

# Conflict of Interest – The Dreaded C

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<b>The Scene</b>	New client recommended by a fellow lawyer; client is an up and coming Corporation.
<b>The Matter</b>	Potential new client is aggrieved over a matter concerning MB Corporation and would like to sue them!
<b>The Problem</b>	MB Corporation's name sounds familiar but the lawyer can't quite put his finger on it.
<b>Solution</b>	After client leaves: <ol style="list-style-type: none"> <li>Stand outside his door and yell to the office in general "Eh, anyone did work for MB Corporation before ah?", or</li> <li>Send out a mass email to all staff asking if anyone's ever done work for MB Corporation.</li> </ol>

If there's no answer by the end of the day, the case is accepted because the 'conflict check' is done.

The problem of course is that, that is the day the partner who just finished a trial in which he represented MB Corporation, is off on his honeymoon sans blackberry and handphone... thus... silence from the office in general and no feedback on the email that was sent out.

Many lawyers believe that a conflict check can be upheld by a brief moment of thought – a quick sift through their memory and comparing their client's circumstances to that of the firm's other clients – at the time they are being retained for their services.<sup>1</sup>

## Why is This Bad?

- ♦ Loyalty and independence of judgement are essential to the effective representation of a client.
- ♦ Not only is it fundamental but it goes to the core of the lawyer/client relationship.
- ♦ A conflict of interest may make it impossible to exercise loyalty and good judgement in favour of your client.

## What is a Conflict of Interest?

Rule of thumb is where you find yourself in a compromising situation that is likely to *negatively impact the advice* that you would otherwise give to a client. It can be described as a set of circumstances that is likely to adversely affect your:

- ♦ Judgement concerning a client; or
- ♦ Loyalty in respect and towards a client; or
- ♦ Ability to safeguard the interests of a client.

## Examples of a Conflict of Interest Situation

- ♦ Acting for **more than one person** on a single matter;
- ♦ Acting for a client on a matter where the lawyer **has a personal interest** other than earning his professional fees;
- ♦ Acting for **one client against another client**;
- ♦ Acting for **one client against a former client**;
- ♦ **Declined 'clients'**. Before declining a client, you would have interviewed the potential client; whilst making the decision on whether to take on the brief, you may have received confidential information. This may create obligations of confidentiality on your part.

## How Do You Manage A Conflict Of Interest Situation?

### Step 1

Conduct a legal analysis (i.e. facts of your case against the rules of the profession) and discuss the conflict with your client. There are certain situations of conflict to which a client cannot consent.

### Step 2

If it is one to which your client can consent, then you must disclose all necessary information to all of the parties affected by this conflict.

### Step 3

The affected parties must now decide based on your disclosure if they are prepared to accept your representation. This is a form of “informed consent/waiver” and is valid if it is made voluntarily and knowingly. Their consent should be in writing alongside the disclosure you have made, on which that consent is given. This protects both parties.

### Step 4

To assess your files at regular intervals throughout the representation to see if any situations of conflict has developed during the engagement.

## Tools for Thought!

1 Ultimately, a conflict check is to ensure that your commitment to your client’s matter will not be distracted by your commitment to any other person. Further, avoidance of conflicts facilitates another core value of a law practice, i.e. the preservation of confidentiality.<sup>6</sup>

2 A conflicts management system should not be limited to mainly

identifying client-created conflicts that materialise *in the course* of your engagement.

If you or your firm are not intimately involved in the affairs of your client, those conflicts will be revealed only by constant diligence, including periodic contacts with your client to ask, “What’s new?”<sup>7</sup>

Want to start your very own Conflicts System? We’ll tell you how. Look out for **Jurisk! March 2008**

<sup>1</sup> Todd C. Scott, ‘Conflict-Checking Systems: Three Great (and Cheap) Ways to Effectively Manage Conflict Checking’, Volume 2, Number 2, February 2006.

<sup>2</sup> Ellen Yankiver Suni, ‘Conflicts of Interest’. GP Solo, Vol. 22, No. 7, October/November 2005.

<sup>3</sup> *Ibid.*

<sup>4</sup> Ellen Freedman, ‘Handling Conflicts of Interest’ GP Solo, Vol. 4, No. 2, May 2006.

<sup>5</sup> Law Society of British Columbia’s Model Conflicts of Interest Checklist,

[http://www.lawsociety.bc.ca/practice\\_support/articles/checklist-conflicts.html](http://www.lawsociety.bc.ca/practice_support/articles/checklist-conflicts.html)

<sup>6</sup> J. Anthony Vittal, ‘Conflict Management Using Technology to Navigate the Minefield’, Volume 17, Number 4, June 2000

<sup>7</sup> *Ibid.*