A Guide to Establishing Information Barriers

Preamble

In certain cases of conflict, a law practice can use information barriers to act in matters where the rules of conflict would otherwise prevent them from doing so. When faced with a conflict, the law practice must consider whether it is an appropriate case to establish an information barrier, and the steps to take to ensure the information barrier is effective.

These guidelines will assist you in answering some of these questions. They are designed to help all types of law practices, including inhouse and government teams. The guidelines are intended to cover conflicts concerning former clients and conflict of duties concerning current clients.[1]

Of course, there will be instances where the erection of information barriers will be insufficient, or inappropriate, to address the conflict. This Guide is intended to help you determine whether information barriers are applicable to your circumstances.

Step 1 – Is there a conflict?

While at first glance it may appear there is a conflict, it is important to go through the process of working out whether there is a genuine conflict. It is only in the case of a genuine conflict that you would need to establish an information barrier.[2]

Questions

- Does your law practice hold any information that is relevant to the new matter?
- Is that relevant information confidential to another client?
- Could that information be used to the disadvantage of that other client?

If you answer yes to these questions, then you probably have a conflict and may wish to consider whether you should establish an information barrier.

Re Nash v Timbertop Finance Pty Ltd (in liq), in the matter of the bankrupt estate of Nash [2019] FCA 957 at [64] sets out a test for determining whether there is a conflict by responding to a simple sequence of questions, namely:

a) What is the relevant information?
b) Is that information confidential?
c) Does the legal practitioner have possession of that information?
d) Is the legal practitioner proposing to act 'against' the former client in the requisite case?
e) Is there a real risk that the confidential information will be relevant?
f) Is there no real risk of misuse of the confidential information?

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[1] See rules 10 and 11 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (**ASCR**).
[2] As above.

Step 2 – In what circumstances might my law practice consider retaining a matter in which a conflict has been identified?

Usually, the most practical response to a conflict of interest is to refer the client to another law practice.

There may be some circumstances where it would be appropriate to retain the matter despite the conflict. This may include, for example, where:

- it is late in the proceeding when you identify the conflict – it would create unreasonable expense, delay, or inconvenience not only to your client but other parties, witnesses, and the court,
- there is something special about the matter that makes you the best person to continue in it – e.g. you have specialist expertise, or it is a niche area of law with which you are familiar, or you are currently acting in related matters, and you are best placed to represent the client, or
- there are special qualities about the client – such as a long-established relationship or it may be difficult for the client to instruct a new solicitor.

Step 3 – Does my law practice have the capacity to establish an effective information barrier?

In most cases, it is only possible to establish an effective information barrier if your law practice has embedded business procedures and protocols that create an environment conducive to protecting confidential client information. This typically includes:

- **a training program** for all staff on confidentiality and information barrier obligations
- **a specialist conflict and compliance officer** responsible for managing conflicts and monitoring compliance with information barriers
- **electronic record systems** that enable firewalls and/or password-protected access to confidential information
- **filing systems** that allow restricted access to hard-copy records.

On review, your practice may determine that it cannot establish effective information barriers because, for example:

- you do not have the necessary technology or business systems to implement and maintain effective information barriers
- the law practice is too small, such as having only one supervising solicitor, making segregation of information impracticable[3]

Step 4 – Can my law practice establish an effective information barrier in this case?

Some relevant considerations

Your law practice probably cannot establish an effective information barrier in this case, if:

- confidential information about the other case has already moved across the practice, and it would not be possible to quarantine the confidential information.

Your law practice may be able to establish an effective information barrier if:

[3] See *Webb & Salter* [2016] FCCA 1087, at [22]; *Zhang v Ng* [2021] NSWSC 1369, at [62].

- a solicitor is available to conduct the case who has not had and will not have access to any relevant confidential information, and
- the relevant confidential information can be quarantined.

Factors that make it easier to establish an effective information barrier include:

- the relevant confidential information is contained within a file closed some time ago,
- only a small number of current staff would have been exposed to the confidential information, and
- staff who worked on the closed matter are physically separated from the staff with conduct of the case.

It is possible to establish an effective information barrier even if your law practice holds relevant confidential information.[4]

Step 5 – What steps should my law practice take to establish an effective information barrier?

The following process may be effective:

- **have rules and directions restricting access to confidential information**, including paper files, electronic records, and discussions with colleagues
- **physically isolate hardcopy information** to prevent inadvertent access
- **establish electronic firewalls** and access controls around the confidential information
- **obtain undertakings from all relevant staff** confirming they will comply with the information barrier requirements
- **appoint a Compliance Officer** responsible for oversight, monitoring, and enforcement of the information barrier.

Relevant case law

Zani -v- Lawfirst Pty Ltd trading as Bennett + Co [2014] WASC 75 - this case sets out the benefit of having information barriers as part of your business processes rather than an ad hoc approach. The firm used Law Society Guidelines as their reference point.

Mihova & Mihova [2025] FedCFamC1F 113 at [27] - this case sets out the details of an effective information barrier.

Walthamstow Pty Ltd v Caratti (No 2) [2023] WASC 363, at [107] – [108] - this case identifies lack of geographical separation of solicitors involved and ad hoc nature of the information barrier as obstacles to the establishment of an effective information barrier.

Step 6 – What should my law practice do in the event of a breach of the information barrier

All affected staff should be aware that any breach or potential breach of the information barrier should be reported immediately to the Compliance Officer, who, in smaller practices, may be the authorised principal of the practice.

The Compliance Officer will determine what action needs to be taken to re-establish the effectiveness of the information barrier. However, it may be necessary to withdraw from the matter.

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[4] See *Prince Jefri Bolkiah v KPMG* [1998] UKHL 52.

Step 7 – What should my law practice do at the conclusion of the matter?

At the conclusion of the matter, your law practice should decommission the information barrier so that all staff are aware that their obligations under the information barrier have come to an end.