

## Episode 44

# Whose Side Are You On? Navigating conflicts of interest

### Intro

Legal matters are rarely straightforward and conflicts can and do occur. In the event they do arise, it's fundamental that the conflict is managed properly. Host Julian Morrow chats with Alex Haslam – Insurance, Construction and Commercial Litigation specialist at Gilchrist Connell about the circumstances in which a conflict can arise, the steps you can take to avoid these and what can be done if faced with a conflict situation.

---

**Julian:** Welcome to Risk on Air. I'm Julian Morrow, and today our subject is conflicts of interest. Welcome, Alex.

**Alex:** Nice to meet you, Julian, and good to be here.

**Julian:** Could we start with an outline of the basic principle about avoiding conflicts of interest and maybe some of the circumstances where conflicts most commonly occur?

**Alex:** Absolutely. A solicitor has a duty to be unaffected by other interests and that can be both duties to other clients and in respect of their own interests. Now a conflict of interest is an inherent risk in any legal practice. Circumstances that conflicts can often arise are outlined quite clearly in the Solicitors' Rules, but there are some others as well. A solicitor borrowing money from a client, that's not allowed within the exception of certain circumstances, acting for more than one client in respect of a transaction, acting in litigation where you've got more than one client, and their interest might be opposed. And other than borrowing money, acting where there are interests that you have that are contrary to those of your client. These things often arise in practice because we don't just act for one person.

**Julian:** One of the, I think, most common areas that you've just described is acting for more than one person in a transaction or dispute. It's very important to be really clear on who 'the client' is and to be aware of when potential conflicts might arise. Could you talk to us a little bit more about those situations and how a solicitor should work through the conflict challenges in practice?

**Alex:** Yeah, absolutely. I'd say there were three real circumstances where this can arise. Acting for more than one client on a transaction is quite a clear one and this often arises when you are acting on a conveyance. It's less common these days, but it certainly was quite common not so long ago, for a solicitor to act on both sides of a conveyancing transaction, that is, for both the vendor and the purchaser. This happens or happened quite frequently in rural areas where there were not too many solicitors around. So, if there was one solicitor in town, you'd have to go to that person.

## Episode 44 - Transcript

Whose Side Are You On? Navigating conflicts of interest

In those circumstances you have, usually, a potential conflict, it's not an actual conflict because the interests of the parties being the vendor and the purchaser often don't conflict as such. The vendor wants to sell the property, purchaser wants to buy it, the price has already been arranged, the terms are usually quite standard. What you need to do in those circumstances is realise that there's a potential that the interest might not be aligned insofar as the vendor wants to sell it quickly, the purchaser wants to delay, those sorts of things. But if at the beginning you get the informed consent of both parties to act, you can continue to act, but at the outset you need to identify that there is a potential conflict and go to both of the clients to get their approval for you to continue to act.

**Julian:** And precisely what you need to do to get that informed consent is something we might come back to. In that situation it might be relatively straightforward, but it can get quite tricky.

**Alex:** Yes, it can absolutely get tricky, but it is something that can change from circumstance to circumstance. In the circumstance of a vendor and purchaser, it can be quite easy. You say, "I'm going to be acting for the other party, are you happy for me to do that?". It's probably still prudent in those circumstances to suggest that they get independent legal advice if they consider that their interests are at risk. You can't advise on those risks because, again, you're in, potentially in, conflict, but it would be quite simple in those circumstances.

Another circumstance where you can be in conflict is where you're in possession of confidential information. It usually happens when you're acting for a client as against a former client and you have, because you've acted for the former client, in your possession some confidential information about the former client. That's where the conflict of duties really stand is you have a duty of confidentiality to your former client, you have a duty of loyalty to your current client. Now a solicitor acting for a client has an obligation to disclose to them any information in their possession that might be useful to the client's interest.

Now in these circumstances, if you have something that relates to a former client, and you would normally have such information about a former client because you've acted for them previously and there'd be information that you would have as a solicitor that would be privileged or confidential to that client that's not in the public domain, then you have an obligation to inform your current client of that information to the extent that's helpful for them.

But at the same time, you have an obligation of confidentiality to the former client to not disclose that information at all.

So, in those circumstances you can continue to act for the current client, again, if you get informed consent from the former client. But how it works is you can only continue to act if the former client, one, gives you informed consent for you acting and also gives you consent to disclose that information to the current client.

**Julian:** And another tricky issue there is what exactly constitutes confidential information about a former client? Because as I understand it, sometimes courts take a broader view of that than we might expect on the face of it.

**Alex:** You often do get into a position where you have information that you might think is not confidential or might be otherwise available, but the courts take a broader view on this because they consider these obligations as being extremely sacred and anything that's in your possession really that isn't otherwise publicly available should not be disclosed.

## Episode 44 - Transcript

Whose Side Are You On? Navigating conflicts of interest

- Julian:** I seem to recall in the Schapelle Corby case there was even an example where a solicitor repeating something that the solicitor thought was already on the public record was regarded as a use of confidential information because sometimes the mere fact that it's the solicitor saying it changes the way that information is received.
- Alex:** Absolutely. I mean, we come into possession of information that might otherwise not be deemed to be privileged or confidential, but when it's told to us by a client, automatically there's the possibility that privilege attaches to it or alternatively it might be provided in a way that's confidential other than privilege that means that we can't disclose it.
- Julian:** You mentioned a situation like a rural area where access to solicitors can be a bit of a challenge. What about some scenarios where the number of entities involved might have to do with the legal structures, things like companies being the obvious one, but maybe other things like associations or organisations that have memberships of some type or other?
- Alex:** Yes, there are unincorporated associations, they can take many forms. I was involved in a matter where we acted for an irrigation scheme where the scheme itself was comprised of members. It was an unincorporated association and I acted for the solicitor who acted for that unincorporated association. There was a dispute, and the issue arose as to who the client actually was, and because there were a number of people in the scheme as members and they all had, individually, had differing interests, but collectively they had one interest – and that was to negotiate with the government in this case as to a buyout of some irrigation. And in that case, we had to determine who the client was (the client was the scheme as a whole, the membership). And our position was that the solicitor only owed an obligation to advise the scheme as a whole on the common interest of the scheme rather than the individual interests of each of the scheme members; and there were differing interests of them, but there was this common interest and the allegation was that the solicitor owed obligations to each of the members to advise on their individual rights. Now the matter was never determined, it resolved, but we thought that, you know, as a solicitor who's acting in a common interest, you can't also advise on an individual interest because the two of them might conflict.
- Julian:** What about a situation where there's a company and you are dealing with the managing director and there might be a divergence between the interests of the individual who might be your long-standing professional associate and the entity that they are the controlling mind of?
- Alex:** Absolutely. And this is quite common where the differences between the interests of the company and the directors diverge. Obviously, a company is an entity, the directors are the personification of that company, but they do have differing interests. Obviously, directors have their own directors' duties under the Corporations Act and more generally a company has its own obligations. They can often conflict, and it needs to be clear from the outset as to who your client is. Usually that's done by discussion at the retainer stage, right at the beginning of a matter. It can happen later, if you see that there's a potential conflict, clarity is absolutely key in those circumstances.
- Julian:** So Alex, let's talk about some solid practice tips to bear in mind when we're looking at the really complicated conflict of interest issues that can arise day-to-day in practice.

## Episode 44 - Transcript

Whose Side Are You On? Navigating conflicts of interest

**Alex:** I mentioned earlier about getting informed consent. I suppose before I get to that, I think the first issue is identifying whether there is or there may be a conflict. And it's something that, you know, people often say, you know in your waters if there's a conflict or there's a potential conflict and if you have to ask whether there is a conflict or have to ask someone else if there's a conflict, there probably is one there.

**Julian:** There's definitely a potential one.

**Alex:** Absolutely. If you think there's a potential conflict or a conflict, there's likely a potential conflict. And, I mean, there's things that you can do to get some clarity on that. The easiest thing to do is to speak to another partner or another lawyer in your firm as to whether they think you have a conflict. Pull up the ethics hotlines; most jurisdictions have an ethics hotline at their respective law societies and then just work it through. Now, if you can see that your interests are one thing or alternatively the interests of one client are one thing and the interests of another client are another, then you'll then have to work that through.

Now, as I said earlier, there is a potential way through it and that is to obtain informed consent. Now, that can work where, as I said before, you are acting on two sides of a particular transaction or if you've come into possession of confidential information.

The other circumstance it can arise in is where you actually have a conflict on a particular matter where you're acting for one client, the duties that you owe to that client and the duty owed to another client actually come into conflict. It's quite obvious this can happen in litigation often and the situation will arise where you have to make a decision where you have one client who wants to sue another or potentially wants to cross-claim against another. What do you do then? You can get informed consent in that situation, but often it's very difficult.

Now, as I said before, informed consent can vary from situation to situation.

**Julian:** And it's not going to be a cure-all, is it? Because there are cases where sometimes the Courts just say, "In fact, this conflict was such that you simply couldn't act and no level of informed consent was actually going to be enough."

**Alex:** That's right. So informed consent comes in varying levels, but as you say, it can get very difficult. Now in all situations, you would go and say to your client, you need to get some independent legal advice on this, I can't advise you on this conflict and therefore as to whether or not to give informed consent. If they come back and say, "Yep, happy for you to act," as you say, there are situations where that just isn't enough.

There has been a recent decision of the New South Wales Court of Appeal, *Atanaskovic Hartnell v Birketu*. It was a reasonably well publicised matter, so a lot of people will know about this already, but a Sydney law firm, one of its employed solicitors unfortunately, was involved in a fraud. There were a number of frauds, but one of them involved, for a client, indicating that some money held by a bank should be disbursed back to the client, albeit via the law firm's trust account. The trust account details given were in fact the details of the solicitor himself. The firm actually didn't have a trust account, so \$7 million was transferred to the employed solicitor who has now been jailed who dissipated that money.

**Julian:** So, very clear case of conflict there and no possibility of informed consent. But that's not the one we're talking about, is it?

## Episode 44 - Transcript

Whose Side Are You On? Navigating conflicts of interest

**Alex:** No, no, absolutely not. So, what happened was the firm on behalf of the client who was defrauded brought proceedings against the employed solicitor, and then was asked to investigate its rights as against the bank for releasing the money without consent. And the firm indicated to the client that it wouldn't be charging for the investigations. It raised, as a potential conflict, its role as the employer of the fraudster. Nothing further than that – undertook to not charge, went ahead and started the investigation. And probably rightly because of the conflict, a new solicitor came on board following which the law firm invoiced the client for its investigation costs.

Now there was a professional negligence case that was on foot, but at the same time there was a costs case where the firm wanted to recover its cost. Now I was of the view, I was always of the view, that under the Solicitors' Rules, you cannot cure a conflict of interest as between your own interests and those of your clients. In the Solicitors' Rules for conflicts between client and client, it says you can get informed consent, but for solicitors it's silent. So, I felt there's a real possibility here that they're not going to recover costs because no informed consent. The court at first instance agreed with me, not that they knew it, but the judge said yes, did not obtain fully informed consent.

One of the reasons was although the judge also said "Yes, it's not in the Rules that you can cure this by informed consent," he said that the conflict was so serious that even informed consent could not cure this because there'd be absolutely no benefit to the client in the firm continuing to act. It was in their interest to undertake this investigation and for them to determine that the bank was at fault and not the fraudster and therefore potentially not them. The Court of Appeal upheld the primary judge's finding, but they indicated that informed consent was a way of curing a conflict between a solicitor's own interest and those of the clients. But still, that this conflict was so significant that informed consent could not cure it.

**Julian:** So, two key takeaways there. Firstly, understanding the nature of the conflict, whether it's a conflict between the interests of two clients or a former client is one thing, but then the conflict between the interests of the client and the solicitor could very much impact on what's required to obtain informed consent. And remembering that there are some circumstances where even informed consent will not be enough.

**Alex:** That's right. And this was one of them. Again, the Court of Appeal and the first instance Judge said it was practically impossible to get around the conflict.

**Julian:** What about situations, Alex, of a conflict between a duty to the Court and a duty to the client?

**Alex:** The one that springs to mind, Julian, is where a solicitor has to give evidence on behalf of their client's case. Now, it used to be the position under the Solicitors' Rules that in very rare circumstances a solicitor could continue to act for their client on a litigated matter if they were a material witness in the case. That means someone who speaks to a very significant part of the case or a very important part of the case.

Nowadays, it is the case that you cannot advocate for your client in a case if you are a material witness; you can continue to act where you are not the advocate. So, I take that to mean if you're not standing up as the counsel in court, and I suspect that's possibly more from a practical reason than anything else in that otherwise you'd be examining and or being cross-examined and seeking to object on your own behalf in essence.

**Julian:** Sounds like a lot of headspace to be dealing with.

## Episode 44 - Transcript

Whose Side Are You On? Navigating conflicts of interest

**Alex:** And I think that's actually the reason for the preclusion in the first place, although it's been slightly limited recently, is this very ethereal 'the proper administration of justice', and that 'justice should not only be done but should be seen to be done', is whether a lay person walking into court would think, "Well this is extremely strange, what's going on here? Who is this solicitor actually acting for?" This person, is, as a witness, they need to be giving independent witness evidence, but at the same time they have an obligation to their client. As I said before, they have a duty of loyalty to act in their client's best interest. So, there's a seemingly obvious conflict between a person giving what they should be doing, which is independent witness evidence, and on the other hand potentially advocating for their client's position. And that requirement to give independent witness evidence is a duty to the court that you have as a witness, but also as a solicitor being an officer of the court.

**Julian:** Alex, if you've got a conflict between two clients or a client and a former client and you determine that there really is a real conflict there, and let's say informed consent isn't going to be provided, how do you work out what to do then, particularly if it's two concurrent clients?

**Alex:** Well, you would have to assess whether there is any way that you can continue to assist one of those clients, because you will not be able to act for both of those clients.

**Julian:** Is it possible that you might not be able to act for either of them?

**Alex:** I think that's usually what happens. If in a situation where you need informed consent and you don't get it, you should probably cease acting for both clients. As I said, there might be a situation where you could potentially act partially for one of the clients where there is no conflict, but at the end of the day, what's in the client's best interest? So, if the options are, you cease to act and the client goes off, gets another lawyer who can act for them fully, isn't that better for them rather than you trying to work out certain areas where you could assist them, but then obviously being precluded from doing all of what they want. So, the general rule of thumb is, cease to act.

**Julian:** These issues can come up in litigation as we've discussed, but they also do come up in disciplinary areas as well quite often. Are there any recent or outstanding cases that are really at the top of your thinking when you think about how to deal with conflicts or cautionary tales that we could convey?

**Alex:** Well, I know there was one reasonably recent Western Australian decision, but it's not unusual. A solicitor was acting for a subsidiary of an overseas company in relation to various legal matters and was instructed by their director. Later on there was employment issues, there was an issue that related to the rights and entitlements of their employees, including the director. The firm acted for the director relating to those employment issues and advice on how to protect his entitlements, and the Legal Profession Complaints Committee determined that he should never have provided advice to the director in circumstances where he had full knowledge of the company's business and was acting contrary to their interests.

So, these litigated matters and the disciplinary matters, they usually go hand in hand. I mean, a client can sue a lawyer for breach of fiduciary duty, which is the legal cause of action for a conflict of interest, or there can be a disciplinary complaint. Often, they happen both at the same time.

Episode 44 - Transcript

Whose Side Are You On? Navigating conflicts of interest

**Julian:** And that particular case, I think ended up with the practitioner being struck off. And ironically enough, the practitioner's name I think was Staffa, which given the nature of the conflict might've been another reason to see it coming.

**Alex:** Yeah, see absolutely it can be that serious. There are plenty of examples of acting in conflict situations and it can arise very readily and sometimes you can't even see it coming, but they are extremely serious. It comes to the heart of what we do as lawyers. We owe duties of loyalty and confidentiality to our clients. We owe duties to not act contrary to their interest by putting our own interests first. We owe duties to the court, and it should really form the basis of how a legal practitioner operates. So, the fact that this practitioner was struck off is not surprising to me.

**Julian:** Alex Haslam, thanks so much for speaking with us on Risk on Air.

**Alex:** No problem. Thanks Julian.

---

### Outro

Thanks for listening to Risk on Air by Lawcover. Join us for the next episode on current risks in legal practice to stay up to date.

### Resources:

[Atanaskovic Hartnell v Birketu Pty Ltd \[2021\] NSWCA 201](#)

[Staffa v Legal Profession Complaints Committee \[2022\] 83 WASCA](#)