What Does My Conflicts Department Do?

Presented by:

Ann Ostrander
Director of Loss Prevention
Kirkland & Ellis LLP

John Kruse
Director of Records & Conflicts Administration
Cadwalader, Wickersham & Taft LLP
Two Functions of a Conflicts Department

**Conflicts Checking**
- What is a conflict of interest?
- What are the rules?
- When do they apply?
- What happens if we ignore them?

**New Business Intake**
- Is this a worthy client?
- Is this a good representation for our Firm?
Our Clients & Our Matters

- The Firm represents a number of different clients that can be companies, partnerships or individuals.
- Clients can be clients for the duration of a single matter or numerous matters that span years ... even decades!
- A matter can be finite with a definite start and finish, and ... some matters never close!
- Effective conflicts analysis requires thorough knowledge of our clients and understanding what we do for them.
- A Conflicts Database is the specialized application that manages all this information.
What’s in the Conflicts Database?

- The names of a firm’s clients and all persons (individuals, companies, entities, parent companies, subsidiaries, affiliates) connected to past, current and often pending matters of the firm.

- Descriptive data about the relationships of all names to the firm, e.g., client, adversary, opposing plaintiff, etc.

- The names and descriptions of all matters handled for various clients (this used to be found on index cards!)

- The names of partners and attorneys associated with each matter.

- Matter specific data, e.g., date opened / closed, status, area of law.

- Lateral attorneys’ previous clients and matters.
Conflicts Personnel: Analysts, who generally possess deep knowledge of a firm’s client base and the conflict-of-interest rules that pertain to lawyers, as well as expert research skills.

Conflicts Database: a CRITICAL APPLICATION in a law firm that is maintained and used to protect the firm from conflicts-of-interest and to safeguard the interests of its clients. Examples include: LegalKEY, Elite, CA MDY.
Why are these essential resources? ...

Because the RISKS are EXTREMELY high!
Potential risks associated with conflicts of interest

- Malpractice claims against the firm
- Loss of clients
- Loss of current and future business
- Harm to firm’s reputation
- Disqualification by courts
- Forfeiture of fees
Three Kinds of Conflicts

- **Legal/Ethical**
  - Direct adverse relationships
  - Protecting client’s confidential information

- **Business**
  - Representing competitors

- **Issue**
  - Philosophical differences
  - Expectations of clients
Two Events that lead to potential conflicts

- When opening a piece of new business
- When a new attorney joins the Firm
What is a Conflicts Check?

With each new representation/piece of business that comes into the Firm, the names associated with the NEW piece of business will have to be checked against the database of names associated with all the OLD matters to make sure that we aren’t on the opposite side of those people or companies in our existing matters. That would be a conflict of interest since you can’t be on more than one side of a matter (if you were, you’d always win!).
So, What’s the Problem?

- Companies have many subsidiaries, affiliates, divisions and related entities. Although it’s not an absolute that you can’t be adverse to the subsidiary of a client, you would always want to know if you were going to be adverse somehow to one of its family members.

- In many instances, you’d need the consent of the client to do so.

- Even if it’s ultimately okay, it always pays to know the lay of the land.
Okay, so I’ve searched all the people, entities, and related entities in my new matter. Am I clear to proceed now?

Companies buy and sell each other every day; what is a subsidiary of a company today may not be a subsidiary tomorrow.

Part of the job of the Conflicts staff is to investigate the most thorough and recent lists of related companies for all new clients and matters.
Okay, so I’ve investigated all the subsidiaries and companies and cleared my new piece of business. Now I’m done, right? Not so fast!

You may clear a new representation today, but what happens on Monday morning when Lawyer X shows up from another Firm, where s/he’s just been suing the pants off your client on the other side of the same matter?
Most Conflicts Databases, therefore, track not only the names and entities associated with all matters, but also the work lists associated with every LATERAL hire attorney in the firm (i.e., all the cases on which they have worked in the past).
Constant Checking

- Checks can be requested of the Conflicts Department at any time / any day as partners are continuously courting new clients / new business.

- Firms consistently check all new business against all old and existing business, including subsidiaries and affiliates, as well as attorneys’ previous caseloads and generating reports of all matters with the same names.
Who reviews the reports and determines whether a true conflict exists?

- The attorney opening the new business
- A committee or other attorney skilled in ethics
- Staff who specialize in this field
What Can go Wrong?

- Attorneys don’t perform a conflicts check before they start work on a new piece of business.
- Attorneys don’t submit all the names.
- A name is misspelled.
- A name is missed by the Conflicts staff.
- The search strategy is bad.
- The staff doesn’t include a hit on a report.
- The person reviewing a report overlooks a hit.
- The person reviewing the report makes a bad decision about something that might be a problem.
- The Conflicts Database can be down!
What are the Rules?

- ABA Model Rules of Professional Conduct

- Every state has their own that have been adapted from the Model Rules

- 1.7 - 1.10 - - the major rules governing conflicts of interest
Rule 1.7: Conflict of Interest: Current Clients

A lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- the representation of one client will be directly adverse to another client; or

- there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, etc.
Rule 1.8 provides: A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, or other pecuniary interest adverse to a client.
Rule 1.9 Duties to Former Clients

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent...in writing.
Rule 1.10 Imputation of Conflicts of Interest

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9…
Bottom line

“[T]o protect the reasonable expectations of clients with regard to the loyalty of the client’s lawyer and the confidentiality of the work. . . .” Wolfram, Modern Legal Ethics (1986)

- Reasonable expectation - not ours, but client’s
- Loyalty of the lawyer
- Independent judgment
- Confidentiality - from both disclosure and use
What to do if there is a conflict?

- The Firm cannot take on the new business
  Or
- Needs bilateral consent in writing (often because the factual link is immaterial)
  Or
- May be able to erect an ethical wall (a/k/a “screens,” “Chinese Walls,”; these are efforts made by a firm to segregate the knowledge an individual has to avoid “contaminating” the rest of the firm.)
How do you coordinate all this?

- Fully Integrated Systems
- Automated Workflow systems for New Business/Conflicts
- Conflicts databases with lateral hire information
- Conflicts systems that track ethical walls, as well as engagement documentation, waivers, retainers, etc.
Unique Conflicts Issues

- May require special attention
- Intellectual Property (patent prosecution)
- Bankruptcy
- Lateral Hires
So... what exactly does the Conflicts Department do?

- Perform subsidiary and affiliations research
- Perform searches in Firm’s database
- Determine which hits should appear on the reports
- Produce individually-tailored conflicts reports
- Verify information and maintain integrity of the database
- Erect ethical walls
- Ensures compliance with Firm policies
Supplemental Method of Conflicts Checking

- Daily or weekly report that is sent to all attorneys of all new business that is about to be or has been opened.

- At minimum, such reports include:
  - Client and matter names
  - Names of all parties connected to the matters
  - Partners handling the matters
New Business Intake

- Ensures accuracy on form
- Performs searches to ensure client is worthy
- Verifies billing information/engagement letter
- Ensures new business has approval
  - Committee
  - General Counsel
  - Practice Group leaders
  - Office Managing Partners
- Assigns client/matter number
- Produces daily/weekly report for general distribution
Engagement Letters

- Most State Bars and Courts look to see if the client reasonably thinks they are still a client (hence the value of engagement letters)
- Establishes a firm foundation for good client relations
- Reduces misunderstandings about who/what is our client
- Promotes discussion of what is (and is not) a conflict
- Eliminates fee disputes
- Discusses method of resolution of there is a dispute
- Memorializes conflict waivers
- Often will include advance waivers
Other Engagement Issues

- Outside Counsel Guidelines (sometimes the client tells us what the rules of engagement are...)

- Information sources:
  - Dun&Bradstreet, Hoovers, Directory of Corporate Affiliations, OneSource
  - OFAC, Complinet, World Check
  - Anti-Money Laundering Regulations in the UK
  - Disengagement Letters
Special thank you to... our contributors...

Ed Hayes, Business Intake Manager, Hunton & Williams

Mary Anne Fry, Director of Libraries & Records, King & Spalding LLP