



IP Professionals and Ethics – Conflicts of Interest

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Aims of the Session

- ◆ Provide an understanding of conflicts of interest as can arise for IP professionals
- ◆ Provide some practical steps to avoid problems
- ◆ 'Patent Attorneys and Conflicts of Interest' (2009) 4 (6) *Journal of Intellectual Property Law and Practice*
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What do we mean by conflict of interest?

- ◆ Today's focus is conflict of *duties*
- ◆ Duty of confidentiality
- ◆ Duty not to allow attorney's own interests or duties owed to another (current) client to conflict with duties owed to this client





Confidentiality

- ◆ Owed to current, former and potential clients
- ◆ An ongoing duty, regardless of how long since acted
- ◆ ‘Published’
- ◆ Obvious as well as more subtle information protected – eg ‘getting to know you factors’; attitude to litigation
- ◆ Subconscious use
- ◆ What risk of disclosure?





Avoid where conflict may occur

- ◆ An attorney must take all reasonable steps to *avoid* situations in which a conflict between the interests of a client and the interests of the attorney or those of another client *may* occur.
 - Professional Standards Board Code of Conduct
 - Rule 3.2.8





Duty to *avoid* conflict

- ◆ Refuse to take on new client if would conflict with duties to past or current clients:
 - Past clients:
 - Duty to protect confidential information
 - Not act against in same matter (IPTA guideline 19)
 - Current clients:
 - Duty to protect confidential information
 - Not act against in same matter
 - Your duties may vary depending on what agreed (express or implied): be competent, use best efforts, advise? disclose relevant information?





'Conflicts checks'

- ◆ What is it that you're checking for and why
- ◆ 'Commercial / economic' conflicts are a business decision for you
- ◆ Legal conflicts: need to check for:
 - Clients, past and current
 - Ownership of patent
 - Technology or subject matter conflict
- ◆ Take care in how much disclose during process





Informed Consent

- ◆ How sophisticated is client? Efforts required will vary
- ◆ *Informed* consent, but without breaching duty of confidence owed to other clients
- ◆ Before start work ('advance waiver'): both clients agree that in future attorney may have to:
 - keep secrets from client,
 - give advice to *other* client against this client's interests
 - stop acting for both if actual conflict arises
- ◆ After start work, and actual conflict arises
 - How to resolve: much more difficult to get *informed* consent; may need to stop acting for both
 - Maintain critical rights first r 3.2.8; IPTA guideline 20





Information screens

- ◆ Only designed to help protect confidential information
 - Past client – ‘successive conflicts’
- ◆ Cannot be used to allow practice to act simultaneously for two current clients with conflicting interests
 - ‘concurrent conflicts’





Consequences of breach

- ◆ Court injunction to avoid breach
- ◆ Sued for damages for negligence, breach of contract, breach of confidence
- ◆ Discipline and loss of right to practise

