberately failed to discover relevant documents.

Your comments

Exercise – conflict and consent

Background – relevant part of rule 11

Where a solicitor seeks to act for two or more clients in the same or related matters and where the clients' interests are adverse and there is a potential conflict the solicitor may act where the clients have given **informed consent**.

Zoom poll

Do you obtain written consent when complying with rule 11?

- a) Yes
- b) No

Exercise – concurrent conflicts

Background

You act for a vendor and a purchaser in relation to the private sale of the vendor's principal place. The vendor is overseas so you have been receiving instructions from the vendor's attorney.

The contract has been exchanged. Before the cooling-off period expires the attorney contacts you and says the vendor mistakenly forgot to mention that they had done some owner builder works but that they have spoken to the selling agent who said that they don't need to disclose details about the works in the section 32 statement.

Zoom Q & A

1. What would you do next?
2. What is your position if the purchaser wishes to terminate the contract?

Exercise – conflict between purchaser and nominee

Background

You act for a company purchaser of land. The directors instruct you that they now wish to nominate a third party individual who has approached them with a generous offer to buy the land from the company.

Zoom poll

Would you act for the nominee?

- a) Yes
- b) No

Did you know?

A deterrent excess is payable where a firm has a claim and the firm acted for multiple parties or interests. Refer to clause 5.2 of the policy. You can find the policy [here](#).

Claims

LPLC regularly sees claims where conflict is an issue.

Recent claims include:

- Acting for a purchaser under a head contract and the same purchaser (now the vendor) and the ultimate purchaser in a sub-sale.
- Acting for multiple parties in a joint venture to develop land.
- Continuing to act for vendor after a sale of land dispute arises and where the vendor alleges that the practitioner is liable for any loss due to their negligence in failing to properly document the transaction.

Compliance with the spirit and letter of the rules materially reduces the risk of a conflicts claim.

However, LPLC often becomes aware of practitioners overlooking or ignoring the requirements of the rules.

Claims and intra-family transfers

A typical scenario seen by LPLC in claims where there is a conflict is intra-family transfers where the clients are in heated agreement about what they want, emotions are running high and the clients don't understand the need for one party to go elsewhere.

Also common in intra-family transfers is that at least one party was vulnerable.

Common mistakes

The common mistakes LPLC sees in acting for multiple party claims, particularly in intra-family transfers, are:

- no recommendation for the vulnerable party to seek independent advice
- failure to explain the transaction and its consequences
- no records to confirm advice or recommendation to seek independent advice.

Some practitioners mistakenly assume, when acting for multiple parties in a matter, any conflict of interest concerns will be overcome by the clients' consent to act.

A gift from grandma

In one claim a grandmother agreed to gift \$300,000 to her favourite granddaughter to buy a new property.

The conditions of the gift were that the grandmother be allowed to build a granny flat on the property and have a right to live there.

The practitioner met with the granddaughter and her husband. The couple explained that the property they intended to buy would be funded by the sale of their current home, a mortgage and the gift from grandma.

They asked for a document that clearly stated the money was a gift and did not need to be repaid. They also said the granny flat would be built on the property.

The practitioner then met with the grandmother who explained she wanted to gift the money to remove it from her estate as she did not want her children to have it when she died. While she seemed very capable and sure of what she wanted, she was 89, partially deaf and blind and had suffered three strokes.

The practitioner prepared an agreement to document the deal, which was signed by the parties.

The property was purchased and the parties moved into the house pending construction of the granny flat. Before long, they had a falling out and the grandmother moved out and demanded her gift back and ultimately issued proceedings against the couple.

After the matter failed to settle at mediation, the practitioner was joined.

The allegations against the practitioner were that he:

- failed to advise the grandmother to seek independent advice about the agreement
- failed to properly explain the agreement and its consequences to the grandmother
- knew or should have known there was a conflict of interest and the grandmother was vulnerable.

Acting for vendor and purchaser

A number of claims where conflict is an issue involve a practitioner acting for both the vendor and purchaser when the contract is conditional.

In one claim the practitioner was instructed to just prepare a section 32 statement as the selling agent would prepare the contract of sale. The selling agent inserted a special condition at the request of the purchaser making the contract subject to the purchaser obtaining a planning permit. After the contract was signed the practitioner commenced acting for the purchaser and continued to act for the vendor.

When the purchaser tried to end the contract relying on the special condition, the vendor argued that on their interpretation of the special condition the purchaser was not entitled to end the contract. The vendor alleged that if the practitioner had properly advised the vendor on the effect of the special condition they would not have disputed the purchaser's right to end the contract.

They also alleged that by failing to properly advise the vendor, the practitioner had favoured the purchaser's interests over the vendor's, although the parties agreed to cancel the contract, the vendor's loss was the commission payable to the agent and the vendor sought payment from the practitioner.

Property development conflict

In this claim the practitioner acted for a company owned by a friend and the friend's business partner. The company was developing a multi-unit property.

The company came under financial pressure and engaged a company owned by the practitioner's wife to sell the units. She had connections with spruikers who marketed properties to investors. The practitioner's friend set the price for each of

the units and the wife added commission for her company and the spruikers to arrive at the sale price.

Each of the units was sold and the proceeds were directed to the wife's company. The practitioner's role was limited to preparing the sale documents, including settlement statements that were provided to his friend prior to settlement.

The practitioner's friend subsequently had a falling out with his business partner who took control of the company. The business partner disputed the payments made to the wife's company, alleging she acted as an estate agent under the *Estate Agents Act 1980 (Vic)* without a licence and was not entitled to commission.

The business partner sued the practitioner for breach of trust, arguing payment was made to the wife's company without instructions and was not required to be made under the Estate Agents Act.

The practitioner was in a position of conflict because of his wife's interest and should not have acted in the matter. He was exposed to a claim in circumstances where payments were made to his wife's company without the knowledge of his friend's business partner.

More generally, acting for a land developer and any other party is fraught with risks. These include breach of the duty of loyalty and potential allegations by the purchaser that the practitioner favoured the rights of the vendor over those of the purchaser.

Zoom poll

Is it a breach of the common law obligation to not act in conflict, to act to for a developer and purchaser off-the-plan?

- a) Yes
- b) No
- c) Don't know

Zoom poll

Is it a breach of rule 11, to act to for a developer and purchaser off-the-plan?

- a) Yes
- b) No
- c) Don't know

Your comments

Conflict - agent v client

LPLC has seen a number of claims where there is the potential for conflict in advising both the vendor and the real estate agent engaged by the vendor to sell the property.

The agent may place the vendor's practitioner in a position of conflict by requesting advice from the practitioner in circumstances where the agent has made a mistake and is looking for advice about how to remedy the mistake. The same potential for conflict may arise where instructions are from a vendor advocate or purchaser advocate, an attorney for a party or anyone who is providing instructions on behalf of the actual vendor / purchaser client.

One example where it is possible to see a conflict between the purchaser client and a buyer advocate is the case of *Doerrenberg and Gauci v Prime Estate Pty Ltd (Civil Claims)* [2017] VCAT 2028. In this case the buyer advocate informed the purchaser that they received legal advice and the contract was in order. But no advice was obtained. This case is perhaps also an example of an agent having a self-interest conflict.

Special attention is required to identify any potential conflict when receiving instructions from someone else on behalf of the client. Sometimes, in order to protect a clients' interests and avoid a conflict, it is necessary for the practitioners to deal directly with the client and not the agent.

In the example above where the agent made an error, the practitioner should have informed the agent that they were unable to provide any advice until they had sought instructions from the client.

Conflict – do the right thing

There are a number of consequences that may arise in relation to a breach of ethical obligations such as acting in conflict including:

- A finding of unsatisfactory professional conduct
- Breach of the obligation to ensure clients make informed choices

Refer rule 7 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#)

If in doubt about an ethical issue, contact LIV ethics:

Phone: 03 9607 9336

Email: ethics@liv.asn.au

Below are some examples of rulings in relation to conflicts of interest.

Examples of rulings

- LIV ethics ruling no. R4959

Where a solicitor previously acted for a company and received instructions via the Company's Managing Director on behalf of the company, the solicitor may be able to subsequently act at a new firm for the same individual in his capacity as shareholder in dispute with the Company.

In the opinion of the Ethics Committee, and on the information presented, the Principal is not conflicted to act for X in relation to the dispute between Shareholders as he does not appear to have acquired relevant confidential information.

- LIV ethics ruling no. R4694

Pursuant to Rule 8 of the Professional Conduct & Practice Rules 2005 a practitioner cannot act for both parties in the sale and purchase of lots on a subdivision where the vendor is the builder, developer, or subdivider.

The practitioner was concerned that the operation of Rule 8.7 of the Professional Conduct & Practice Rules 2005 operates unfairly against country practitioners, especially where only one legal firm exists in the area, as the Rule forbids practitioners from acting for both parties where there are conflicting interests. The practitioner asked whether the Rule could be re-examined with a view to assisting country practitioners.

In the opinion of the Ethics Committee and on the information presented:

1. *A practitioner cannot act for both vendor and purchaser in the sale and purchase of lots on a subdivision where the vendor is the builder, developer, or subdivider.*
2. *The Ethics Committee notes that this matter may be the subject of change in the new Australian Solicitors Conduct Rules.*

- NSW Law Society ethics committee

Conflict of interest – Practical Aspects by Jennie Pakula contains examples of ethics ruling by NSW Law Society ethic committee including one where a practitioner who was acting for the vendor of a property went on to purchase that property. You can find this paper [here](#).

Exercise – do the right thing

Background

You act for a purchaser buying an investment property. The property is unencumbered. The vendor is self-represented so the transaction is being done in paper.

The purchaser's lender and their legal representative are based in Queensland. Settlement is to take place at the vendor's house in Malvern. The practitioner acting for the lender asks you to act as their agent to attend settlement.

Zoom poll

Have you ever acted as agent for another party to attend settlement on their behalf?

- a) Yes
- b) No

Zoom poll

Is there a conflict to also act for the purchaser's lender?

- a) Yes
- b) No
- c) Don't know

Please also insert any comments in the chat function.

Your comments

Conflict checklist – 5 crucial items

Making, using and updating your checklists is good risk management.

Atul Gawande in the Checklist Manifesto refers to checklists including 5 crucial issues that need to be addressed to avoid harm.

Here are five crucial items about conflict of interest to help you avoid a claim.

1. Checked for any conflict at the start of a matter.
2. Continued to be vigilant to identify any conflict during the matter.
3. Considered the rules and common law.
4. Complied with the office policies and procedures about conflict.
5. Sought advice from LIV ethics when in doubt.

What to include in your firm's conflicts policy

A conflicts policy sets out the approach a law practice takes to choices about conflicts issues. Good policy aids good decision-making on a case-by-case basis and aids consistency of decision-making across the practice and over time.

The policy embodies the appetite and tolerance of the law practice for conflict risk and compliance. Law practices' conflicts policies may vary regarding:

- types of legal services offered as some practice areas and segments within practice areas are more conflicts-prone than others
- criteria for acceptance of new clients including loyalty-sensitive clients that insist on exclusivity
- criteria for accepting new matters, especially if multiple interests are involved
- who can approve new clients and matters
- resources deployed (the higher the risk, the higher the safeguards and the more resources will be required for conflicts screening, safeguards and checking compliance)

- implementation of safeguards such as consents, terms of engagement, information barriers, independent advice and whether to adopt minimum compliance or best practice
- approaches to emerging conflict, such as whether in the case of diverging client interests the firm will continue to act for one party if possible
- writing non-engagement letters to unrepresented parties.

Policy embodies the 'rules' a law practice makes for itself or a sole practitioner makes for himself or herself. When a conflict claim arises the lawyer sometimes says:

- usually I would not have acted but this time I broke my own rules; or
- we have a policy that written consent is required but the policy wasn't followed.

The larger the practice, the more important it is that a policy is documented, communicated and backed up with resources for monitoring and troubleshooting.

More information about conflict

Websites

- [LIV ethics hub](#). You will find ethics rulings and guidelines
- [NSW Law Society ethics hub](#).
- [LPLC - word search 'conflict'](#).

Legislation and rules

- [Legal Services Council](#).
- [Austlii](#).
- [VLSBC](#).

[Guidance for CPD providers on ethics education](#).

Text

Gino Dal Pont (2021). *Lawyers' professional responsibility*, (7th ed), Thomson Reuters (Professional) Australia Limited.

Christine Parker and Adrian Evans (2019). *Inside Lawyers Ethics*, (3rd ed), Cambridge University Press.

Appendix

Cases that consider legal practitioners ceasing to act because of a conflict of interest.

Barristers

Slaveski v State of Victoria & Ors [\[2009\] VSC 540](#)

Allison v Tuna Tasmania Pty Ltd (2012) 21 Tas R 293; [\[2012\] TASSC 36](#);
BC201203948

Mancini v Mancini [\[1999\] NSWSC 800](#);

Watson v Watson unreported decision NSWSC 25/5/98

Uncle Toby's Co Pty Ltd v Trevor Jones Steel Fabrications Pty Ltd (in liq) unreported decision VSC Batt J [12/10/95](#)

Solicitors

Spincode Pty Ltd v Look Software Pty Ltd (2001) 4 VR 501; [\[2001\] VSCA 248](#)

Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd [\[2014\] FCA 1065](#)

Burns & Sellers [\[2018\] FamCA 91](#)

Re Edgecliff Car Rentals Pty Ltd (dereg.) [\[2017\] NSWSC 244](#)

Birkett Investments Pty v Streatfeild Investments Pty Ltd [\[2016\] ACTSC 323](#)

Babcock & Brown DIF III Global Co-Investment Fund LP v BBLP LLC [\[2015\] VSC 453](#)

Reflection

Once you have completed reading this booklet and watching the accompanying webinar, Conveyancing and conflict, take time to reflect on what you have learned that might help you and your colleagues in your work.