

CONFLICT OF INTEREST (June 2004)

Conflict of interest is a problem for all firms whether it is the single handed practice in a small town deciding who and how to act for when a local client goes through a messy divorce right up to large firms writing independent reports for a government department when pre-existing client relationships strongly indicate true independence may be difficult to guarantee and deliver. The problem won't go away and strategies designed to 'manage' conflict away may be little more than a sham. Similarly, the erection of 'Chinese Walls' may turn out to be nothing but a lame excuse to retain profitable clients and work as the investment banking fraternity have found. The outcome for that group was the creation of much maligned and frequently totally impotent compliance departments.

Escalating PI insurance costs are testimony to poorly managed conflict and not a consequence of malfeasance. In some US states this can now cost over 7% of fee income!

An example of poorly applied conflict avoidance hit the courts in England in March and again in the Appeal Court in June.

The story is somewhat long and convoluted but in essence it concerns a major international law firm who were instructed to act for a client in a \$27Billion takeover. The law firm concerned went through its detailed internal conflict identification process and learned that it had previously acted for a party involved in the takeover. On further investigation the firm concluded that no conflict existed. 14 days passed during which it emerged that the formerly unrelated party was an 'issue'. Chinese Walls and other paraphernalia were erected. Enter another major law firm seeking a restraining order and an emergency hearing ensued. The High Court found for the plaintiff and the takeover client was lost. One judge commented, "I'm satisfied that there is a real or serious risk of conflict". Not to be outdone an Appeal was heard (on a public holiday) with the same result. It seems that Chinese Walls and all other undertakings are not worth a 'tin of fish' if there is even a remote possibility of conflict. One of two Law Lords concluded: "There is a clear **potential** conflict of interest in (named firm) acting for those concerned with the bid at the same time as it was instructed to act for (client name) on the (named) contract." Another firm has now been instructed on what may be the most lucrative takeover in London this year. All this was played out with full media attention. Whether this recent English case will have an impact on the local conflict regime is open to debate. Whatever happens it should be something of a wake up call.