

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Appendix "A"

ADVISORY COMMITTEE ON CONFLICTS OF INTEREST

FINAL REPORT

June 2, 2010

Introduction

1. The Advisory Committee on Conflicts of Interest (the “Committee”) has completed its review of the conflicts rules and submits its report and recommendations to Council. Copies of the Model Code Definitions and Rule 2.04 showing the proposed amendments are attached as Appendix “A”. Clean copies of the Definitions and Rule follow the marked up versions.
2. The rule on Conflicts of Interest is one of two rules currently missing from the Model Code adopted by Federation Council in October 2009. To assist Council in understanding the considerations informing the Committee’s proposed changes to the rule this memo contains a detailed analysis of the approach taken by the Committee.
3. This Committee was appointed in February 2009 with the following Terms of Reference:

The Federation of Law Societies of Canada establishes the Advisory Committee on Conflicts of Interest (the “Committee”) whose mandate shall be to make recommendations to the Council of the Federation regarding the rule in the Federation’s draft Model Code of Conduct (the “Model Code”) relating to conflicts of interest. In particular, the Committee shall:

- i. Consider the state of the law with respect to the legal profession and conflicts of interest;
- ii. Consider the work of the Federation’s Model Code of Conduct Implementation Committee with respect of the draft rule in the Model Code on conflicts of interest;
- iii. Consider the report of the Canadian Bar Association Task Force on Conflicts of Interest and the recommendations set forth therein;
- iv. Consult with such individuals or organizations as it deems advisable in order to carry out its mandate;
- v. In consultation with the senior staff of the Federation, submit for the Federation Executive’s approval a budget in respect of the Committee’s work; and
- vi. Endeavour to provide a report to the Council of the Federation with recommendations with respect to the rule in the Model Code relating to conflicts of interest no later than June 1, 2009.

4. The Committee was composed of:
 - Chair: Bonnie Tough of Tough & Podrebarac; litigator with expertise in commercial litigation, class actions and insurance litigation; Benchler for the Law Society of Upper Canada
 - Michel Décary of Stikeman Elliott’s Montreal office; Senior Litigator with a practice focusing on corporate, commercial and securities litigation and officer and director liability
 - Mona Duckett of Dawson, Stevens, Duckett & Shaigec in Edmonton; Practicing criminal defence and related administrative law; Council Member to the FLSC for the Law Society of Alberta

- Allan Fineblit, Chief Executive Officer of the Law Society of Manitoba; FLSC Liaison to the CBA Task Force on Conflicts of Interest
- Phil Star of Pink Star Murphy Barro, Yarmouth, Nova Scotia; practicing in the areas of criminal and civil litigation, real estate, wills and estates, family law, corporate and commercial law, motor vehicle accidents; Past President of the Nova Scotia Barristers' Society
- Anne Stewart of Blake, Cassels & Graydon, Vancouver; Acting for both public and private companies in the areas of corporate structuring and re-organization, mergers and acquisitions, financing and commercial contracts; Ethics Committee member for the Law Society of British Columbia.

5. FLSC staff support was provided by Frederica Wilson and Melanie Mallet.

The Committee's work

6. The Committee normally met by teleconference; however, it held one in person meeting in Toronto in June 2009, which provided an opportunity to meet with and receive information from members of the Canadian Bar Association's Conflict of Interest Task Force. Shortly thereafter, the work of the Committee was temporarily postponed due to illness of the then Chair. Work recommenced in the spring of 2010.
7. The Committee focused its work on the significant differences between the FLSC's draft Model Code conflicts rule and the Report of the CBA Task Force. In doing so, four key differences were identified:
 - The definition of client
 - The definition of conflict of interest
 - The rule related to acting against current clients
 - The rule related to acting against former clients
8. The Committee was very cognizant of the fact that it was mandated to examine ethical rules for a Code of Professional Conduct for lawyers. The Committee was charged with advising and reporting to Council of the Federation, whose vision is "acting in the public interest by strengthening Canada's system of governance of an independent legal profession, reinforcing public confidence in it and making it a leading example for justice systems around the world." The Committee recognized the time and effort put into the CBA Task Force work and its efforts to come up with rules and tools that would be of practical assistance to members of the legal profession. As the CBA Task Force recognized in their report, it is, however, the role of law societies to regulate the profession and to set standards for professional conduct. The perspectives of lawyers and firms were important in our deliberations, but the public interest mandate of law societies was foremost in our final considerations.
9. The Committee was also guided by the fact that while the jurisdiction and responsibility of law societies to set rules governing professional conduct is undisputed, the courts are not bound to accept and apply these rules. Adoption

of an approach to regulating conflicts of interest that diverges significantly from the Supreme Court's bright line test and interpretation of fiduciary duties might lead to lawyers being removed as counsel by a court even though they have complied with the rules set by law societies. In our view, this would place lawyers in an untenable situation.

10. We believe that the approach we have taken, a clarification of the important duty of loyalty, reflects the reality of the practice of law while at the same time protecting the public interest. Ethical rules will not encompass all of the issues the Courts have considered in the context of conflicts litigation, but the ethical rules are a crucial means by which law societies protect the public interest and provide guidance to lawyers. Consistency between jurisprudence touching on lawyer's ethical duties and professional rules of conduct set by those who regulate lawyers in the public interest is important.
11. Attached as Appendix "A" are the Model Code of Conduct Definitions section and Rule 2.04, as revised by the Committee. The Committee did not study or amend any portion of the rule that did not relate directly to the four issues outlined above, which were the focus of our work. The changes we recommend to the Model Code Definitions and Rule 2.04 are outlined in the body of this report and have been reflected in Appendix "A". The original draft Rule 2.04 was provided to law societies for their review and feedback with the rest of the Model Code in the summer of 2007. Feedback on the rule was reviewed by the Model Code Implementation Committee as part of its work on the Model Code. Most of the changes to the rule made by the Implementation Committee were of an editorial or organizational nature and are not highlighted in Appendix "A"; the few substantive changes to Rule 2.04 made by the Implementation Committee are highlighted in blue.

Law on Conflicts of Interest

12. The Committee's work included a review of the leading cases on conflicts of interest from the Supreme Court of Canada, namely the so-called "Conflicts Trilogy" – *MacDonald Estate v. Martin*¹, *R v. Neil*², and *Strother v. 3464920 Canada Inc*³. As well, the Committee considered a number of other Canadian and American cases, academic commentary on conflicts of interest and legal ethics, and the Report of the CBA's Task Force on Conflicts of Interest.
13. The Supreme Court Conflicts Trilogy makes it clear that the law of fiduciary duty is at the heart of the conflicts issue. A lawyer is a fiduciary to his or her client. The law of fiduciary duty is said to ensure the proper functioning of socially important institutions and relationships, and to "monitor the abuse of a loyalty reposed".⁴
14. *Black's Law Dictionary* defines a fiduciary duty as:

A duty of utmost good faith, trust, confidence, and candor owed by a

¹ [1990] 3 S.C.R. 1235 ["*MacDonald Estate*"]

² [2002] 3 S.C.R. 631 ["*Neil*"]

³ [2007] 2 S.C.R. 177 ["*Strother*"]

⁴ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 406

fiduciary to the beneficiary; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person.⁵

15. Disclosure is a vital aspect of the lawyer-client fiduciary relationship. In *Neil*, Justice Binnie cited the following passage from *Ramrakha v. Zinner*:

...a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith.⁶

16. The lawyer-client fiduciary duty entails duties of confidentiality and loyalty.⁷ Upholding the duty of loyalty serves the socially important goal of maintaining faith in both the integrity of the justice system and the value of the independent bar.⁸

17. A crucial principle of the duty of loyalty is the fiduciary's duty to avoid conflicts of interest, as well as the *potential* for conflicts of interest. In *Strother*, the Court endorsed the following statement by Layton and Proulx: "[t]he leitmotif of conflict of interest is the broader duty of loyalty".⁹

18. A conflict of interest is defined in *Neil* as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client or a third person".¹⁰

19. Discharging the duty of loyalty prevents conflicts of interest from arising. In *Neil*, the Court also provided a general rule, referred to there as the "bright line" rule as to how a lawyer is to discharge the duty of loyalty:

...a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.¹¹

20. Subsequently, in *Strother*, the Court emphasized that the interests of the current clients must be "legal" in nature. That means, for example, that clients who are business competitors will not necessarily have adverse legal interests. Competition in and of itself is not a hindrance to simultaneous representation.¹²

⁵ *Black's Law Dictionary*, 8th ed., s.v. "fiduciary."

⁶ (1994), 157 A.R. 279 (C.A.) at para. 73, cited at para. 25 of *Neil*.

⁷ *Neil*, *supra* at para 19.

⁸ *Ibid.* at paras. 12 and 13

⁹ *Ibid.* at para. 35.

¹⁰ *Ibid.* at para. 31.

¹¹ *Ibid.* at para. 29, emphasis in original.

¹² *Strother*, *supra*, paras. 54 – 55: "The question of whether a real risk of impairment exists is a question of fact."

21. Upholding the duty of loyalty is not an absolute prohibition against simultaneous representation; this duty merely requires disclosure and consent where there are “directly adverse”, “immediate legal interests” in play. Disclosure and consent are vital aspects of the client/ lawyer fiduciary relationship.
22. Ethical rules of professional conduct should assist the lawyer in understanding the meaning of “conflict of interest” and the means by which conflicts or potential conflicts can be avoided. Where a conflict is alleged however, the courts may become involved in assessing whether such conflict exists and if so, whether any remedy ought to be granted. It is clear from *Neil* and *Strother* that in such circumstances, the court will look to the definition from *Neil*, set out above. However, not all conflicts will lead to disqualification as a remedy. The Court explained in *Strother*:

In each case where no issue of confidential information arises, the court should evaluate whether there is a serious risk that the lawyer’s ability to represent the complaining client may be adversely affected, and if so, what steps short of disqualification (if any) can be taken to provide an adequate remedy to avoid this result.¹³

The Definition of Conflict of Interest

23. The CBA Code defines a conflict of interest as:

an interest that gives rise to a substantial risk of material and adverse effect on representation.¹⁴

24. The draft Model Code defined a conflict of interest or a conflicting interest as:

an interest that would be likely to adversely affect a lawyer’s judgment on behalf of, or loyalty to, a client or a prospective client.¹⁵

25. The *Neil* definition, referred to above, is:

a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client or a third person.

26. The Committee recommends that the Model Code definition read:

¹³ *Ibid.* at para. 59.

¹⁴ Canadian Bar Association, *Code of Professional Conduct*, Chapter V “Impartiality and Conflict of Interest Between Clients” online: <http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf> [“CBA Code”] at page 26

¹⁵ Commentary to Rules 2.04(1) and (2) as restated from the “definitions” section of the Model Code.

27. The CBA's definition is consistent with the Court's approach in *Neil*. As the Court made clear in *Strother*, this definition is of particular relevance when considering questions of remedy. In the interests of providing clear guidance for lawyers, the Committee felt that consistency between ethical codes and case law was desirable.
28. We also wanted to provide additional guidance in the definition by incorporating the description of *Neil*'s "substantial risk" expanded upon in *Strother*¹⁶ and to provide examples of "third persons" to whom other duties may be owed.
29. As a result, the Committee has amended the Model Code's definition of conflict of interest to accord with *Neil* and has added commentary to the definition to explain "substantial risk" as "one that is significant, and while not certain or probable is more than a mere possibility."
30. The Committee also looked to the American Law Institute's *Restatement Third, The Law Governing Lawyers* (2000) - the source of the *Neil* definition - to clarify the duties which might be owed to third persons. Commentary has been added to Model Code rule 2.04(2), "Duty to Avoid Conflicts of Interest", (the addition of para. 2) to explain how such duties might be owed, even if there is no lawyer/client relationship, where confidential information has been received. This reference does not create a duty to third persons, but merely explains that such duties may already exist.

The Current Client Rule

31. The CBA's rule on current clients states that:

A lawyer may act in a matter which is adverse to the interests of a current client provided that:

- (a) the matter is unrelated to any matter in which the lawyer is acting for the current client, and
- (b) no conflicting interest is present.¹⁷

32. The draft rule 2.04(3) in the Model Code read:

A lawyer must not represent a client whose interests are adverse to the interest of a current client without the consent of both clients.

33. The *Neil* "bright line" rule, referred to above, reads:

a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer

¹⁶ At para. 61, Justice Binnie explained that "[w]hile it is sufficient to show a possibility (rather than a probability) of adverse impact, the possibility must be more than speculation".

¹⁷ CBA Code, *supra* at p. 26

reasonably believes that he or she is able to represent each client without adversely affecting the other.

34. The Committee recommends that Rule 2.04(3) read:

A lawyer must not represent a client whose interests are directly adverse to the immediate legal interests of a current client – even if the matters are unrelated – unless both clients consent.

35. The Model Code rule is consistent with the Supreme Court’s instruction on how to discharge the duty of loyalty, as stated in *Neil*. The *Neil* rule, as expanded upon in *Strother*, contains some explicit caveats that the Committee considered important including clarification that the client interests must be “legal”, the requirement for full disclosure and the clarification that the duty of loyalty affects unrelated matters. The Court’s “full disclosure” requirement is already captured in the Model Code definitions of “consent” and “disclosure” and the commentary has been amended to draw these to the reader’s attention.

36. This approach diverges from that adopted by the CBA, as its rule does not presumptively require client consent on unrelated matters. What distinguishes the CBA approach is the “trigger” for a requirement of disclosure and consent on an unrelated matter. Under its rule, consent is required in an unrelated matter only when there is a “substantial risk of material and adverse effect”. Until that threshold is reached, no disclosure of the adverse interest is required and there is no requirement to obtain consent.

37. In considering this issue, the CBA characterizes the Court’s findings in *Neil* regarding acting against a current client in an unrelated matter as *obiter*.¹⁸ We do not interpret *Neil* this way. However, whether or not the “bright line” test can be described as *obiter*, it was unambiguously reinforced in *Strother*, and the Court has offered clear and compelling guidance on the duties lawyers owe to clients. This guidance is particularly compelling in light of the fiduciary nature of the lawyer-client relationship. The bright line test does not prohibit simultaneous representation, but merely requires disclosure and consent before a lawyer may engage in such representation. As explained above, the disclosure requirement is entirely consistent with fiduciary obligations to clients.

38. Moreover, we are mindful of the intersection of fiduciary law with law societies’ public interest mandates. The public interest is a multi-faceted concept. It includes considerations of choice of counsel, a key argument the CBA makes in favour of a less restrictive approach to conflicts of interest. But there is a strong public interest as well in maintaining the trust that must exist between lawyers and their clients. The public interest duty of law societies is arguably not upheld by an approach to conflicts of interest that:

- permits lawyers to act against current clients,
- even if only in unrelated matters,
- where the new client’s interests are directly adverse to the immediate legal interests of the current client,

¹⁸ See e.g. Canadian Bar Association Task Force on Conflicts of Interest Report, *Conflicts of Interest: Final Report, Recommendations & Toolkit* (August 2008) at 37.

- without the client's knowledge or consent.

39. Such an approach does not take sufficient account of the fiduciary nature of the relationship between a client and his, her or its lawyer. The absence of a requirement to disclose an adverse interest and to obtain the client's consent to act creates the potential for the client to feel "betrayed" by his, her or its lawyer and for the trust that must exist in all fiduciary relationships to be threatened.
40. It is important to note that an approach modeled on *Neil* would not prohibit simultaneous representation; what it would require is that the lawyer tell the client when he or she proposes to engage in such conduct and obtain the client's consent. This approach would seem to be more consistent with the stringent obligations imposed on a lawyer by the fiduciary nature of the lawyer-client relationship.
41. The Committee considered "sophisticated" clients. In certain highly specialized areas of practice, there may be only a few lawyers with the expertise to provide services to clients needing those services, creating an access issue. Those clients tend to be sophisticated clients such as governments, financial institutions, publicly-traded or similarly substantial companies, and entities with in-house counsel.
42. The Committee also considered comments that some clients retain firms with minor work to create an artificial disqualification of the firm for strategic reasons thus preventing the firm from acting for others on unrelated.
43. The Court in *Neil* referred to the concept of "inferred consent" at para. 28, which might exceptionally arise:

In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently *unrelated* that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied.

44. The Committee believes that in light of the practice referred to above, recognized in *Neil* as "tactical rather than principled", inferred consent for sophisticated clients ought to be dealt with expressly in the Model Code commentary. We have therefore amended the commentary to this rule to endorse advance notice of inferred consent in the case of sophisticated clients. We have also added commentary pointing out that the attempt to create conflicts for purely tactical reasons is contrary to the ethical requirement that lawyers act in good faith.

The Former Client Rule

45. The draft Model Code Rule on acting against former clients, 2.04(5), reads:

Unless the client consents, a lawyer must not act against a former client or against persons who were involved in or associated with a former client in a matter in which the lawyer represented the former client:

- (a) in the same matter,
- (b) in any related matter, or
- (c) except as provided by subrule (6), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information.

46. The CBA's rules on acting against former clients, Chapter 5, read:

12. A lawyer who has acted for a client in a matter should not thereafter, in the same or any related matter, act against the client or otherwise act against the client where:

- (a) the lawyer might be tempted to breach the Rule in Chapter IV - Confidential Information; or
- (b) the lawyer's duty to the other client would require the lawyer to attack the legal work done during the prior matter or, in effect, change sides on a central aspect of the prior legal work. The term "legal work" refers to the very legal advice, representation or work product that the lawyer provides to a client in a specific dispute, transaction or similar mandate.

13. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person. It is also not improper for a lawyer to advise, represent or take a position for or against a particular issue for another client where the immediate interests of the former client are not directly and adversely affected by the lawyer's representation of another client.

47. The Committee agrees that duties owed to former clients extend beyond those dealing with confidential information, as outlined in CBA Rule 12(b) above. This view is affirmed in *Stewart v. Canadian Broadcasting Corp.*¹⁹ and *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.*²⁰ The Committee has added commentary to the rule 2.04(5), "Acting Against Former Clients" to explicitly acknowledge that the duty of loyalty owed to a former client prohibits the lawyer/law firm from attacking the legal work performed for that former client during the retainer or from undermining the former client's position on a matter that was central to the retainer.

48. The Committee has retained the prohibition on acting against a former client on the same or a related matter without consent, consistent with our interpretation of the duty of loyalty.

¹⁹ 1997 CanLII 12318 (ON S.C.).

²⁰ 2008 NSCA 22 (CanLII).

The Definition of Client

49. The CBA Code defines the “client” as:

the person who:

- (a) consults the lawyer and on whose behalf a lawyer renders or undertakes to render legal services or
- (b) having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services;

...in the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing;

...the definition of client does not extend to near-clients, affiliated entities, directors, shareholders, employees or family members unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established;

50. The draft definition of client in the Model Code provided:

“client” includes a client of a lawyer’s firm, whether or not the lawyer handles the client’s work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law.

51. In light of the definition of conflict of interest, and the “Neil-consistent” current client rule recommended, the definition of “client” must be very clear. The duty of loyalty imposes stringent obligations on a lawyer, but these duties arise only in regard to the beneficiary, the client. The draft definition in the Model Code provided little guidance as to when a lawyer-client relationship will arise,; thus the Committee has amended the definition to read:

“client” is a person who:

- (a) consults the lawyer and on whose behalf a lawyer renders or agrees to render legal services; or
- (b) having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services.

In the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, government agency, organization, or legal entity that the individual is representing;

For greater clarity, a client does not include an affiliated entity, director, shareholder, employee, family member, or customer/client of the client unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established.

A *Pro Bono* Exemption to Conflicts Rules

52. The Committee examined amendments to Codes of Professional Conduct in three Canadian jurisdictions which provide for a more relaxed standard for conflicts of interest within the scope of brief services provided *pro bono* through organized non-profit clinics or programs.²¹ The purpose of the exemption is to facilitate access to justice for those seeking summary, limited scope services. The rules generally provide for a knowledge standard for conflicts, require the lawyer to protect confidential information, do not impute knowledge to other firm members, and require adequate screening mechanisms within the lawyer's firm.
53. The Committee considered that not all jurisdictions have organizations facilitating the delivery of *pro bono* services as do British Columbia, Alberta and Ontario. There are also diverse views about the role of *pro bono* services. The Committee concluded that jurisdictional variances did not warrant the inclusion of such a provision in a National Model Code at this time.

Conclusion

54. The rule on Conflicts of Interest proposed by the Committee and accompanying changes to the Definitions section of the Model Code are out in Appendix "A" to this report.

²¹ British Columbia: Chapter 6, Rules 7.01 to 7.04; Alberta: Chapter 6, Rule 5.1; Ontario: Rule 2.04(15) – (19) and see the LSUC Professional Regulation Committee report at http://www.lsuc.on.ca/media/conjan10_PRC.pdf

DEFINITIONS

In this Code, unless the context indicates otherwise,

“**associate**” includes:

- (a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and
- (b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

“**client**” is a person who:

- (a) consults the lawyer and on whose behalf a lawyer renders or agrees to render legal services; or
- (b) having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services.

In the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing;

For greater clarity, a client does not include a near-client, affiliated entity, director, shareholder, employee or family member unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established.

Commentary

A lawyer-client relationship may be established without formality.
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“**conflict of interest**” or “**conflicting interest**” arises when there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another client, a former client or a third person;

Commentary

A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.

“**consent**” means fully informed and voluntary consent after disclosure

- (a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

- (b) orally, provided that each person consenting receives a separate letter recording the consent;

“disclosure” means full and fair disclosure of all information relevant to a person’s decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

“interprovincial law firm” means a law firm that carries on the practice of law in more than one province or territory of Canada;

“law firm” includes one or more lawyers practising:

- (a) in a sole proprietorship;
- (b) in a partnership;
- (c) as a clinic under the [provincial or territorial Act governing legal aid];
- (d) in a government, a Crown corporation or any other public body; or
- (e) in a corporation or other organization;

“lawyer” means a member of the Society and includes a law student registered in the Society’s pre-call training program;

“Society” means the Law Society of <province or territory>;

“tribunal” includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not advise or represent more than one side of a dispute.

2.04 (2) A lawyer must not act or continue to act in a matter when there is, or is likely to be, a conflicting interest, unless, after disclosure, the client consents.

Commentary

As defined in these rules, a conflict of interest or a conflicting interest arises when there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client or a third person. A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility..

A lawyer should be aware that he or she might owe duties to a third person, even though no formal lawyer-client relationship exists. The lawyer might, for instance, receive confidential information from a person, giving rise to a duty of confidentiality. Duties to third persons might also arise when a lawyer acts in non-lawyer capacity, for example as a corporate director or officer, or as an executor of an estate.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest.

A lawyer's disclosure should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflicting interest could have an adverse effect on the client's interests. This would include the lawyer's relations to the parties and interest in or connection with the matter, if any.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be

better served by not engaging another lawyer, such as when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A lawyer should not act for a client if the lawyer's duty to the client and the personal interests of the lawyer, a law partner or an associate are in conflict. Conflicting interests include, but are not limited to, the financial interest of a lawyer, a law partner or an associate of a lawyer including a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, an associate a family member or a law partner, had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture the financial interests that do not compromise a lawyer's duty to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. A lawyer acting for a friend or family member may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

A lawyer's sexual or close personal relationship with a client may also conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. A primary risk is that the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

Sole practitioners who practise in association with other lawyers in cost-sharing or other arrangements should consider whether a conflict would exist if two lawyers in an association represent clients in opposite sides of a dispute. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts and other organizations. A dual role may result in a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client.

The lawyer should also consider Rule 6.03 (Outside Interests and Practice of Law).

While subrule (2) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Acting Against Current Clients

2.04 (3) A lawyer must not represent a client whose interests are directly adverse to the immediate legal interests of a current client – even if the matters are unrelated - unless both clients consent.

Commentary

As defined in these rules, consent means fully informed and voluntary consent after disclosure. Consent must either be in writing or recorded in writing and sent to the client. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time to permit a genuine and independent decision. A lawyer must also take reasonable steps to ensure that the client understands the matters disclosed.

The consent of a client described in this rule may be express or inferred. A lawyer should record in writing the basis for inferring the consent of a client. It may be reasonable to infer such consent when:

- the matters are unrelated;
- the lawyer has no relevant confidential information arising from one client that might reasonably affect the other;
- the parties affected have commonly consented to lawyers acting against them in unrelated matters; and
- the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the legal interests of the other.

In the case of a sophisticated client, such as a government, financial institution, publicly traded or similarly substantial company, or entity with in-house counsel, a lawyer need not provide the client with a written record of the basis for inferring consent where the lawyer has advised the client in a written retainer letter at the outset of the retainer that consent to represent a client whose interests are directly adverse to the immediate legal interests of the current client will be inferred when the four conditions set out above have been met.

The attempt to create conflicts of interest for purely tactical reasons, for example by consulting multiple lawyers on behalf of a client or as in-house counsel in order to prevent them from representing another client is contrary to the requirement in Rule 6.02(1) to act in good faith with

all persons with whom a lawyer has dealings and is likely to undermine public confidence in the profession and the administration of justice.

Concurrent Representation

2.04 (4) A law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

- (a) disclosure of the advantages and disadvantages of the firm so acting has been made to each client;
- (b) each client consents after having received advice from a lawyer independent of the firm;
- (c) it is in the best interests of the clients that the firm so acts;
- (d) each client is represented by a different lawyer at the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) the law firm withdraws from the representation of all clients if a dispute that cannot be resolved develops between the clients.

Commentary

Concurrent representation, as distinguished from joint retainers as discussed below, permits law firms to act for a number of clients in a matter, for example, competing bids in a corporate acquisition, in which the clients' interests are immediately divergent and may conflict, but the clients are not in a dispute. A law firm may agree to act in such circumstances provided the requirements of the rule are met. In particular, the clients are to be fully apprised of and understand the risks associated with the arrangement.

In some situations, although all the clients would consent, the law firm should not accept a concurrent retainer. For example, in a matter in which one of the clients was less sophisticated or more vulnerable than the other, acting under this rule would be undesirable because the less sophisticated and more vulnerable client may later regret his or her consent and perceive the situation as having been one in which the law firm gave preferential and better services to the other client.

Acting Against Former Clients

2.04 (5) Unless the client consents, a lawyer must not act against a former client or against persons who were involved in or associated with a former client in a matter in which the lawyer represented the former client:

- (a) in the same matter,
- (b) in any related matter, or

- (c) except as provided by subrule (6), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information.

Commentary

It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter. Generally this Rule would prohibit a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer.

2.04 (6) If a lawyer has acted for a former client and obtained confidential information relevant to a new matter, a partner or associate of the lawyer may act in the new matter against the former client if:

- (a) the former client consents to the lawyer's partner or associate acting; or
- (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:
 - (i) the adequacy of assurances that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter has occurred;
 - (ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;
 - (iii) the extent of prejudice to any party;
 - (iv) the good faith of the parties;
 - (v) the availability of suitable alternative counsel; and
 - (vi) issues affecting the public interest.

Commentary

The guidelines at the end of the Commentary to subrule (26) regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Joint Retainers

2.04 (7) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer must advise each of the clients that:

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (7). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
 - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;
 - (ii) the other spouse or partner had died; or
 - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (9).

2.04 (8) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (9) When a lawyer has advised the clients as provided under subrule (7) and 2.04(8) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (10) Except as provided by subrule (11), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

- (a) refer the clients to other lawyers; or
- (b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:
 - (i) no legal advice is required; and
 - (ii) the clients are sophisticated.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (11) Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflicting interest, or when the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue

develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Acting for Borrower and Lender

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) "**lending client**" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (7) to (11), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

- (a) the lender is a lending client;
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- (c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or
- (d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

- (a) provide the advice described in subrule (6) to the lending client before accepting the retainer,
- (b) provide the advice described in subrule (7), or
- (c) obtain the consent of the lending client as required by subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Conflicts from Transfer Between Law Firms

Application of Rule

2.04 (17) In this rule:

- (a) **“client”**, in this subrule, bears the same meaning as in the Definitions chapter, and also includes anyone to whom a lawyer owes a duty of confidentiality, even if no solicitor-client relationship exists between them;
- (b) **“confidential information”** means information obtained from a client that is not generally known to the public; and
- (c) **“matter”** means a case or client file, but does not include general “know-how” and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

2.04 (18) This rule applies when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client (“former client”);
- (b) the interests of those clients in that matter conflict; and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

2.04 (19) Subrules (20) to (22) do not apply to a lawyer employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Commentary

The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

Lawyers and support staff — This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer’s firm and confidences of clients of other law firms in which the person has worked.

Government employees and in-house counsel — The definition of “law firm” includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law firms with multiple offices — This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client’s consent or to establish that it is in the public

interest that it continue to represent its client in the matter.

Law Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses relevant confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:
 - (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;
 - (ii) the extent of prejudice to any party;
 - (iii) the good faith of the parties;
 - (iv) the availability of suitable alternative counsel; and
 - (v) issues affecting the public interest.

Commentary

The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

2.04 (21) For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

2.04 (22) If the transferring lawyer actually possesses relevant information respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm:

- (a) the lawyer must execute an affidavit or solemn declaration to that effect, and
- (b) the new law firm must
 - (i) notify its client and the former client or, if the former client is represented in the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under this rule, and

- (ii) deliver to the persons notified under subclause (i) a copy of any affidavit or solemn declaration executed under clause (a).

Transferring Lawyer Disqualification

2.04 (23) Unless the former client consents, a transferring lawyer referred to in subrule (20) or (22) must not:

- (a) participate in any manner in the new law firm's representation of its client in the matter;
or
- (b) disclose any confidential information respecting the former client.

2.04 (24) Unless the former client consents, members of the new law firm must not discuss with a transferring lawyer referred to in subrule (20) or (22) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (17) to (26) may apply to a tribunal of competent jurisdiction for a determination of any aspect of those subrules.

Due Diligence

2.04 (26) A lawyer must exercise due diligence to ensure that each lawyer and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained complies with subrules (17) to (26), including not disclosing confidential information of clients of the firm or any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

When a law firm ("new law firm") considers hiring a lawyer or an articulated law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which:

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

- (b) the interests of the clients of the two law firms conflict; and
- (c) the transferring lawyer actually possesses relevant information.

The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm (“former client”) that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

- (a) the new law firm obtains the former client’s consent to its continued representation of its client in that matter; or
- (b) the new law firm complies with subrule (20)(b) and, in determining whether continued representation is in the interests of justice, both clients’ interests are the paramount consideration.

If the new law firm seeks the former client’s consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client’s confidential information will occur. The former client’s consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (25) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of subrule (20)(b). Ideally, this process should be completed before the transferring person is hired.

B. If no conflict exists

Although the notice required by subrule (22) need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.

A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (25) for a determination of that issue.

C. If the new law firm is not sure whether a conflict exists

There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:

- (a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and
- (b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of “reasonable measures” that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken “to ensure that no disclosure will occur to any member of the new law firm of the former client’s confidential information.”

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes “reasonable measures.” For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer “measures” are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not “work together” with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are “reasonable.”

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association’s Task Force report entitled “Conflict of Interest Disqualification: *Martin v. Gray* and Screening Methods” (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new “law firm”, the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (20)(b), particularly clause (v). Only when the entire firm must be disqualified under subrule (20) will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm’s representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The current matter should be discussed only within the limited group that is working on

the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised
 - (a) that the screened lawyer is now with the new law firm, which represents the current client, and
 - (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The screened lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Doing Business with a Client

Definitions

2.04 (27) In subrules (27) to (41),

"independent legal advice" means a retainer in which:

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
- (b) the client's transaction involves doing business with
 - (i) another lawyer, or

- (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

“independent legal representation” means a retainer in which

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction, and
- (b) the retained lawyer will act as the client’s lawyer in relation to the matter;

Commentary

If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

“related persons” means related persons as defined in the *Income Tax Act* (Canada); and

“syndicated mortgage” means a mortgage having more than one investor.

2.04 (28) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

This provision applies to any transaction with a client, including:

- (a) lending or borrowing money;
- (b) buying or selling property;
- (c) accepting a gift, including a testamentary gift;
- (d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;
- (e) recommending an investment; and

- (f) entering into a common business venture.

Commentary

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (29) Subject to subrule (30), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

- (a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;
- (b) recommend and require that the client receive independent legal advice and
- (c) if the client requests the lawyer to act, obtain the client's ~~written~~ consent.

Commentary

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (32).

2.04 (30) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (31) A lawyer must not borrow money from a client unless

- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
- (b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (32) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

- (a) provide the client with a written certificate that the client has received independent legal advice, and
- (b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (33) Subject to subrule (31), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (34) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

- (a) disclose and explain the nature of the conflicting interest to the client;

- (b) require that the client receive independent legal representation; and
- (c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (35) Except as provided by subrule (36), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (36) A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;
- (b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or
- (c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:
 - (i) the lawyer has complied with this rule (Conflicts), in particular, subrules (27) to (36) (Doing Business with a Client); and
 - (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

2.04 (37) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (38) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (39) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (40) A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (41) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.