Information Barrier Scenarios

Scenario 1 – conflict identified during the course of litigation – former client conflict (Rule 10)

Solicitor A works in a large law practice that has offices across NSW. The Law Practice has a Conflict of Interest Policy which includes regular training for staff.

Client X has been charged with murder and is being represented by Solicitor A.

Solicitor A has been representing Client X for 22 months. The trial date has been set down.

Two weeks out from the trial date, Solicitor A is provided with information about a new key crown witness (Witness F).

A conflict check is undertaken by the Law Practice Compliance Officer (a senior solicitor who is not involved in the current proceedings). The conflict check discloses that Witness F is a former client of the Law Practice. The conflict check indicates that the Law Practice holds relevant confidential information about Witness F.

1. Is this an appropriate case to establish an information barrier?

In deciding whether this is an appropriate case to establish an information barrier, the Law Practice considers:

- The potential for the trial to be delayed and the impact this would have on the Court,
- The impact on the client if they had to instruct a new solicitor at short notice, and
- The overall cost impact.

2. Factors taken into account in deciding whether an effective information barrier can be established

- Solicitor A had no involvement in the earlier matter and does not recall any confidential information about Witness F,
- The solicitor who represented Witness F worked in a different office to Solicitor A, and
- The solicitor who represented Witness F no longer works at the Law Practice.

Based on these considerations, the Law Practice Compliance Officer and Solicitor A decide an effective information barrier can be established.

What is an effective Information Barrier?

- Solicitor A, their supervisor and the legal support officers working on the file must give undertakings to the Law Practice confirming they have not accessed and will not access any confidential information about Witness F,
- Solicitor A is prepared to give an undertaking to the Court if required,[1]
- Electronic firewalls are put in place around Witness F's information. Hardcopy files are archived offsite with a record available of who accesses the files,

[1] Solicitors are reminded that breach of an undertaking may amount to unsatisfactory professional conduct or professional misconduct under the *Legal Profession Uniform Law* (NSW). More information on solicitors' undertakings can be accessed here.

- The Compliance Officer will oversight the information barrier and any breach will be reported to them immediately, and
- An audit of the information barriers can be undertaken at any time.

Scenario 2 – family law litigation matter– former client conflict (Rule 10)

Solicitors A and B work in a large law practice that has several offices across NSW. The Law Practice has a Conflict of Interest Policy which includes regular training for staff.

Solicitor A gave preliminary advice to the wife about her family law dispute before she commenced proceedings. The wife disclosed confidential information about her family law dispute to Solicitor A. She does not retain the Law Practice for her family law proceedings.

Six months later, the husband attends the same Law Practice and consults Solicitor B. He ultimately chooses to retain Solicitor B in the family law proceedings.

A conflict check is undertaken, and it discloses that a preliminary advice had been provided to the wife in the same proceedings, but she did not retain the practice to represent her in the proceedings.

1. Is this an appropriate case to establish an information barrier?

The husband wants to retain the Law Practice because they are in his local town – it is a regional town and there are not many law practices that do family law work in the area. The legal service provided to the wife was limited to a single consultation and the provision of one advice only.

2. Factors taken into account in deciding whether an effective information barrier can be established

- Solicitor B was not involved in the advice provided to the wife and has no knowledge of any of the wife's confidential information,
- Solicitor A is now working in a different office to Solicitor B, and
- The Law Practice has administrative and technology systems that allow the wife's file to be protected from access by Solicitor B.

What is an effective information barrier?

- Solicitor A and her supervisor must give undertakings to the Law Practice confirming they will not discuss or disclose any information about the wife with anyone in the Law Practice,
- Electronic firewalls are put in place around the wife's information to prevent the risk of information flowing to Solicitor B. There is no hard copy file,
- Solicitor B must give an undertaking to the Law Practice confirming they will not access any information relating to the wife and they will not discuss the husband's matter with Solicitor A,
- An electronic firewall is established around the husband's file with access only available to Solicitor B, their supervisor and one administrative support person. This will ensure Solicitor B and the team acting for the husband maintain continuous awareness of the information barrier,
- The Compliance Officer will oversight the Information Barrier and any breach will be reported to them immediately, and
- An audit of the information barriers can be undertaken at any time.

Scenario 3 – litigation proceedings – concurrent client conflict (Rule 11)

Solicitor A works in a large law practice that has several offices across NSW. The Law Practice has a Conflict of Interest Policy which includes regular training for staff.

Solicitor A is representing several permanent residents of a residential park who have been served with termination notices because the owner is converting the park into a tourist facility.

Shortly before the hearing the owner makes an offer to settle the matter, on the basis of a modest payment to each resident. Some of the residents wish to accept the offer while others want to proceed with the hearing.

Solicitor A immediately recognises the conflict and stops taking any further instructions from the clients. He advises the clients that he cannot continue to represent all the residents.

1. Is this an appropriate case to establish an information barrier?

In deciding whether this is an appropriate case to establish an information barrier, the Law Practice considers:

- The fact that the hearing is imminent,
- There are no other local practices with expertise in this area of law, and
- Some of the residents have exhausted their savings funding the litigation.

2. Factors taken into account in deciding whether an effective information barrier can be established

- There is another solicitor with relevant expertise in the Law Practice,
- The parties have consented to splitting the residents between Solicitor A and the new Solicitor B, and
- The Law Practice has administrative and technology systems that allow the solicitors to represent the two groups without the risk of information flowing between the two teams.

Informed consent – rule 11

To comply with Rule 11, the Law Practice must have the informed consent of all the residents. To ensure the consent is fully informed, it may be necessary to refer some of the residents to another solicitor for independent legal advice about the arrangement.

Once the Law Practice has the consent of all the residents for Solicitor A to represent the litigation group and Solicitor B to represent the settlement group, they must now establish an effective information barrier.

What is an effective information barrier?

- Solicitor A and her supervisor must give undertakings to the Law Practice confirming they will not discuss or disclose any information about the litigation group to Solicitor B and his legal team,
- Solicitor B and his supervisor must give undertakings to the Law Practice confirming they will not discuss or disclose any information about the settlement group to Solicitor A and her legal team,
- Electronic firewalls are put in place around each of the groups' information, with access restricted to the relevant team, to prevent the flow of information between the two teams,
- All hardcopy files must be stored securely so they can only be accessed by the relevant teams,
- The Compliance Officer will oversight the Information Barrier and any breach will be reported to them immediately, and
- An audit of the information barriers can be undertaken at any time.

Scenario 4 - Purchaser and Vendor's Mortgagee: Acting for two parties in a transaction

Two teams within the same law practice are acting on the same matter to complete a purchase of property and mortgage discharge. One team is representing the purchaser of the property, and the other is representing the vendor's mortgagee with the discharge of the mortgage of the property.

The law practice is representing two or more clients in the same matter.

Even though the law practice is not acting for the vendor (rather, the vendor's mortgagee), they are still acting for two or more clients in relation to the same matter.

What is an effective information barrier?

The law practice can act in this matter if each client is aware that the solicitor or law practice is also acting for another client and has given informed consent to the solicitor or law practice so acting.

The reason an ethical divider must be used in this matter is to ensure that the duty of confidentiality is adhered to.

As part of the information barrier protocol, the Compliance Officer must ensure that each file is locked so it is only visible to, and accessible by, the team assigned to work on the matter for each client.

The teams working for either client in this matter must send written approval and confirmation to Compliance Officer in response to the information barrier protocol.

The Compliance Officer should audit the Ethical Divider to ensure that there are no breaches.

Breaches should be notified to the Compliance Officer.

Scenario 5 - Acting in two matters which are long lasting

A law practice has been approached to represent a former employee for a large corporation in relation to an external investigation into the same corporation.

The corporation is an existing client of the law practice. The law practice has also been approached by the corporation to advise on the same external investigation.

The law practice is representing two or more clients in the same matter where the clients' interests are adverse and there is a conflict, or potential conflict, of the duties to act in the best interests of each client.

What is an effective information barrier?

The law practice may act for both the corporation and the employee only if each client is aware that the solicitor or law practice is also acting for another client and has given informed consent to the solicitor or law practice so acting AND where an effective information barrier has been established.

In addition, as an ongoing client of the practice, those representing the corporation currently or in the past must not represent the employee.

Once established and whilst the matter is ongoing the information barrier must be continually monitored and updated as required.

Rule 11 applies to the law practice and solicitors alike, so individuals who have acted for the corporation in other matters must be excluded from acting for the employee.

The law practice must also establish physical separation of staff working on either side of the information barrier, as well as digital separation of all files.

Confidential information refers not only to physical documents, but also conversations between staff members.

Whenever a new team member is brought in to work on the matter (for either client), the Compliance Officer must assess any potential conflicts of interest and the team member must accept the ethical divider protocol.

Team members who are no longer involved in the matter are still precluded from working on any matters for the client on the other side.

Scenario 6 - Managing Class Action Conflicts

The law practice has been instructed to act for a corporate client to assist them with responding to subpoenas in relation to a class action.

The law practice is already acting for the plaintiffs in the class action.

The subpoena is issued by a defendant in the class action. The interests of corporate client are not adverse to the interests of the plaintiffs (as there was no dispute between the plaintiffs and the corporate client).

What is an effective information barrier?

The law practice can act for both the corporate client and plaintiffs subject to obtaining informed consent from both clients as well as establishing an information barrier.

The scope of the corporate client was limited to only responding to the subpoenas issued by the defendants.

The law practice can monitor the matter and if a dispute arises between the law practice's clients or if their interests diverge, the law practice would need to cease acting.

The information barrier prevents partners and staff who work on the class action from working on the subpoena matter (and vice versa).

The team must alert the Compliance Officer to any change in personnel, matter, client's relationship etc.

In the case of any class action, the Compliance Officer must perform a comprehensive conflict check against all plaintiffs (if there are multiple) to ensure there are no conflicts present prior to accepting instructions or beginning work.

For further information about informed consent, please refer to the Ethics FAQs.