Conflicts of Interest – Managing Cakeism

by Nick Patterson, Director of Liability UK, Charles Taylor Adjusting

What do you do if you are dealing with an Employers Liability claim under an annual policy but subsequently receive an instruction to act for a different Insured under a project policy for the same incident? And what if this is further complicated by both Insureds/Insurers potentially being liable, and an apportionment of liability is required?

No loss adjuster in this situation wants to disappoint either client but knows that to act for both is not feasible – unless both instructing principals and their Insureds are consulted, and a course of action is agreed and implemented to all parties’ satisfaction.

In this article, Nick Patterson, Director of Liability UK, Charles Taylor Adjusting, looks at how to deal with potential conflicts of interest.
Conflicts of interest are inevitable

Clients are faced with an ever-decreasing number of loss adjusters from which to choose. Consequently, managing conflicts of interest has likely never been so difficult for Insurers and other instructing clients.

Here are several other examples where a conflict of interest will clearly arise:

– A large fire affects not only the building owner, but also its tenants. The adjusting firm cannot act for both insurers impartially and must, in my view, decline the instruction from one (or possibly many) of the parties to prevent any taint of bias in its judgement and adjustment of the claim.

– A water utility service bursts, causing damage to neighbouring properties. The adjusting firm can either act for the water utility or accept an instruction from those insurers who insure the neighbouring properties – not both.

– A contractor causes fire damage to commercial premises, which subsequently spreads. Again, the adjusting firm can only accept the instruction from one Insurer, whether the first or third party. They cannot act for other Insurers for claims arising from the same incident, subject to the comments below.

– Some instructing clients are wary of loss adjuster nominations on accounts and consider that such nominations have inherent conflicts and as such should be handled sensitively and with the agreement of the Insurer.
As professionals, whether from the insurance, legal, accountancy or surveying professions (to name but a few), we are bound by ethical as well as specific professional standards to avoid any activities which could place us in conflict with the interests of the clients we serve.

Governing bodies and professional institutes attempt to specify what constitutes a conflict of interest and will often detail the actions to be taken by those professionals whether as individuals or for the companies that they work for. Service level agreements will also specify the actions that the professional services supplier must follow when a conflict of interest is identified. Further, regulators remain highly interested in conflicts of interest and will act to penalise firms undertaking work where they are conflicted.
Loss adjusters

The Royal Charter of the Chartered Institute of Loss Adjusters provides its members with the following guidance regarding conflicts of interest:

3.1 [Members should] at all times be aware of the potential for conflicts of interest between clients. A conflict of interest between clients arises where a member, or a member’s firm, owes separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict or there is a significant risk that they may conflict.

3.2 [Conflicts of interest] encompass all situations where doing the best for one client will result in prejudice to another client in that matter or a related matter. A matter is related if it involves the same incident, asset or policy, or there is otherwise some reasonable degree of relationship.

3.3 Where a member is retained on behalf of one client in a matter, that member or their firm should not then act for a second client on the same or a related matter where the interests of the second client are adverse to those of the first unless the informed consent of both clients to the member or their firm so acting is obtained.

3.4 The informed consent of all clients should only be sought where this does not involve a breach of the duty of confidentiality owed to each client. Where informed consent cannot be obtained without breach of the duty of confidentiality, the member or their firm should first seek the informed consent of the client to disclosure of such confidential information to the other client(s) as is necessary to allow the informed consent of both clients to be obtained to their continuing to act. In most cases, it will only be necessary to
disclose to the second client the name of the first client for whom the member or their firm is acting and the general nature of the matter.

3.5 If the informed consent of all clients to the member or their firm continuing to act cannot be obtained, the member or their firm may continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality owed to the other client(s) is not put at risk. Whilst the decision as to which client(s) the member or their firm continues to act for is for the member or their firm, where the member or their firm agrees to act for multiple clients in a matter, it is recommended that they should discuss and agree with the clients at the outset what will happen if a conflict arises and agree which client(s) the member or their firm will continue to represent where this is possible.

3.6 It is recognised that members do respond to claims on an emergency basis. If a potential or real conflict of interest arises at any point during the response and informed consent cannot be obtained, the member must take immediate steps to withdraw from the situation, whilst advising the claimant appropriately and with discretion as to the nature of the conflict.

3.7 Members and their firms should anticipate and deal proactively with conflicts of interest. Members or their firms should have in place a conflict management policy appropriate to their business model, and should have in place a process to identify the more probable conflicts that may arise.

3.8 The same Insured may have separate policies with different Insurers covering either different aspects of the same loss or where dual insurance exists, and historically for ease and economy of handling Insurers have been content for the same member to deal with both aspects of the loss. Provided the member acts impartially and transparently in such instances, nothing contained within these guidance notes is intended to impinge upon these agreed and established working arrangements.

3.9 It is not practical to establish guidelines that apply to all situations and circumstances. If a member is in any doubt as to the correct course of action, they should seek further advice and, if necessary, legal advice.
How do other professions deal with conflicts of interest?

Solicitors

The Solicitors Regulatory Authority (SRA) continually publishes and updates its conflict of interest procedures. It recognises that it is important to have in place systems that enable the solicitor/firm to identify and deal with potential conflicts. Specific conflict situations are defined within its code of conduct and include:

– The firm and current clients (“own interest conflict”); and

– Two or more current clients (“client conflict”).

The SRA states that a solicitor “can never act where there is a conflict, or a significant risk of conflict, between you and your client. If there is a conflict, or a significant risk of a conflict, between two or more current clients, you must not act for all or both of them unless the matter falls within the scope of the limited exceptions…”

In deciding whether to act in these limited circumstances, the “overriding consideration will be the best interests of each of the clients concerned and, in particular, whether the benefits to the clients of you acting for all or both of the clients outweigh the risks”.

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As a profession, accountants have probably faced the greatest criticism in dealing with conflicts of interest. Following the recent collapses of publicly quoted companies, accountants are coming under greater scrutiny where they provide consultancy and audit services. The accountancy profession continues to grapple with conflicts of interest and has developed complex rules to assist, or not as the case may be. The rules are summarised below:

“A professional accountant in public practice shall take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may create threats to compliance with the fundamental principles. For example, a threat to objectivity may be created when a professional accountant in public practice competes directly with a client or has a joint venture or similar arrangement with a major competitor of a client. A threat to objectivity or confidentiality may also be created when a professional accountant in public practice performs services for clients whose interests are in conflict or the clients are in dispute with each other in relation to the matter or transaction in question.

Subject to the specific provisions, there is, however, nothing improper in a professional accountant in public practice having two clients whose interests are in conflict.”

Depending upon the circumstances giving rise to the conflict, application of one of the following safeguards is generally necessary:

– Notifying the client of the firm’s business interest or activities that may represent a conflict of interest and obtaining their consent to act in such circumstances; or

– Notifying all known relevant parties that the professional accountant in public practice is acting for two or more parties in respect of a matter where their respective interests are in conflict and obtaining their consent to so act; or

– Notifying the client that the professional accountant in public practice does not act exclusively for any one client in the provision of proposed services (for example, in a particular market sector or with respect to a specific service) and obtaining their consent to so act.
Surveyors

The RICS Rules of Conduct set an overarching obligation for both members and RICS-regulated firms at all times to:

“…act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with its professional obligations”.

The RICS stresses that the effective identification and management of conflicts of interest is a challenging but essential component of professionalism. This professional statement, which supports the RICS Rules of Conduct, also places an overarching mandatory requirement on all RICS members and regulated firms, and specifies RICS’s expectations of how compliance with the Rules of Conduct should be achieved.

Brokers

As a regulated activity, brokers act under the auspices of the FCA which publishes a handbook that details the “underlying principles of business”. A conflict of interest is defined as when there are competing interests or loyalties that are either, or potentially can be, at odds with each other. The FCA provides examples of how the firm should behave where a conflict is identified:

1. Integrity – A firm must conduct business with integrity.

2. Management and Control – reasonable care to manage and organise its affairs responsibly with adequate risk management controls.


4. Communication with Clients – due regard to the needs of its clients to provide clear and unequivocal information.

5. Manage conflicts of interest fairly between itself and its customer, and between the customer and another client.
The FCA requires that brokers maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to manage conflicts of interest giving rise to a material risk of damage to the interests of its clients.

When the firm’s own interests conflict with those of a client, or the firm is unable to act in the best interests of one commercial customer without adversely affecting the interests of another customer, it must refuse to act.

Conflicts of interest need not relate to fees but may include profit share, volume overriders, claims-handling arrangements, acting under nominations, contingent commissions, work transfer, corporate hospitality, training support and others.

The FCA has become increasingly concerned that conflicts of interest are not being made clear to customers. Internal systems need to demonstrate that conflicts of interest are being managed and audit trails are essential. Openness and transparency are not enough – systems need to be adhered to and enforced.
Conclusion

Loss adjusting has always been relatively unique compared to other areas of insurance. The profession is not generally regulated, subject to the exception of client/claim advocacy and membership of the Chartered Institute of Loss adjusters is by individuals rather than firms that employ loss adjusters. Whilst generally the services provided by loss adjusters are not regulated, usually their clients are, so loss adjusters are required to act as if they are themselves regulated.

With the consolidation of service providers, particularly in the insurance industry but not exclusively, clients are frequently placed in a position where they consider that they have little or no option but to continue with the instruction of one firm, subject to safeguards. Whether this is acceptable is the decision of the clients who are affected by the conflict, not the professional service providers.

However, with ever increasing commercial pressures clearly being brought to bear, managing conflicts of interest is becoming an ever more significant problem for loss adjusters [and other professional service providers].

In the event of a potential conflict of interest, the only feasible approach is to seek the agreement of all parties, but if that cannot be obtained, then the loss adjuster/service provider should cease acting for both or continue acting for one client (but only if that is acceptable to the second and there would be no prejudice). It is a difficult situation which requires early disclosure to both clients and careful management.

Managing conflicts of interest, particularly within the loss adjusting profession, has never been straightforward and appears to be more problematic than ever before.

About Us

Charles Taylor Adjusting (CTA) is one of the leading loss adjusting businesses in the market. We focus on commercial losses and claims in the aviation, marine, natural resources, property, casualty, technical and special risks markets, many of which are large and complex in nature. CTA is a business of Charles Taylor plc which is quoted on the London Stock Exchange.

Charles Taylor plc is a leading provider of insurance-related professional services and technological solutions to clients across the global insurance market. The Group has been providing services since 1884 and today employs over 3,000 staff in 120 locations spread across more than 30 countries in the UK, the Americas, Asia Pacific, Europe, the Middle East and Africa.

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