

CONFLICTS OF INTEREST SYSTEMS – PROCEDURES

Conflicts of interest can lead to serious malpractice and ethical problems. To detect conflicts, a good conflicts checking system is essential. No lawyer can remember every person connected with every case. Eventually a new client will appear with interests opposed to a present or past client. If undetected, such a conflict will cause much wasted effort if you are eventually forced to resign from the case and can result in malpractice claims and disciplinary proceedings.

One type of conflict problem lawyers run into is representation of multiple parties. Representing husband and wife, buyer and seller, insured and insurer, estate and administrator, directors and officers, guardian and ward, or trustee and beneficiary can be dangerous because the parties' interests may diverge. Any time multiple parties are represented or the lawyer has a personal interest in the matter, conflicts can arise.

Conflict problems also arise when lawyers fail to document that they are *not* representing someone. For example, assume a husband and wife want an amicable dissolution. They come to you and ask you to represent both of them.

In this type of situation, documentation is critical. Assuming that you are permitted to represent one of the parties, confirm representation of the client with an engagement letter and send the other party a nonengagement letter. The nonengagement letter should state that you are not representing the nonclient's interests and that the nonclient should seek independent counsel.

A good conflict checking system will detect possible conflicts of interest before representation. Nevertheless, some conflicts may arise during representation. Every lawyer should develop policies for handling conflict situations as they arise. Follow ORPCs 1.7, 1.8, and 1.9, and be sure to carefully document your actions.

A poor conflict system is as bad as having no conflict system at all. There are different approaches to setting up conflict systems, depending on the size and type of office. All effective systems have certain things in common. A good conflict system has these characteristics:

1. The system is integrated with other office systems;
2. The system provides for easy access to conflict data for everyone in the office;
3. Checks are conducted at the three key junctures: before the initial consultation, before a new file is opened, and when a new party enters the case;
4. Searches check for spelling variations of names;
5. Conflict entries show the party's relationship with the client;
6. All parties connected with a case are entered into the system; and
7. Conflict searches are documented in the file.

CONFLICTS OF INTEREST SYSTEMS – PROCEDURES

Creating a Conflict Checking System

The traditional conflict system used index cards to keep track of conflict names. This system was slow to maintain and check. A simple word processing or spreadsheet database, such as through Microsoft Word or Excel, can be used for conflict checking. Some software programs are built for conflict-checking purposes. There are two types of conflict checking software programs. The first is a standalone conflict checking program whose sole function is to serve as a conflict database and perform conflict checks. Another option is to use a legal practice management software program with built-in conflict checking capabilities. These programs include other features like contacts, matter management, calendaring, timekeeping, and billing, among others. Both standalone and legal practice management software programs with conflict checking capabilities usually allow you to electronically save or print a “conflict” report for the file. The PLF practice management attorneys monitor new developments and can provide information about these types of software.

A database stores information on records in fields. When you set up a database, you select the particular fields that will appear on each record. When you create a new record, the fields will automatically appear to prompt the user to enter the correct information.

The big advantage of a database is that you can search the records using a particular name. Once you give the command, the database scans all the records in the database to see whether the designated name is present. If the name appears in any record, the computer pulls that record up onto the screen.

When shopping for a database, look for one that is easily searchable and will hold enough records. Many databases hold an unlimited number of records while others are limited. We recommend a minimum of 5000 records for the new sole practitioner.

Setting Up the Conflict Database

When you set up a database for your practice, include the following fields in each record:

Date Opened:	(the date when the file or matter was opened)
Matter Name:	(the name of the file or matter)
Matter Number:	(the number assigned when the file or matter was opened, if applicable)
Client Name:	(the name of the client) ¹
Attorney:	(initials of the responsible lawyer, if applicable)
Description of Matter:	(a description of the matter detailed enough to allow the user to determine whether a conflict exists without having to pull the file)
Conflict Names:	(names of all related and adverse parties and their relationships to the client) ²
Date Closed:	(the date when the file or matter was closed)
Closed File Number:	(the number assigned when the file or matter was closed)
Date Destroyed:	(the date when the file or matter was destroyed, if applicable)

¹ This field could be further divided to separately track the client by last name, first name, and middle name.

² Conflicts can also be tracked in two separate fields, one for adverse parties and one for related parties.

Other fields that could be added to a conflict database include the client’s federal taxpayer

CONFLICTS OF INTEREST SYSTEMS – PROCEDURES

identification or Social Security number and the name of the opposing counsel. At a minimum, always include each party's relationship with the client or role in the case. This information makes it much easier to quickly assess the seriousness of a potential conflict.

Using a Conflict System

A Checking Routine

Set up a procedure for checking conflicts. Conflicts should be checked three times. First, check for conflicts when a potential client first contacts you but before the initial interview. (A preliminary check of the potential client's name allows you to decline further discussion, preventing a crucial divulgence of confidences.) Second, do a more thorough check before you open a new file for that client. After talking with the potential client, you will have the names of others connected with the case. Third, check the conflict system whenever a new party enters the case.

Office Sharing

Lawyers sharing offices *may* need to provide each other with the names of their clients so that a conflict of interest check can be completed. However, before revealing a client's name to other lawyers in your office share, obtain the client's informed consent in writing. OSB Formal Ethics Opinion No. 2005-50 cautions lawyers sharing offices to avoid conflicts of interest by (1) not holding themselves out to the public as members of the same firm through joint advertising, joint letterhead, or otherwise; (2) respecting confidentiality of information relating to the representation of their respective clients and insuring the same from their employees; and (3) keeping their respective files separate. If these steps are not taken, then lawyers in an office share cannot represent adverse parties. If a common phone system is used, office sharers must not represent adverse parties unless they have taken steps to assure that phone messages containing client information or legal advice are not given to or transmitted by shared employees. Mail must not be opened by shared employees. If the lawyers share a secretary or other employee who is in possession of the confidences or secrets of both lawyers, then the simultaneous representation of adverse parties would be prohibited.

Document Conflict Checks

Assign responsibility for conflict checking at each of the three stages mentioned above, and establish a method for recording that a check was completed. A client intake sheet or a specific conflict check request form are possible ways for keeping track of this. Always show the names that were checked and who performed the check. When a new file is opened, make sure that the conflict check was actually done.

Input New Conflict Information

The person checking for conflicts should also input the new conflict information from the client intake sheets or conflict check requests. Be sure to include everyone connected with the case. Lawyers in your own firm, staff members, and close relatives of lawyers and staff should be listed in the conflict system. This insures that cases will not be taken against people connected with the firm.

In addition to all clients, enter the names of all prospective clients and declined clients into the conflict system. A failure to enter prospective or declined clients in the conflict system can be embarrassing and costly and may result in ethical or malpractice claims against the lawyer. For example, assume a husband comes in for a consultation because he is contemplating divorce. During the consultation, the husband discloses confidential information. The husband then decides not to proceed with the divorce, or the lawyer declines the husband as a client. Two years later, the wife comes to the lawyer seeking a divorce. If the lawyer accepts the wife as a client, the lawyer will have a conflict of interest. This could easily happen if the lawyer forgot about the consultation with the husband and did not maintain a record of consultations in the conflict system. A similar situation

CONFLICTS OF INTEREST SYSTEMS – PROCEDURES

can occur when two lawyers in the same firm interview prospective clients who have adverse interests.

When a Name Is Found

If a name is found in the conflict system, notify the responsible lawyer immediately. The faster the lawyer is aware of the potential client's relationship to a current or past case, the better position the lawyer is in to make a decision to decline representation or make proper disclosure. If a name comes up during a conflict check, it does not necessarily mean there is a conflict. The lawyer responsible for the client or matter must make the final decision. However, if there is no way to check for conflicts, or if a check is not done, the lawyer will not know until it is too late.

If the lawyer decides to decline representation, notify the declined client immediately. To protect client confidentiality, state only that a potential conflict exists. Do not provide any further details to the declined client. Always document notice and declination of representation with a nonengagement letter.

New Lawyers and Staff

Conflicts can arise when a new lawyer or staff member joins the firm. The new lawyer or staff member may have worked on cases at another firm that present a conflict with your firm's clients. Every lawyer and staff member should maintain a personal list of former clients. Have the new person review a list of the firm's clients and compare it with their personal list. When the comparison is complete, incorporate the new person's former clients into the firm's conflict system. This step ensures that all lawyers in the firm will be aware of any potential conflicts the new person might have. (The new person's conflicts are now the firm's conflicts unless the screening rule in ORPC 1.10 applies.)

When a Lawyer or Staff Member Leaves the Firm

When leaving a firm, a lawyer or staff member should take a list of the clients to whom they provided legal services. The list will let the lawyer or staff member screen for conflicts in their new office. If the lawyer or staff member did not maintain a list of the clients they served, the old firm may be able to provide the list from the firm's conflict system. (This option may not be available for staff members.)

If the firm's conflict system accurately reflects all the matters the lawyer worked on while at the firm, the firm can print a report for the lawyer or provide the information electronically, if available. If the firm's conflict system tracks only the primary lawyer on client matters and does not reflect all the lawyers who may have worked on a given file, the firm may want to create the necessary conflict information from billing records or provide the departing lawyer with a list of all the matters that were opened during the time the departing lawyer was employed at the firm.

New Client List

Regularly circulate a list of new clients and cases to all lawyers and staff in the office. Ask that everyone review the list for possible conflicts that may not be in the conflict system. Someone in the office may recognize a conflict from the list that would not be detected otherwise.

CONFLICTS OF INTEREST SYSTEMS – PROCEDURES

Request for Conflict Search and System Entry

FILE NAME John Smith – Business Lease

CLIENT/COMPANY NAME John Smith

CLIENT MATTER Business Lease RESPONSIBLE ATTORNEY MLS

RELATED PARTIES

NAME	RELATIONSHIP
<u>LB Properties, Inc.</u>	<u>Lessor</u>
<u>Mary Smith</u>	<u>Real Estate Agent for Lessee</u>
<u>John Doe</u>	<u>Real Estate Agent for Lessor</u>
<u>Betty Clark</u>	<u>Property Manager</u>
<u>555 SE Downs, No. 115, Portland, Oregon</u>	<u>Property Address</u>

- NEW MATTER (to open new file)
- ADDITIONAL INFORMATION (to update file)
- SEARCH ONLY (do not add information)

Requested by MLS Request Date July 1, 2023

-
-
- NO CONFLICTS FOUND
 - NAMES FOUND AS FOLLOWS:

Searched by BLL Search Date July 1, 2023

CONFLICTS OF INTEREST SYSTEMS – PROCEDURES

IMPORTANT NOTICES

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials for use in their own practices. © 2023 OSB Professional Liability Fund