



## **How to stay conflict free for small practices**

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# Why are we here?

## Focus areas by firm size

The graphic below shows that for many allegations, small and mid-sized firms have disproportionately high numbers of claims. By contrast there are few claims, and none which are disproportionately high for firms 10 or more practitioners.

	No claims
	Claims, but low or proportionate
	Claims are disproportionate

Primary Allegation	Secondary Allegation	Firm size (practitioners)				
		1	2-5	6-9	10-15	>15
Conflict of interest	Former client					
	Current client					
	Practitioners own interests					

<sup>1</sup> Professional Liability Risk Profile Analysis

# Ashley Macknay, Director MDS Legal

Practises principally in the areas of commercial litigation and professional indemnity.

Panel solicitor of Law Mutual (WA) since 2003 and for the LPB for several years.

Member of the Courts Committee and the Ethics Committee of the Law Society of WA.

Law Society's delegate to the Professional Ethics Committee of the Law Council of Australia. As a member of that Committee, has participated in the drafting of the Australian Solicitors Conduct Rules

Former member of the Legal Profession Rules Advisory Committee

Lectured for several years in Ethics and Dispute Resolution in the Legal Theory and Ethics unit in the Faculty Law at the University of Western Australia.

# STRUCTURE OF SEMINAR

- Introduction
- Types of conflicts and examples of each
- Identification and avoidance of conflicts

# FIDUCIARY DUTY

- Duty of undivided loyalty to client
- Prohibition on conflict of interest v duty
- Prohibition on conflict of duty v duty

# LEGAL PROFESSION CONDUCT RULES 2010 (WA)

## Statutory rules

- Do not affect Supreme Court's supervisory jurisdiction
- Do not affect duties/requirements under statute/law/equity

(see Rule 4)

# PARAMOUNT DUTY

- Duty to the court and the administration of justice
- Prevails over inconsistent duties including duty to the client

(see Rule 5)

# OTHER FUNDAMENTAL ETHICAL OBLIGATIONS

- Act in the best interests of client
- Avoid compromise of professional independence

(see Rule 6)



# DUTIES TO CLIENT

- Follow client's lawful, proper and competent instructions
- Candour
- Act in the best interests of client
- Confidentiality  
(see Rules 7, 8 & 9)

# CONFLICT OF INTEREST

- Duty to protect and preserve interests of client unaffected by interests of:
  - practitioner/law firm
  - another client
  - any other person(see Rule 12)

# THREE TYPES OF CONFLICT

1. Former client v current client
2. Current client v current client
3. Current client v self

# FORMER v CURRENT CLIENT

Rule 13: Must not act if real possibility would be required in order to act in best interests of current client to use or disclose confidential information from former client

unless

- informed written consent, or
- an effective information barrier

# INFORMED CONSENT

- Full disclosure to client
- Independent legal advice recommended
- Consent in writing
- Must consent to use/disclosure of information

Without disclosure, do not act

# INFORMATION BARRIER

- Also known as “Chinese wall”
- Impractical for sole practitioner/small firm

Without disclosure, do not act

# RULES: CURRENT v CURRENT CLIENT

- Practitioner must not provide legal services to client if:
  - engaged by another client in same or related matter
  - interests of the clients are adverse and
  - a conflict or potential conflict of duties to act in the best interests of each clientunless
  - each client gives informed consent;and
  - information barrier is established(rule 14)

# INFORMED CONSENT / INFORMATION BARRIER

- Full disclosure to client
- Independent legal advice recommended
- Both clients must give informed consent to acting
- Information barrier required
- Sole practitioner / small firms should not act in current client v current client conflict



# RULES: CURRENT CLIENT v SELF

Practitioner must not provide legal services to a client where practitioner knows/ought reasonably to know

- the interests of the client may conflict with their interests

unless

- client fully informed of conflict
- client has received independent written legal advice

(see Rule 15)

# HOW TO IDENTIFY AND AVOID CONFLICTS (1)

*Refer Law Mutual (WA) Risk and Control Map – Phases 1 & 2*

Screen client and matter, and engage client

- Proper identification of the client/s
- Proper identification of other parties
- Conflict search on file register
- Conflict search within document management system
- Where potential conflict identified, apply conflict policy
- Proper engagement of the client/s
  - file opening form
  - identify if particular conflict risk, eg seller and purchaser
  - written cost agreement including scope of instructions (with possible limit on scope)
  - authority where multiple clients

# HOW TO IDENTIFY AND AVOID CONFLICTS (2)

## Phase 3: provide and monitor service

- Be alert to a conflict if:
  - you act in matter where particular conflict risk
  - you intend withholding information from your client
  - you are asked to commence acting / you commence acting for another client in the same matter
  - the other parties to the matter change / a new party is added
  - your firm has its own interest in the matter (eg costs recovery)
  - an allegation is made against your firm by the client / other party

## HOW TO IDENTIFY AND AVOID CONFLICTS (3)

- Phase 3: provide and monitor service
  - Be alert to a conflict if:
    - you are employing new professional or support staff
    - you are merging your practice or acquiring files
    - you are taking instructions from person on behalf of other clients without written authority
    - a client refers a party it is contracting with to you to act for that party
    - you are going into business with a client
    - you are told a conflict is being “managed”
    - you are taking instructions from relative / friend of an elderly / infirm client
    - you are acting for client when on company board/ association committee of client

# PARTICULAR CONFLICT RISKS

<ul style="list-style-type: none"><li>• executor/beneficiary</li></ul>	<ul style="list-style-type: none"><li>• borrower/guarantor</li></ul>
<ul style="list-style-type: none"><li>• testator/beneficiary</li></ul>	<ul style="list-style-type: none"><li>• buyer/seller</li></ul>
<ul style="list-style-type: none"><li>• trustee/beneficiary</li></ul>	<ul style="list-style-type: none"><li>• lessor/lessee</li></ul>
<ul style="list-style-type: none"><li>• grantor/attorney</li></ul>	<ul style="list-style-type: none"><li>• business partners</li></ul>
<ul style="list-style-type: none"><li>• grantor/guardian</li></ul>	<ul style="list-style-type: none"><li>• multiple defendants (criminal)</li></ul>
<ul style="list-style-type: none"><li>• borrower/lender</li></ul>	<ul style="list-style-type: none"><li>• multiple parties (civil)</li></ul>
<ul style="list-style-type: none"><li>• mortgagor/mortgagee</li></ul>	<ul style="list-style-type: none"><li>• insurer/insured</li></ul>

# Resources

- Law Society of Western Australia – Senior Advisors Panel
- Western Australian Bar Association – Pro Bono Representation of Practitioners before the Legal Profession Complaints Committee and The State Administrative Tribunal
- Legal Profession Conduct Rules 2010
- Lawyers' Professional Responsibility: (5<sup>th</sup> Ed) GE Dal Pont