



The Fundamentals of Loss Prevention for Lawyers

EXCERPT

► **CHAPTER 4: Conflicts of Interest**

Serving Illinois Lawyers

Chapter 4: Conflicts of Interest

As part of your screening of potential clients and new matters, you must undertake a conflicts analysis before you make any final decisions about retention. One of the major causes of legal malpractice claims is conflict of interest. This happens when conflicts checks are not undertaken; or when they are not fully analyzed.

Conflicts of interest can generally be divided into two broad categories:

- **the client's** interests (past or present) are adverse to those of another client (past or present); and
- **the lawyer's** interests may be adverse to the interests of the client.

Most traditional conflict of interest systems are designed to identify the first type of conflict, but not the second. The second type of conflict, however, is appearing more frequently in legal malpractice claims.

Conflicts can be case-specific. When in doubt, call the ISBA Mutual Risk Management Hotline at (866) 473-4722.

The following procedures are aimed at avoiding both types of conflicts.

Establishing a Conflict of Interest System

Capturing the proper information

Your conflict of interest system is only as good as the information you put into it. If you misspell a name or neglect to add the maiden name of a client, for example, you may miss a conflict in the future. The following information should be recorded and maintained in your conflict database for future reference:

Information on past and present clients:

- name and address of the client and his/her spouse, including all former or maiden names previously used by client;
- file name and number;
- date the file was opened;
- nature of the legal work to be performed (e.g., divorce, will, personal injury case);
- name of the lawyer within the firm who is primarily responsible for the case or matter;
- names of all adverse parties; and
- names of other interested parties.

Information on members of the firm:

- names of all lawyers and their spouses; and
- names of all employees and their spouses.

Information on persons/entities which the firm has declined to represent:

- name of the person/entity declined; and
- names of any adverse parties in the declined matter, if known.

See the [Sample Letters and Forms](#) for a list of [Types of Names to Be Added to a Conflict of Interest Database](#).

Input procedures

It is vital that everyone in the office follow the same format in inputting data. You may find it preferable to have one person in charge of inputting all data and checking for conflicts to ensure that the integrity of the system is maintained. (If you do rely on one individual, however, don't forget to cross-train another person to fill in at vacation time.)

When to check for conflicts

There are three critical points at which conflict checks should be performed:

- **The initial meeting/telephone conference with a potential client.** Never receive or review confidential information from a prospective client before a conflicts check has been completed.
- **Opening a new client file.** The person responsible for establishing new files should be instructed that a new file number cannot be assigned until a conflict search is completed and initialed.
- **Entry of a new party to the case/matter.**
- **Check for potential conflicts when hiring new lawyers, paralegals and "of counsel".** Require each new lawyer and paralegal to disclose the names of their previous clients. This process is particularly important when lateral partners are brought into the firm.

How to check for conflicts

A request for a conflict of interest search should be filled out and submitted to the person responsible for checking for conflicts by the lawyer who is primarily responsible for the new matter.

See the [Sample Letters and Forms](#) section for a list of [Types of Names to Be Added to Conflict of Interest Database](#) and a [Conflict of Interest Search Form](#).

All the names on the Conflict of Interest Search Form should be checked against the names in the database (or on file cards, if a manual system is maintained) by the person responsible for checking conflicts. The results of the search should then be recorded on the bottom of the form, which should be signed, dated and returned to the requesting lawyer. The conflict clerk should also input all data on the Conflict of Interest Search Form into the conflict system, unless it is a preliminary search. (For a sample [Conflict of Interest Search Form](#), see the [Samples and Forms](#) section.

- **If a potential conflict is found,** the firm should review the [Illinois Rules of Professional Conduct](#), determine whether a conflict actually exists, and if so, whether it can be waived with the full consent of the parties.
- **If no conflict was uncovered,** the completed Conflict of Interest Search Form should be placed in the client's file. Each file should contain a completed and signed Conflict Search Form. Assistants should be instructed not to open a file and give a matter a new file number until a completed Conflict Search Form has been received.
- **If a new party is added to the matter,** the lawyer primarily responsible for the matter should submit a new Conflict of Interest Search Form listing the new party's name. This new name should be checked for conflicts and entered into the system. The completed form should then be returned to the primary lawyer for inclusion in the client file.

Computerized systems versus manual systems

Computerized conflict of interest systems are generally preferable to manual systems because they tend to be quicker and more reliable. Computers can search through thousands of names in a matter of seconds. Manual file card systems can also be effective in a smaller office provided they are used consistently and properly.

Memory check

In addition to maintaining a manual or computerized system, distribute new client/matter intake sheets to each lawyer in the office at least once a week. A lawyer may recognize a conflict on the distribution list that was not discovered by the manual file card or computer search.

For a sample [New Client/Matter Intake Form](#), see the [Sample Letters and Forms](#) section.

Appoint a conflict expert within the firm

If you practice with other lawyers, designate one lawyer in the office as the conflict expert. All questionable conflicts should be discussed with and approved by this lawyer. Solo practitioners can seek assistance from a trusted colleague or sources such as the [ARDC](#), [Illinois State Bar Association](#) or a local law school.

Dealing with the “Unrepresented Party”

Legal practitioners today are involved with greater frequency in transactions in which at least one party is not represented by counsel. Typically, the unrepresented party believes there is no need for them to obtain independent advice because it is a “friendly” matter between “friendly” parties. Unfortunately, this amiable approach goes right out the window when the deal falls apart or the unrepresented party later regrets their decision. Let’s look at a few examples of this growing malpractice trap:

Example: The simple house closing

Lawyer represents seller in the sale of their home. Buyer is unrepresented by counsel. At the closing, buyer asks lawyer about the documents buyer is signing. Lawyer feels there is no harm in briefly summarizing the contents of the documents for buyer. The deal closes.

Buyer subsequently decides that the property is worth far less than the purchase price. Rather than blame himself for a poor business decision, he sues the lawyer on several grounds.

- First, buyer alleges that the lawyer had a fiduciary duty to advise him to seek his own independent counsel.
- Second, buyer alleges that lawyer was in fact his counsel by virtue of the comments lawyer made to buyer at the closing.
- Finally, the buyer alleges that lawyer and seller conspired to defraud the buyer.

Example: The small company deal

Lawyer has represented Mrs. Smith, president of a family business, for years. Mrs. Smith, the majority shareholder, hires lawyer to sell a portion of her stock to her son, who also is employed by the family business. Lawyer proceeds to draft the stock purchase agreement with the interests of their client, Mrs. Smith, in mind. Her son is unrepresented by counsel throughout the transaction. During several meetings to finalize the terms of the agreement, the lawyer

answers several questions posed by the son. After the deal is consummated, the son sues the lawyer for an alleged conflict of interest in representing both parties to the transaction.

To reduce your risk in these situations, we suggest the following actions:

- First, promptly send a letter to the unrepresented party stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that they should seek legal counsel immediately. For a sample [Letter to Unrepresented Party](#), see the [Sample Letters and Forms](#) section.
- Second, watch what you say to the unrepresented individual orally and in writing. Exchanging pleasantries about the weather is okay. Anything else is suspect.

Representing Multiple Parties

Lawyers should exercise great care and discretion in determining whether to concurrently represent multiple parties. Here are a few examples of multiple representations that can create conflicts for lawyers:

- buyers and sellers (in a real estate deal)
- husband and wife in estate planning matters
- multiple beneficiaries
- guardian and ward
- majority and minority stockholders
- a corporation and its directors or officers
- the partners in a newly formed partnership
- a general partner and the limited partners
- multiple criminal or civil defendants
- multiple civil plaintiffs

If you have been approached to represent multiple parties, we suggest you take the following steps:

Determine whether one or more potential conflicts of interest exist

According to your review of the [Illinois Rules of Professional Conduct Rule 1.7](#) and [Rule 1.8](#).

- **Assume the worst.** In assessing whether to take on the joint representation, consider the worst-case scenario. Don't forget that a conflict of interest may be grounds for a legal malpractice claim or the return of legal fees in the future.
- **Require each client to consent to the multiple representation in writing**, if you have determined that the multiple representation is reasonable under the [Illinois Rules of Professional Conduct](#). The consent should fully disclose the potential conflicts involved in the representation and suggest that the clients discuss the potential conflicts with independent counsel.
- **Warn the clients** that any client confidences will be shared jointly with all the represented parties in the consent agreement.
- **In these situations, a one-size-fits-all consent form will not do.** You must explain the implications involved in that specific joint representation.

- **Don't assume that one party to the transaction or case has the authority to engage you to represent other "related" parties.** For example, don't file an appearance on behalf of all of the limited partners based upon the approval of one limited partner. You should obtain the written, informed consent of each party you are representing.
- **Don't assume that you can continue to represent the multiple parties by virtue of their written consent if a conflict does appear during the representation.** Instead, you must again apply the [Illinois Rules of Professional Conduct](#) and determine whether one client will be adversely affected by your representation of the other. If the answer is yes, you may have to withdraw.

Conflicts of Interest to Avoid at All Costs

Some situations are just too fraught with conflict. At the very least, contact the ISBA Mutual Risk Management Hotline at (866) 472-4722 before taking them on.

- concurrently representing opposing but ostensibly "friendly" parties, such as a buyer and seller, lender and borrower, or a divorcing husband and wife. ***In the opinion of most ethics experts, these conflicts are so significant that they cannot be waived by consent.*** Just say no;
- acting as both counsel and an officer or director of a corporate client (for more discussion on directors and officers, see the section [Serving as a Director or Officer and Other Risky Business Relationships](#));
- having a financial interest (other than fees) in a client matter;
- purchasing real estate from or selling real estate to a client;
- holding the position of beneficiary under a client's will; and
- engaging in business transactions with a current client.

Self-Dealing Conflicts of Interest to Avoid

You have a fiduciary duty to your client and the Illinois Rules of Professional Conduct expressly prohibit self-dealing and/or obtaining a benefit from the client. Here is a list of self-dealing conflicts that are prohibited by the Illinois Rules of Professional Conduct and that should be avoided.

- accepting anything other than a simple gift from a client;
- suggesting a substantial gift be made to the lawyer or for the lawyer's benefit where the lawyer is not related to the client;
- making an agreement giving the lawyer literary or media rights to a portrayal or account based on information relating to the representation;
- having sexual relations with a client unless a consensual relationship existed prior to the lawyer-client relationship;
- making an agreement with the client prospectively limiting the lawyer's liability to client for malpractice.

Conflicts of Interest Do's and Don'ts

Do...

- ✓ Establish a Conflict of Interest system.
- ✓ Send a letter to the unrepresented party stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that they should seek legal counsel immediately.
- ✓ Watch what you say to the unrepresented individual orally and in writing. Exchanging pleasantries about the weather is okay. Anything else is suspect.
- ✓ Call the ISBA Mutual Risk Management hotline at (866) 473-4722 if you are in doubt.

Don't...

- ⊗ Don't take any matter without conducting a conflicts check.
- ⊗ Don't make any lateral hires without conducting a conflicts check.
- ⊗ Don't overlook Of Counsel, Independent Contractors and Temporary Lawyers in your Conflict Checks.
- ⊗ Don't proceed with conflicted representation without reviewing the [Illinois Rules of Professional Conduct](#) to determine whether it is consentable and/or waivable.

Addenda: Sample Letters and Forms

Types of Names to Be Added to Conflict of Interest Database

This is not a complete list.

Litigation

Insured
Plaintiffs
Defendants
Insurer
Guardian Ad Litem
Spouse
Expert Witnesses
Other Witnesses/Deponents
Lienholders

Probate

Deceased
Executor/Administrator
Spouse/Children/Heirs/Beneficiaries
Guardian/Conservator

Divorce

Client
Spouse
Children
Expert Witnesses

Worker's Compensation

Injured Worker
Employer
Insurer
Lienholders
Expert Witnesses

Real Estate

Buyer
Seller
Lending Institution

Corporation/Partnership Entities

Principal Owners/ Shareholders
Partners
Directors
Key Officers
Subsidiaries/Affiliates/Parent Corporation

Estate Planning

Grantors
Spouse/Children/Heirs/Beneficiaries
Trustee

Criminal

Client
Witnesses
Victim(s)
Expert Witnesses

Bankruptcy

Client
Spouse
Creditors
Debtors
Trustee of Bankruptcy Estate

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⁴ Lawyers should take care to include not only current names but, under some circumstances, former and alternative names, as well. For instance, this may require identifying maiden names, nicknames, corporate DBAs or trade names.

Conflict of Interest Search Form

- Search Only (do not add to system)
- Declined Client (add to system only if confidential information was obtained from non-client)
- New Client/Matter (add to system)
- Additional Information (add to system)

Client/Potential Client Name: _____

Other Name, Maiden, AKA, DBA.: _____

Matter (describe nature of representation): _____

File Name (if any): _____ File No. (if any): _____

Adverse Parties _____ Relationship Code _____

_____	_____
_____	_____
_____	_____
_____	_____

Other Parties Involved in Matter _____ Relationship Code _____

_____	_____
_____	_____
_____	_____

Requested By: _____ Date: _____ No Conflict Found

- Names Found as Follows: _____
- Searched and Entered By: _____ Date: _____

New Client/Matter Intake Form

Date File Opened: _____

File Number: _____ Matter Type: _____

File Name: _____

Client Name: _____

Contact Name and Title (if different): _____

Client Address: _____

Client Telephone Numbers: Work _____ Home _____ Cell _____

Client Fax Number: _____ Email Address: _____

Responsible Lawyer: _____

Billing/Fee Information

- | | |
|--|--|
| <input type="checkbox"/> Retainer: \$ _____ | Billing Cycle: |
| <input type="checkbox"/> Hourly \$ _____ | <input type="checkbox"/> Monthly |
| <input type="checkbox"/> Contingent \$ _____ | <input type="checkbox"/> Other (explain why) _____ |
| <input type="checkbox"/> Fixed Fee \$ _____ | <input type="checkbox"/> N/A |

Calendaring Information

File Review Dates:

- Every 30 days
- Every 60 days

Statute of Limitations Date:(Reminders 180, 90, 60, 30 and 15 days prior)

Verified by: _____ (Lawyer Initials)

Other Critical Dates to Calendar: _____

Calendaring Information

- Added to Calendaring System
- Conflict Search Completed
- Engagement Letter sent or Contingent Fee Agreement signed

File Opened By: _____ Date: _____



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