

SIGNIFICANCE OF A CONFLICT CHECK SYSTEM IN LEGAL OUTSOURCING

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The necessity of a thorough and comprehensive conflict check while using outside counsel, contract attorneys or outsourcing legal work



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An important duty of an attorney is to identify and resolve any potential conflict of interest in their legal work. According to American Bar Association Model Rules of Professional Conduct, Rule 1.7 (Conflict of Interest: Current Clients) (“Rule”), an attorney should not represent a client if the representation will result in concurrent conflict of interest. The rule further requires attorneys to develop reasonable procedures to check for conflict of interest. Ultimately, the purpose of conflict checking is to ensure that an attorney’s commitment to a client’s matter will not be compromised or influenced by the attorney’s commitment to another client.

Given the fluid nature of both business and personal relationships and histories, the question of how an attorney can ensure the absence of a conflict is not always a simple one. The first step an attorney should take toward meeting their commitment is to compare the details of their previous clients with the requirements of a prospective client before accepting a new assignment.

However, the issue of conflict of interest can become even more complex when an outsourced legal process is involved. If the Legal Process Outsourcing firm (“LPO”) is not committed to maintaining a conflict checking protocol of their own, a variety of pitfalls may arise, including:

- If a large number of third-party associates handle various client services at the same time, it is possible that an LPO could fail to track a client’s history and/or relationship to opposing parties.
- Outsourced legal work is often very specific, so an associate performing the work would not have – nor need to have – broad knowledge of a client’s previous relationships.

- Similarly, since work contracts are typically for discrete projects, an LPO will not be able to assess obligations between former and current clients.
- Although ABA Model Rules provide for rules regarding conflict of interests, it will be difficult to make foreign lawyers accountable under the U S law.

The above discussion makes it clear that in the absence of formal regulation, the LPOs have a responsibility to develop internal guidelines and checklists for self-regulation. The LPOs can avoid conflict of interest for their clients by developing and practicing a conflict checking system within the LPO. The conflict checking practice should be viewed as an ongoing and permanent commitment to secure a client's confidence.

Recommended procedures for establishing a conflict of interest database:

- Establish a thorough, well-maintained list of client names
- Ensure that the conflict checking system becomes a routine component of the LPO's procedures
- Ensure that all associates in an LPO are trained in the procedure and involved in the system
- Ensure the liability for the conflict check remains with a US-based firm

Additionally, when developing a conflict checking system, a premium should be placed on ease of use and maintenance. A computer-based conflict checking system will likely be superior to a well maintained manual system by allowing for regular and thorough system-wide checks that are less likely to overlook a single client name buried in a large database.

Developing and Maintaining a Conflict Checking System:

The most reliable step towards developing and maintaining a conflict checking system is to establish a robust computer database into which data is entered to identify possible conflict situations. The conflict check feature in most current case management applications and databases will automatically identify possible conflict situations. In addition, the LPO staff should run routine manual searches within the databases to ensure the absence of conflict for all appropriate parties and counsel in new matters, new parties, and existing matters.

Important client information included in the database should encompass:

1. Names and other identifiers such as:
 - (a) Names including maiden name or other legal names of the client(s),
 - (b) Adverse parties and their counsel including individual attorneys and their firm(s),
 - (c) Co-parties and their counsel,
 - (d) Experts and major witnesses.
2. A description of the matter being handled such as contract, defense, prosecution, expert/consultant, and others.
3. The date when the file was opened and if it is a closed matter, the date of closing,
4. Name of the associate responsible,
5. Case name and number.

Summary

Protecting the client's interest should be the highest priority of an LPO. To that end, developing and maintaining a conflict checking system that results in effective searches prior to signing a retention agreement with a new client will help ensure that client's interests. If there are no potential conflicts, the adverse party lists and adverse counsel lists should also be reviewed to see if the client has any connection with the LPO's current or past legal matters. In case there is a conflict of interest, the client should be advised accordingly.

A conflict check should be a mandatory step in any LPO's client intake and management process.
