

Lawyers Professional Liability Conflict of Interest

Lawyers Risk Management Note: A recent study of Lawyers claims reported to us revealed that, while claims alleging Conflicts of Interest are down from previous studies, the mere hint of divided loyalties tends to inflame jurors. Listed below are some suggestions to avoid or minimize potential malpractice claims arising out of conflict situations.

Conflicts arising from dealings with former or current clients

1. Don't rely on memory to identify current or former clients. Use a centralized and computerized conflict checking system to identify potential conflicts up front.
2. Within your system, capture the following data at a minimum:
 - Current clients
 - Former clients
 - Opposing parties
 - Declined potential clients
 - Officers, directors and principals of corporate clients
 - Principals or owners of partnerships, general partnerships and limited partnerships
 - Interested non-parties
 - Entities for which firm members serve as directors, officers or managers
 - People related to your firm's attorneys and employees

Please note that this list is just a first step and should be expanded as needed to reflect your particular practice.

3. Use engagement letters that clearly identify the client. If there are other interested parties who may need separate counsel, include a statement in your letter that those or individuals may wish to engage separate counsel.

4. Check for conflicts prior to the disclosure of any confidential information.

5. Share new client and potential client information with your firm's attorneys and staff members on a timely basis, preferably within twenty-four hours of first learning of the potential client.

6. If there appears to be a minor conflict, disclose the potential conflict to the client and, if the client consents to the representation, this disclosure should form part of the waiver agreement.

7. Any disclosure should contain the following:

- A description of the conflict in a manner sufficient for the client to understand the nature and extent of the conflict.
- The circumstances under which the client may need independent legal counsel.
- The reasons and events that might cause the firm to withdraw as a result of the conflict.

Once the client has reviewed the disclosure, have the client sign a waiver agreement containing the disclosure statement, if applicable.

Conflicts arising from the lawyer's own adverse interest

Understand that there may be exclusions or limitations in your professional liability policy for claims arising from transactions stemming from investment or ownership interests in your client's business. Regardless, it is strongly recommended that you:

1. Avoid investing in your client's business ventures.
2. Avoid acting in a management position for any client's business.
3. Avoid becoming a trustee for your client with discretionary investment power or authority over clients' funds.

4. Avoid being designated a beneficiary or distributee of a client's estate.

If you do engage in any of the activities listed above, some of the following suggestions may be helpful in defending malpractice claims should they arise:

1. Provide the appropriate disclosure. Advise your clients to retain separate legal advice to review contracts surrounding transactions.
2. Routinely seek the advice of experts in other fields when making management or investment decisions and document the advice given and your reasoning for following or straying from that advice.
3. If serving as a director or officer for any entity, be sure the entity has a directors' and officers' liability policy with adequate limits.

4. Be sure all of your actions with regard to transactions surrounding any investment with your client are fair, reasonable and fully explained in writing. Remember that, if a problem arises, it will be tempting for adverse parties to create an impression that the lawyer is victimizing his or her clients.

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This information is merely a guide and does not include all potential risk management practices and in no way should be considered a representation that, if the above tips are practiced consistently, there will not be a claim made against you. The above information is necessarily high level and is based on generally recommended risk management practices and is not intended to be exhaustive or all-inclusive. It should, under no circumstances, be construed to constitute legal advice.