# BEST PRACTICES FOR CONFLICT CHECKING AND BUILDING ETHICAL WALLS

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It's hard to believe, but over a decade has passed since I last wrote about conflict checking. ["Maintaining Your Conflict of Interest System" *PA Bar News*, April 3, 2000.] In that article's first paragraph I set the tone by stating, "A complete and reliable Conflict of Interest database requires consistent care and feeding." There's lots of good, practical information in that former article, and if you never read it, you may want to. You can find it, and a whole host of other articles and resources, on the PBA web site (www.pabar.org) in the Law Practice Management Resources section, which is available only to PBA Members. This article will delve further, provide additional practical information, and provide guidance on erecting Ethical Walls.

First let's establish where the "bright line in the sand" exists, because conflicts of interest don't always necessarily mean one cannot take on a representation.

In order to get my facts straight for this article, I turned to King of Prussia-based attorney Barbara S. Rosenberg (ethicscounsel@gmail.com). Barbara focuses her practice on attorneys' professional responsibility issues, including attorney discipline, bar admissions, fee disputes and legal malpractice, and also provides expert opinions. Previously, she served as disciplinary counsel, prosecuting attorneys for violations of the Rules of Professional Conduct. Barbara graciously provided a wealth of information, for which I express my gratitude. I also turned to the ABA Center for Professional Responsibility, from which I gathered a substantial amount of information on the challenges of constructing Ethical Walls.

Let's start first with those types of conflicts which cannot or should not be waived. Concurrent conflicts as described in RPC 1.7(a)(1) in which there is direct adversity to another client is clearly on the NO side. Likewise, conflicts set forth in RPC 1.8(c) – solicitation of substantial gift; 1.8(d) – securing media rights during representation; 1.8(e) – providing financial assistance to client; 1.8(h) – limiting liability for malpractice; and 1.8(j) – sexual relations with a client, all seem to fall clearly on the NO side in terms of creating unwaivable conflicts.

Other conflicts may be waived with informed consent, as defined in the Rules, and which may or may not be possible to obtain, depending on the circumstances, including the client's sophistication and access to independent counsel. These would include conflicts under Rule 1.8(e) – entering into a business transaction with a client; 1.7(a)(2) – representation which may be materially limited by lawyer's responsibilities to another client, former client, third person or personal interest of lawyer; and 1.8(f) - accepting compensation from another for representing client.

If a conflict appears to be waivable, full disclosure of the risks and advantages of the representation must be disclosed, including the possibility that future developments may require withdrawal from the representation, or where applicable, that representation may be impacted by disqualification proceedings. All parties affected must agree to waive the conflict.

Finally, there are imputed conflicts. These are created when an attorney or staff member joins a firm, having formerly represented clients adverse to current clients of the firm. [Note that this first arose in the context of governmental lawyers accepting positions with private law firms, incepting with DR 9-101(B).] The duty to protect client confidence follows the attorney or staff member, and creates an imputed conflict, even before any information is shared. Just the appearance of impropriety in protecting client confidence can be sufficient to create a conflict.

If the firm sets up an Ethical Wall as soon as possible upon knowing that an imputed conflict exists, it may avoid disqualification due to conflict. And it is not necessary under these circumstances to obtain written waivers from all parties. But the Ethical Wall can be challenged, and the firm must be able to show it is effective in screening the disqualified individuals. [Note: see RPC 1.10 Imputation of Conflicts of Interest: General Rule.]

You no doubt noted that I mentioned the "bright line in the sand" previously, and some of you wisely disagreed with that phrase. Because in point of fact, the best minds in the country often disagree on these issues. Conflict issues are very fact-sensitive, and there are different standards applicable to discipline, disqualification, and malpractice. So if you have any question about whether there

is a conflict and/or whether it is waivable, you should do one or more of the following:

- Consult with in-house ethics committee or counsel
- Consult with outside ethics counsel

- Consult with your professional liability insurance company's confidential malpractice avoidance hotline
- Contact the bar association ethics hotline

Remember also that there are additional resources to which your in-house committee or counsel can turn. There's the widely-regarded web site, Freivogel on Conflicts (www.freivogel.com), and there's the ABA Center for Professional Responsibility, available only to ABA members. The Office of Disciplinary Counsel is taking a much harder look at alleged conflicts than in the past. However, most conflict violations result in private discipline, about which no information is publicly available. So it's impossible to say how frequently this occurs.

Nowadays, it is essential to have a finely-tuned conflict of interest system. If you are still relying on memory (unless you are a solo and have a very sharp memory) you are at risk. Many firms are still straddling between utilizing new methodology, e.g. time & billing or case management databases, and old card files.

For most firms, old card files are impossibly inaccurate. Old-time practices had many firms creating a card for only the main party involved in a matter, and none for additional parties. Cards were historically created only for clients, and rarely or never for prospects who may have shared confidential information. Some firms lost card files over the years to fire, flood and other natural disasters. Or simply, as at one firm I worked with, a tumble down the stairs left their thousands of cards in hopelessly unsearchable order.

The good news is that the older the card files, the less likely they are to reveal any real conflict risk. But I recommend that they be scanned with a searchable text layer, and then destroyed. It will save time, and preserve the information once and for all.

The common oversights in the maintenance of a conflict system include:

- Failure to include names of all parties involved. For business entities this can include officers, major shareholders, and board members. It may also need to include predecessor business names.
- Failure to include prospective clients who have shared confidential information. As an aside, if you have a web site which permits direct contact with the firm, you want to have a clear disclaimer on the contact page (not just a link – print it on the page!) which notifies that contacting the firm does not establish an attorney-client relationship, that no privilege exists for information provided, and that no confidential information should be provided until an actual engagement is formed by a signed agreement.

- Failure to review files of concluded matters for names of additional parties which later became part of the matter, and should be added to the conflict database.
- Failure to establish written rules to ensure consistency with regard to data entry into the database. Lack of consistency in abbreviation, format (e.g. first name, last name or vice versa) and so forth can make for ineffective searches later.
- Failure to enter the firm's employees into the system. This information should include former names for female employees, spouse names if different, and names of businesses owned by employees or spouses.
- Failure to publish a weekly report of each new matter for *every* employee to review, showing the attorney who brought in the file, the type of matter, and the names of individuals and entities associated with the matter.
- Failure to circulate immediately the results of the initial conflict check, if any matches come up, and get each associated individual to review and verify no actual conflict exists, *before* the matter is opened.

For most firms nowadays, the biggest exposure for conflicts often comes from lateral hires. And we're not just speaking of attorneys. Paralegals and secretaries can create disqualifying conflicts as well if they share confidential knowledge of former clients obtained at prior employment. However, a law firm may avoid imputed disqualification by careful screening, also known as erecting an Ethical Wall, Ethical Screen, or Chinese Wall, the purpose of which is to timely prohibit the disqualified lawyer or staff member from having any contact with any other lawyers in the new firm about the matter(s) that gave rise to the disqualification.

One of the important considerations in determining whether a firm has erected an effective Ethical Wall may well be the size and complexity of the law firm. *Booth Creek Ski Holdings v. ASU International* and *NFC, Inc. v General Nutrition, Inc.* are cited as cases where multiple law offices were factors which protected firms from disqualification. The degree of separation in the case of multiple offices, or lack of face-to-face interaction in large firms with single offices housing multiple departments, are factors which weigh heavily in favor of large firms. For small firms, it becomes increasingly difficult to effectively segregate the disqualified lawyer or staff person behind an Ethical Wall.

Ok, let's move on to the practical aspects of building an effective Ethical Wall. The first requirement is to ensure that the lawyer (or staff member) must be isolated from confidences, secrets, and material knowledge concerning the matter. What we're really talking about here are the components of the client file including documents, faxes, email, discovery and so forth.

Once again, the large firm is at an advantage. There are few large firms which do not employ the use of document management software such as Worldox, Interwoven, Hummingbird (or whatever their current names are – they all change so frequently) and so forth. It is a simple matter to create an inclusion list, e.g. those allowed to access documents for a certain client, or an exclusion list, e.g. those who not only cannot access documents, but cannot even see they exist. Easily producible reports can document the firm's effectiveness.

Large firms also usually employ some sort of litigation support software, especially Concordance or Summation if discovery is normally voluminous. Within that software a firm can restrict access to information.

If the firm employs Case Management software, there should be tools available to keep calendar items, to-dos, notes of telephone calls, billing information, contacts and details associated with those contacts, all restricted to those who should have access to the information.

Firms which do not employ document management software, case management software, and/or litigation support software must take special precautions with electronic data. I suggest installation of an additional hard drive on which all electronic information for the client can be housed. Access to the hard drive can be password restricted, so that only those who should have access can get to the data. Remember, faxes, email, discovery, notes of telephone calls etc can all be stored electronically in the client's file. Electronic information is easier to organize and find, is backed up regularly, and is much easier to secure.

You may be wondering why I suggest a separate hard drive. That's because many small firms use desktop search engines like Copernic or X1 instead of document management, due to cost considerations. It's impossible to index only portions of a hard drive with desktop search engines, and anything indexed is viewable by anyone with the software. However, it is easy to specify which hard drives are to be indexed. So a separate hard drive is an excellent and infallible solution for a small firm using desktop search engine software.

Every physical file involved in an Ethical Wall should have a brightly colored banner on the front of each gusset file and bankers box, which indicates screening is in effect, and list, in large lettering, the names of anyone who may not have access to the file. Screened files should always be kept intact, meaning that individual file folders should not be separated from the gusset file. Otherwise, a screening banner should be put on each individual file folder in the file as well.

If the firm has a central fax machine where inbound faxes print and pile up, this could present a problem for a small firm. If there is a "neutral" person who is assigned to pick up and distribute the faxes, no problem, as long as the items waiting on the machine are not subject to accidental viewing by passersby.

An easy solution would be to relocate your equipment to a less visible spot. Or you could implement electronic fax through services such as eFax or MaxEmail. The fax arrives as a PDF (you can also choose TIFF format, but PDF will work better in the long run in other regards) attached to an email in a designated mailbox of your choosing.

I suggest you set up a separate mailbox specifically for inbound fax, and provide access to several "neutral" people in the office, such as receptionist, office manager, and bookkeeper. That way, if someone is out for the day, faxes can still be routed properly. The mailbox should have the new mail notification turned on. As faxes arrive, the staff person opens the email attachment, looks at the cover sheet, and then forwards the email to the appropriate party(s). Your fax number can be set up and active within an hour, and those who send fax have no clue they are not faxing to a "traditional" machine.

The second requirement for an effective Ethical Wall is to ensure that the screened lawyer must be isolated from all contact with the client or any agent, officer or employee of the client and any witness for or against the client. Again, the smaller the firm, the harder this is to achieve. Advance notice to screened individuals as to locations (such as conference rooms, reception areas, etc.) to avoid during specific dates and times can effectively achieve this requirement. Screened lawyers should also avoid intercepting telephone calls after hours if there is no caller ID.

Also, keep in mind that technology enables most lawyers to work effectively from almost anywhere, so even if you have to ask an attorney to work from home on a particular day, it doesn't have to have a negative impact on other client work. The more paper-independent your office is, the easier it is to be fully productive when working remotely.

The third requirement for an effective Ethical Wall is that the lawyer and the firm must be precluded from discussing the matter with each other. This is perhaps the most difficult requirement to implement in a small firm, where it is common to overhear discussions held in hallways or on telephones, and even to enter discussion without knowing specifically what matter is being discussed until it is too late. Lawyers generally like to use ones colleagues as sounding boards when it comes to matter management, and may not think about the Ethical Wall when something particularly challenging or interesting crosses their desk.

This is the same challenge which exists generally when it comes to client confidentiality issues. The best defense is a good offense: education. Everyone should be reminded of the basics – restricting information to only those actively involved in the matter; eliminating matter-related conversations in hallways, reception areas, or where others might overhear without intent to do so; eliminating matter-related conversations in any public location such as elevator, lobby, restaurant, etc.; and keeping all client related documents and communications within the client file — never left on a ledge, conference room table, copy machine, or other public area within the firm.

Next, the firm should provide written notice to any affected former client or current client with specific information sufficient for them to feel comfortable that their confidences are protected. The letter should describe the screening procedures employed, and include a statement of compliance by the screened lawyer. The client should know they have a right to make inquiry or objection, and that the firm will respond promptly.

Additionally, the disqualified lawyer who is screened from participation in the matter may be apportioned no part of the fee earned in the matter. While this requirement may raise the level of bookkeeping complexity, it is relatively easy to enforce.

Lastly, it is required that a firm take *affirmative* steps to accomplish the previous requirements. However, don't forget that the steps must also be *effective*. There is no doubt that the courts will continue to determine and thereby more clearly define what is specifically required and appropriate methodology for erecting an effective Ethical Wall. Keep in mind that this is still relatively new territory, brought about by the reality of increased mobility of lawyers and law firm staff, and the increase of law firm mergers.

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