

CONFLICT AVOIDANCE

Are the rules up with the play – probably not.
(Mar 06)

The rules of professional conduct are set out (in NZ) in the 7th edition of 'The rules of professional conduct for barristers and solicitors'. The specific rules that apply are 1.01, 1.03, 1.04, 1.05 and ruling 1/00 in Appendix ii. When printed out, all pages can be placed in a standard DL envelope.

The NZ rules are short though possibly somewhat ambiguous when compared with the New York Bar Association or the English Law Society, where the complete set could be described as a 'good read' and likely to give a postman a hernia if unwary. However, we all know size is not an indicator of quality.

It was therefore something of a surprise to learn the State Services Commission used a well-known law firm with acknowledged relationships in the IT industry to prepare a report on the legal issues surrounding use of Open Source software, sometimes known as 'free-ware'. The document reference is 573003_3.Doc and can be found on the SSC website, www.ssc.govt.nz. This raises two questions: why did the SSC instruct a firm that has pre-existing relationships with major IT software clients to write a report on the legal issues of open source software? And moreover why did the firm involved not recuse themselves?

There is no implication here that anyone breached **any** rules but the tide is shifting on conflict, independence and operational transparency. For example, Freshfields' London office received something of a 'bloody nose' when instructed over what turned out to be an aborted takeover of Marks & Spencer in March 2004. Their pre-existing client relationship was held to be sufficient grounds to require their withdrawal. The Appeal Court made some very disparaging remarks about the worth and use of 'Chinese Walls' along the way.

Set out below is a short quote from a code of conduct draft not yet in force overseas which clearly indicates the way the tide is turning:

"Professional embarrassment

14. There may be some circumstances in which you should refuse instructions when, although there is no actual conflict of interests as defined in rule 3, you might feel unable to do your best for a client because of some form of professional embarrassment. It may be, for example, that you have acted for a client in the past and accept instructions to act against that client you may feel inhibited in doing your best for the new client because of your past relationship with the former client. If so, the instructions from the new client should be refused, as you would otherwise be in breach of core duties 1.02 (independence) and 1.03 (best interests of client)."

It would be unfortunate if commercial imperatives or the imposition of fragile mechanisms seeking to 'manage' conflict were to become paramount in conflict avoidance in local jurisdictions.

LegalBestPractice has developed conflict management procedures designed to simplify conflict of interest protocols during routine client engagement procedures. Call this office on (09) 520 5360 or email co-jones.pmf@clear.net.nz to learn more.

To place the whole issue of conflict of interest into perspective it may be a timely reminder to readers to report on a survey conducted by Ernst & Young (EY) back in June of 2004. EY surveyed companies to learn if they had encountered conflict of interest with their lawyers in the previous 12 months. A staggering 37% said that they had! A further 34% disclosed they had been forced to instruct different lawyers as a result and 3% had to 'fire' their current lawyers for failing to disclose a conflict. The survey, which was conducted by interview, concluded that the severity of the regulations was not the issue; the respondents made it clear it was the profession sidestepping the rules that was causing the problem.

For the record the survey was conducted in England where the rules are more prescriptive than here. To those who say it couldn't happen here our response is to say the Australasian communities have one additional factor – small population and few large companies. This adds 'independence' to the mix which brings its own set of problems. Anecdotal evidence suggests the problem is as widespread in Australasia as in England. As a postscript the English rules were revised one year after the EY study.