

## Managing Conflicts of Interest: How Does Your Firm Measure Up?

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According to the January 15, 2007, issue of *Canadian Legal Newswire*, conflicts of interest was a “hot topic” in 2006 and will continue to be one this year. Whether you are familiar with the issues posed by the Supreme Court of Canada’s upcoming decision on *2464920 Canada Inc. v. Strother* and related court decisions is not important. What is important, though, is the fact that bar associations, publications and legal continuing education programs are emphasizing the importance of an effective conflicts management program as part of a firm’s risk management arsenal.

The goal of a conflicts management program is to ensure that potential conflicts of interest are identified early and handled appropriately. The questions below and the discussion that follows highlight some of the common pitfalls encountered regarding conflicts management programs and recommended best practices. How strong is your firm’s program?

- |   | Yes                      | No                       |
|---|--------------------------|--------------------------|
| 1. Does your firm have an up-to-date written policy and procedures for the conflicts program?   | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Does your firm have a formal process for conflicts checking?   | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Does your firm use conflicts-checking software?  | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Does the administrative department or individual with responsibility for conflicts checking have the required skills?  | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Does your firm provide on-going training in the conflicts program policy and procedures for lawyers, legal assistants and the administrative staff responsible for conflicts checking? | <input type="checkbox"/> | <input type="checkbox"/> |

If you did not answer “Yes” to all of these questions, read on.

1. Up-to-date written policies and procedures define the controls the firm has put into place to ensure adequate, systematic screening of new business for conflicts of interest. These policies and procedures discuss the professional issues regarding conflicts of interest, such as the various types of *ethical* and *business* conflicts the firm may encounter, as well as the administrative process that has been put into place to safeguard the firm.

The conflicts policy should include the following:

- A statement that all new business must be screened for conflicts before work on a new matter commences. This screening should apply to all new clients as well as

- all new matters for existing clients. Some firms require all conflict checks to be performed before a new client/matter is opened, while others allow the conflicts checking to be completed as part of the file-opening process.
- Designation of the department or individual responsible for performing conflicts checks.
  - Lawyers' responsibilities for collecting and submitting all necessary information, reviewing conflict search reports, resolving conflicts issues and reviewing new matter lists.
  - Designation of the partner or committee responsible for overseeing the resolution of potential conflicts, setting policy and monitoring compliance.

Procedures should supplement the policy with the specifics of how to carry it out. Procedures are action-oriented. They outline the steps the firm expects people to take and the order in which to perform those steps. Operating procedures for a firm's conflicts program should include the following:

- What information is collected;
  - How information is collected;
  - What information is searched;
  - When conflicts checks are performed;
  - How search results are reported; and
  - What steps are to be taken when a potential conflict is identified.
2. Informal methods of conflict checking, which include discussions and e-mail/voice-mail messages to lawyers to find out if the firm is unable to act for a prospective client, are insufficient as the only approach. As firms grow, partners retire and lawyers move from one firm to another, reliance on a documented history of the firm's clients, matters and related parties instead of on the memory of individuals becomes increasingly essential.
  3. A database of client/matter information is indispensable for an effective conflicts program. Maintaining and searching a manual system requires significantly more time than a computerized one. Manual searches do not produce results that are as accurate and thorough as computerized ones, given the consequences of mis-filing of cards and the sophisticated search capabilities that databases can provide.

Many firms use their accounting system for conflicts checking. Unless the accounting software has a separate conflicts-checking module, only names in the client, matter title and billing name fields can be searched. Because the matter title field does not always include the names of all parties involved in the matter, potential conflicts may be missed. For example, if a file reads "Mary Smith vs. Paul Jones et al", who are the other parties? In addition, accounting software without a separate conflicts module does not have the advanced searching capabilities needed for

conflicts checking because they are not needed for accounting functions. These functions include Boolean operators (which enable the searcher to broaden or narrow searches as required), synonym searching (which ensures that variations of a name are always searched) and phonetic searching (which protects against incorrect spellings in the database).

Integrated systems with separate modules for time/billing, conflicts checking, records management, marketing, etc., are often preferred because pertinent client/matter information is automatically carried over from the time/billing module, where it is initially entered, to the other modules. However, the vendors of several excellent packages for conflicts and records management can often provide the necessary bridge so that client/matter information can be downloaded and double-keying avoided.

Using software that marries the conflicts and records management functions ensures that proper names that appear in folder titles are picked up in searches, often revealing related party information not previously identified.

4. Responsibility for the conflicts database should be centralized within the firm. This means that one department or individual should enter names and relationships in the database, perform conflicts checks and report results. To perform these functions well, the assigned individuals need the following skills:
  - Knowledge of the firm's client base;
  - Understanding of the conflicts system's setup and search rules;
  - Anticipation of name entry variations;
  - Familiarity with the system's available search aids;
  - Accuracy;
  - Ability to effectively analyze search results; and
  - Ability to refine search strategy to improve results, when required.

These skills are important because conflicts checking is a subjective and imprecise activity. Any type of database searching is subjective – two individuals performing the same search will probably enter different search statements. The imprecision of conflicts checking is the result of the lack of data integrity in most conflicts databases. Keep in mind that this data has been entered over a number of years, many of which were not governed by any quality assurance standards for either the types of information collected or how it was entered. This imprecision is also because the information submitted for searching is often incomplete or inaccurate. Given these issues, successful conflicts checking requires the right people for this important job.

5. The best policy, procedures and systems will not be effective unless the members of the firm who are involved with managing conflicts know about their roles and

responsibilities in protecting the firm. Formal training of lawyers, legal assistants and the administrative staff who are responsible for maintaining and searching the conflicts database is required. All lawyers new to the firm should be informed of the policy and procedures as part of their orientation program. Legal assistants need training in the administrative procedures involved in conflicts checking and the principles behind them. All staff responsible for the conflicts checking system need to understand their role in conflicts management. Whenever the policy, procedures or systems change, those affected by the changes need to be apprised of them.

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