

Conflict of interest not always so clear cut

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This column presents examples of recent matters involving acting for more than one party and acting against a former client.

Many of the same sorts of problems arise with amazing regularity but there are also a lot of matters with some novel twists.

Many members of the public and some solicitors still think that there is a complete bar to ever acting against a former client. Rule 2 of the Revised Professional Conduct and Practice Rules, which reflects the common law as well as long-held ethical principles, indicates that this is not so.

If you act against a former client from whom you have received confidential information and the former client feels it is reasonable likely that the information could be used to his or her detriment in the current matter, then you have a conflict of interest: a conflict between your duty of confidentiality and of loyalty to the former client and your duty of disclosure to the present client at whose disposal you must put all relevant information coming to your attention.

In some circumstances you may owe a duty of confidentiality to someone who is not your client. This will generally be rare but may arise for example if you have obtained confidential information from a director in acting for a company, or vice versa.

I was surprised recently to receive a letter from a firm of solicitors who said, without providing any details, that they thought another firm had a conflict of interest in acting against their present client where the firm had previously acted for the client in an unrelated matter.

Some members of the public, particularly in small communities, may feel some sort of proprietary interest in their usual solicitors and that may give rise to a commercial rather than an ethical or legal conflict of interest.

In one case a client involved in litigation alleged a conflict of interest because his usual solicitors who had acted for him in quite a number of matters were acting against him in proceedings. It emerged that none of the earlier matters was related to the present matter and that the solicitors didn't act for him in any other present matters.

Two long-standing clients had fallen into dispute and the solicitors commenced

acting for the first of the clients to approach them. Unfortunately the turn of events was likely to remove any possibility of solicitor/client relationship.

What about the possibility of a personal relationship giving rise to a conflict of interest?

In one case the wife in family law proceedings objected to the husband's solicitor acting where he had previously been a next-door neighbour.

It emerged that the solicitor had obtained no confidential information against the wife. However, there was some possibility that he might have to be a material witness in the matter.

That would give rise to his having to withdraw because Rule 19 of the Revised Rules, even though there did not appear to be a conflict of interest.

In a similar case the wife in family law proceedings was concerned that a family friend was acting for her estranged husband.

"Balancing the perception against a practical consideration of possible detriment to a client or former client is sometimes tricky and each case depends on its own circumstances."

Again it appeared that there was no confidential information likely to be used to her detriment and it was unlikely that the solicitor would be a material witness. While there would obviously be some awkwardness, the wife conceded the fact that there was not a conflict of interest but it is obviously a situation that might lead to some embarrassment.

Kossatz v Kossatz, a family law case reported in [1993] FLC92-386 deals with the issue of whether prior social contact gives rise to conflict of interest - it generally does not.

Balancing the perception against a practical consideration of possible detriment to a client or former client is sometimes tricky and each case depends on its own circumstances.

A solicitor acting on the instructions of an insurer sought advice as to whether he would have conflict of interest in acting for the plaintiff and the third party in the same set of property damage proceedings. He was first instructed on behalf of the plaintiff. Proceedings were commenced against

a manufacturer of goods who in turn issued a third party notice against the carrier of the goods. It emerged that the same insurer who insured the plaintiff also insured the third party.

The solicitor raised the question of conflict of interest with the insurer who pressed him to act for the third party as well as the plaintiff on the basis that the insurer would bear the financial burden of the proceedings and there would be no adverse ramifications, for example in terms of future premiums.

While in practical terms this might seem an attractive argument, the Ethics Committee could not see how the Committee would not frown upon the same firm acting for parties on opposite sides of the record and that it would not be in keeping with the aims of the administration of justice for them to do so.

A classic case of conflict between duty of disclosure and the duty of confidentiality came to light when a firm (through separate solicitors) acted for a client proposing to lend money to a third party as well as for a creditor of the third party.

Through acting for the creditor the firm established that the proposed borrower was in financial difficulty. The dilemma was not that the firm owed a duty of confidentiality to the borrower but disclosure of the financial difficulty to anyone other than the creditor (it not being widely known) might, in the firm's view, have adverse repercussions for the creditor.

Obviously the firm could not allow the loan to go ahead or breach the duty of confidentiality owed to the creditor in relation to information they regarded as confidential.

In some cases it is prudent to decline to act without necessarily being able to explain why to the client. That of course poses particular difficulties. Suggesting that the proposed lender make full enquiries in relation to the proposed loan, independently of the firm, might provide a solution.

A conflict of interest can arise when you take over a matter from a firm which has left and a dispute as to that firm's liability arises. How can you act for the client in the dispute where you yourself have handled the matter?

As you can see, it's not always going to be easy. □