SCC File No.: 34545

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

BETWEEN:

CANADIAN NATIONAL RAILWAY

APPELLANT
(RESPONDENT)

AND:

McKERCHER LLP and GORDON WALLACE

RESPONDENTS
(APPELLANTS)

AND:

CANADIAN BAR ASSOCIATION and FEDERATION OF LAW SOCIETIES OF CANADA

INTERVENERS

FACTUM OF THE INTERVENER THE FEDERATION OF LAW SOCIETIES OF CANADA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

John J.L. Hunter, QC
Hunter Litigation Chambers
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1
Tel: 604-891-2400
Fax: 604-647-4554
Email: jhunter@litigationchambers.com

Stanley Martin
Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
Tel: 604-631-3131
Fax: 604-632-4802
Email: smartin@fasken.com

Counsel for the Federation of Law Societies of Canada

Marie-France Major

Supreme Advocacy LLP
100 - 397 Gladstone Avenue
Ottawa, ON K2P 0Y9
Tel: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Federation of Law Societies of Canada

Douglas C. Hodson, QC
Vanessa Monar Enweani
C. Ryan Lepage

MacPherson Leslie & Tyerman LLP
1500, 410 - 22nd Street East
Saskatoon, SK S7K 5T6
Tel: 306-975-7100
Fax: 306-975-7145
Email: dhodson@mlt.com
vmenweani@mlt.com
rlepage@mlt.com

Counsel for the Appellant, Canadian National Railway

Jeffrey Beedell

McMillan LLP
300 - 50 O'Connor St.
Ottawa, ON K1P 6L2
Tel: 6013-232-7171
Fax: 613-231-3191
Email: jeff.beedell@mcmillan.ca

Agent for the Appellant

Gavin MacKenzie

Heenan Blaikie LLP
2900 - 333 Bay Street
Toronto, ON M5H 2T4
Tel: 416-360-2892
Fax: 416-360-8425
Email: gmackenzie@heenan.ca

Counsel for the Respondents, McKercher LLP and Gordon Wallace

Judith Parisien

Heenan Blaikie LLP
300 - 55 Metcalfe Street
Ottawa, ON K1P 6L5
Tel: 613-236-4673
Fax: 613-236-9632
Email: jparisien@heenan.ca

Agent for the Respondents

Malcolm M. Mercer
Eric S. Block
Brendan Brammall

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673
Email: mmercer@mccarthy.ca
eblock@mccarthy.ca
bbrammall@mccarthy.ca

Counsel for the Intervener, The Canadian Bar Association

Henry S. Brown, QC

Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, ON K1N 8S3
Tel: 613-786-0139
Fax: 613-563-9869
Email: henry.brown@gowlings.com

Agent for the Intervener, The Canadian Bar Association

TABLE OF CONTENTS

PAGE

PART 1 - OVERVIEW 1

PART II - STATEMENT OF POINTS IN ISSUE 4

PART III - STATEMENT OF ARGUMENT 4

PART IV - SUBMISSIONS RELATING TO COSTS 10

PART V - REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT 10

PART VI - TABLE OF AUTHORITIES 11

PART VII - STATUTES, REGULATIONS AND RULES 12

Appendix "A" - s. 3.4 entitled "Conflicts" from the Federation of Law Societies of Canada's *Model Code of Professional Conduct* Approved December 2012 12

PART I - OVERVIEW

1. The Intervener, the Federation of Law Societies of Canada (the "Federation"), intervenes only on the nature and scope of the appropriate rule governing the circumstances in which a lawyer may act against the immediate legal interests of another client.

2. The Federation is the umbrella organization of the 14 governing bodies of the legal profession in Canada. Its members, the law societies of Canada's provinces and territories, have statutory authority in their provinces and territories to regulate the approximately 100,000 lawyers in Canada, the 4,200 licensed paralegals in Ontario and the 4,000 notaries in Quebec in the public interest.

3. The mandate of the Federation includes bringing together Canada's law societies to enhance open and transparent governance of an independent legal profession in Canada, and to set national standards and harmonize provincial and territorial rules and procedures.

4. In furtherance of this mission, the Federation has developed over the past ten years a mobility protocol which permits lawyers in Canada, subject to certain qualifications in the northern territories and the province of Québec, to practice law throughout the country once the lawyer has been admitted to practice in any of the provinces or territories of Canada. All of the law societies of Canada have agreed to this protocol, subject to some limited qualifications in the territories and Québec, and it can now be said that the legal profession in Canada has achieved national mobility.

5. To support the mobility regime, commencing in 2004, the Federation has been working on a Model Code of Professional Conduct to harmonize as much as possible the ethical and professional standards of conduct for the legal profession in Canada. In doing so, the Federation has worked closely with the law societies of Canada as it is the law societies that must enact the Model Code of Professional Conduct for the Code to have force.

6. The proper scope of the conflicts rule that deals with acting against current clients has been a matter of some controversy in the profession. During its work on the Model Code, the Federation became aware that some lawyers were of the view that the "bright line" rule of *R.*

Neil, [2002] 3 S.C.R. 631, 2002 SCC 70 ("*Neil*"), prohibits lawyers from acting against the immediate legal interests of current clients without informed consent of the clients, and others were of the view that the *Neil* rule allowed greater flexibility and case-by-case assessment, with the appropriate standard being whether there was a substantial likelihood of impairment of the ability of the lawyer to represent both clients[1].

7. The Federation's initial Model Code of Professional Conduct was adopted by the Federation Council in October 2009 without a conflicts rule to permit further study and consultation on conflicts issues. After further reports to Council and further discussions within the profession, in November 2011 the Federation's Standing Committee on the Model Code of Professional Conduct recommended a conflict of interest rule which the Standing Committee regarded as appropriate to protect the public interest in ensuring that a lawyer's duty of loyalty to his or her client is maintained and consistent with the jurisprudence of this Court.

8. On December 11, 2011, the Federation Council accepted the proposed conflict of interest rule, thereby completing the Federation's efforts to achieve a national Model Code of Professional Conduct. The Model Code was renumbered in December 2012. Relevant portions of the Conflicts rule in the Model Code are attached to this factum as an Appendix[2].

The Federation Model Code rule for current client conflicts

9. The Federation Model Code incorporates the general rule set out in *Neil*, under which lawyers must not act directly adverse to the immediate interests of a current client, even if the mandates are unrelated, unless there is express or implied consent.

10. The Federation Model Code adopts in section 1.1-1 an expanded definition of conflict of interest that references a lawyer's duty of loyalty to a client as well as the issue of client representation:

> A "conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected

---

[1] For a more complete discussion of the debate within the profession, and a helpful commentary on the appropriateness of the "bright line" test, see Dodek, Adam M., "Conflicted Identities: The Battle Over the Duty of Loyalty in Canada", Legal Ethics 14 (2):193-214 (2012)

[2] The entire Model Code may be found at http://www.flsc.ca/_documents/ModelCodeRevDec2012TDBL.pdf

> by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

11. The Model Code sets out in subrule 3.4-1[3] the general duty to avoid conflicts of interest with current, former, concurrent and joint clients:

> A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

12. Instead of having a separate rule in the Model Code dealing with current client conflicts, the application of the general conflicts rule in the current client situation is explained in the Commentary to subrule 3.4-1. The Commentary explains that the prohibition against acting without client consent when there is a conflict of interest protects against the potential irreparable damage to the client relationship if lawyers were permitted to act in such circumstances, and the legitimate fears that clients would have if such conduct were permitted:

> The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v. 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.

13. Finally, Rule 3.4-2 of the Model Code sets out the following prohibition:

> A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

14. The balance of Rule 3.4-2 and a portion of the Commentary deal with circumstances when consent may be inferred, sometimes referred to as the "sophisticated client exception."

---

[3] This renumbered rule was formally Rule 2.04(1) and is referenced in the Appellant's factum under the original numbering. The renumbering was done to facilitate common numbering in and the electronic searching of the provincial and territorial codes of conduct.

15. The intended effect of these provisions is that under the Model Code a lawyer may not act against the immediate legal interests of an existing client unless the lawyer has the consent of both clients and reasonably believes that he or she is able to represent each client without adverse effect on representation or loyalty.

16. The Model Code has been referred to the law societies of Canada for their consideration and, if satisfactory, adoption. Six law societies, including the Law Society of Saskatchewan, have substantially adopted the Model Code[4]. In each case they have approved conflict of interest provisions that are substantially the same as or consistent with those contained in the Model Code. The Model Code is being reviewed by the remaining law societies.

17. The Federation has also established a Standing Committee on the Model Code of Professional Conduct in recognition of the fact that the Model Code must evolve over time in response to changes in the law and changes made by and suggested from individual law societies as they implement the Model Code.

PART II - STATEMENT OF POINTS IN ISSUE

18. The Federation of Law Societies of Canada wishes to address only the first of the Appellant's questions in issue, and only in relation to the general scope of the duty of lawyers who are asked to act against the immediate legal interests of an existing client.

PART III - STATEMENT OF ARGUMENT

The process followed by the Federation

19. The Federation's decision to incorporate the rule from *Neil* in the Model Code was taken after a thorough process of examination of the issues, discussion, and refinement of the wording of the Code. It represents a considered conclusion as to the appropriate standard of conduct that should apply to lawyers across Canada.

20. The Federation process involved three stages, each of which involved thoughtful consideration and weighing of the relevant values and interests:

[4] British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, and Newfoundland and Labrador

(a) the primary objective of regulation in the public interest;

(b) the business interests of the legal profession; and

(c) the interest of clients in having their choice of counsel available.

21. First, the Federation appointed an Advisory Committee on Conflicts of Interest, which issued a Final Report on June 2, 2010. The Advisory Committee recommended the incorporation of a rule equivalent to the bright line test in *Neil*. The Advisory Committee emphasized the public interest mandate, saying at paragraph 8:

> 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 perspectives of lawyers and firms were important in our deliberations, but the public interest mandate of law societies was foremost in our final considerations.

22. The Advisory Committee referred at paragraph 38 of the Final Report to the multi-faceted nature of the public interest and said that there was a strong public interest in maintaining the trust that exists between lawyers and their clients. The public interest duty of law societies would arguably not be upheld by an approach to conflicts of interest that permitted lawyers to act against current clients, where the new clients' interests are directly adverse to the immediate legal interests of the current client, even if only in unrelated matters.

23. At the second stage of the process, the Advisory Committee was reconvened at the request of the Federation Council to consider the comments of the Canadian Bar Association Task Force on the Final Report ("the CBA Task Force"), to hold such consultations as it considered appropriate and report back to Council. The Committee met twelve times, including with representatives of the CBA Task Force in certain meetings, discussed the issue with provincial law societies, and obtained expert academic advice from Professor Brent Cotter, Q.C., former Dean of the College of Law at the University of Saskatchewan, recognized by the Committee as a noted scholar on legal ethics. The Committee asked for Professor Cotter's opinion on how the public interest is best protected by an ethical rule governing acting against a

current client. At paragraph 19 of its Supplementary Report dated February 14, 2011, the Committee summarized Professor Cotter's conclusion that a rule based on the bright line test in *Neil* best advances the public interest because it:

(a) establishes a high standard of loyalty to current clients with a view to protecting the integrity of the administration of justice;

(b) entitles clients to be informed of a conflict of interest at the outset and enables them to make an informed decision whether they wish to provide consent and have the matter proceed;

(c) establishes a framework where it will be legitimate for lawyers to proceed on a reasonable assumption that clients have impliedly consented to the adverse representation;

(d) identifies circumstances where certain representations should not be seen as conflicts at all, such as the appropriate representation of business competitors; and

(e) establishes a final check on the part of lawyers whereby, even if other factors are satisfied, the lawyers must be satisfied that the representation causes no real and substantial risk to the client's interests.

24. The Advisory Committee gave serious consideration to a proposal that it would be sufficient for the lawyer to disclose to a current client the intention to act against the client, rather than requiring that the lawyer obtain consent. The Committee, at paragraph 25 of the Supplementary Report set out Professor Cotter's concern about such an approach:

> The law firm essentially becomes the sole arbiter of client representation. It can take on the new representation and see the existing client leave, or it can decline the new representation and continue to serve the existing client. The choice effectively becomes less a matter of a client's choice of counsel and more a matter of counsel's choice of client. [Emphasis added].

25. However, the majority of the Advisory Committee concluded that the Model Code should include a bright line rule that required client consent, not simply disclosure by the lawyer, as this rule best maintained and protected the public interest (see para. 37).

26. At the third stage of the process, the Federation asked its Standing Committee on the Model Code to review the current client issue again. The Standing Committee worked intensively on the issue over a period of seven months and issued its Report on Conflicts of Interest on November 21, 2011. The Standing Committee concluded that the approach of the

Advisory Committee was correct, and articulated at paragraph 7 the principles that lay behind its recommended rule:

> Ensuring that the rule on conflicts of interest protects the public interest and respects the duties that are fundamental to the lawyer-client relationship were the principles that guided the work of the Standing Committee. These principles are rooted in the mandates of the law societies to govern the legal profession in the public interest, and in the fiduciary duty, of which the duty of loyalty is a key component, which lawyers owe to their clients. In preparing the Recommended Rule, members of the Standing Committee started from the premise that the duties owed by lawyers to their clients require that a lawyer not act in a situation in which there is a conflict of interest unless the client consents. A consensus emerged early in the committee's work, that the rule should also reflect existing law on conflicts of interest, in particular the principle enunciated by the Supreme Court of Canada in its decisions in *Neil*, and *Strother v. 3464920 Canada Inc.* that a lawyer must not represent a client whose immediate legal interests are adverse to those of a current client, even if the matters are unrelated, unless the clients consent (known as the "bright-line rule").

27. The Standing Committee concluded there was merit in taking a fresh approach to the drafting of the rule. It revised the definition of conflict of interest to make specific reference to the duty of loyalty, explaining at paragraph 9:

> The revised definition reflects the opinion of the members of the Standing Committee that the duties that flow from the lawyer client relationship require that both conduct that would have an adverse impact on the representation of the client and conduct that might impair the relationship between a lawyer and the client be prohibited. The commentary to rule 2.04(1) (the general prohibition on acting in situations of conflict of interest) [now rule 3.4-1] also highlights the importance of the duty of loyalty.

28. In recommending the rule, the Standing Committee noted at paragraph 17 that two Canadian jurisdictions, British Columbia and Alberta, had already had rules incorporating the same principles for a decade.

29. In its conclusion, the Standing Committee unanimously recommended the rule and said:

> In amending the definition of conflicts of interest, addressing current client conflicts in a general rule rather than in a separate provision, and expanding upon the consent provisions, the members of the Standing Committee are confident that we have achieved our goal of drafting a rule on conflicts of interest that is clear and not unnecessarily restrictive, while being consistent with the duties that lawyers owe to their clients, including the duty of loyalty. We believe the

> instruction in the rule and commentary, in particular with respect to current client conflicts, is in keeping with the current jurisprudence and consistent with the public interest and the duties that flow from the fiduciary nature of the lawyer-client relationship.

30. The Federation Council subsequently adopted the model rule proposed by the Standing Committee and referred the Model Code with these conflict of interest provisions to law societies for their consideration.

<u>Implications of the Federation Model Code conflicts rule</u>

31. The committee reports, and the Model Code itself, emphasize the importance of the general rule in *Neil* to the preservation of confidence in the justice system and to the preservation of client-lawyer relationships. The Model Code says, in the Commentary to rule 3.4-1:

> The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. ... To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty.

32. The current client conflict rule set out in the Model Code has three principal advantages:

(i) The rule is designed to represent the best protection of the public interest as described in the work of the Advisory Committee and the Standing Committee;

(ii) The rule is clear, functional and easily applied and understood; and

(iii) The rule is intended to be consistent with the common law principles set out by this Court to date and specifically reflects the general rule articulated in *Neil* and *Strother*.

33. The Model Code rule is also intended to be consistent with the fundamental values articulated by this court in *Neil* and *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1243: the concern to maintain the high standards of the legal profession and the integrity of our system of justice. As this court emphasized in *Neil*, the duty of loyalty is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: paragraph 12.

34. This Model Rule also addresses the proper balance between the respective interests of clients and lawyers. It eliminates the situation where clients discover that their lawyer has decided to act against them, with a consequent loss of confidence both in the client-lawyer relationship and in the role of lawyers in the administration of justice. On the other hand, the provision for informed consent allows lawyers to protect their business interests by obtaining the consent of their clients to act in current client conflict situations, either as a term of the retainer or as a specific consent when the conflict arises.

35. The Model Code conflicts rule also reflects a practical and workable approach to conflicts issues. The requirements of the rule are simple and straightforward and can be readily understood by both lawyers and clients. Further, as the Standing Committee noted, there has been extensive experience with the operation of such a conduct rule in two provinces, and in the United States.

36. Finally, the conflict rule is consistent with the principles articulated by this Court in the leading cases, and in particular the admonition that "the duty of loyalty … is essential to the integrity of the administration of justice…" A rule that requires consent from a current client before a lawyer may act where there is a conflict of interest seems most consistent with such a duty.

The Model Code sophisticated client rule

37. In *Neil*, this Court recognized at paragraph 28 that there might be exceptional cases where client consent could be inferred, and referenced in particular governments, chartered banks and "professional litigants". The Saskatchewan Court of Appeal in the present case considered this "professional litigant" exception.

38. The Federation draws to the Court's attention the provision in the Model Code for implied consent to a conflict in the case of what are described by the Advisory Committee as "sophisticated clients". Subrule 3.4-2(b) permits lawyers to infer consent where the client is a government, financial institution, publicly-traded or similarly substantial entity, or an entity with in-house counsel, so long as the matters are unrelated, the lawyer has no relevant confidential information, and the client has commonly consented to lawyers acting for and against it in

unrelated matters. The Commentary discusses when it is appropriate to draw an inference of consent.

PART IV - SUBMISSIONS RELATING TO COSTS

39. The Federation does not seek costs and asks that costs not be awarded against it.

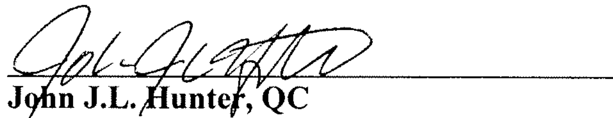
PART V - REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

40. The Federation requests the opportunity to make oral submissions at the hearing of this appeal in order to clarify these submissions and respond to any questions the Court may have.

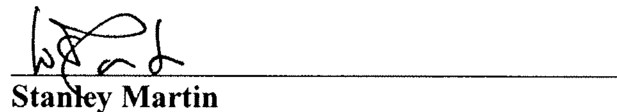
ALL OF WHICH IS RESPECTFULLY SUBMITTED:

DATED at the City of Vancouver in the Province of British Columbia this 9th day of January 2013

SIGNED BY:



John J.L. Hunter, QC



Stanley Martin

Counsel for the Intervener
The Federation of Law Societies of Canada

PART VI - TABLE OF AUTHORITIES

	Para Nos.
MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235	33
R. Neil, [2002] 3 S.C.R. 631, 2002 SCC 70	6, 9, 12, 19, 21, 23, 26, 31-33, 37
Strother v. 3464920 Canada Inc. 2007 SCC 24	12
Dodek, Adam M., "Conflicted Identities: The Battle Over the Duty of Loyalty in Canada", Legal Ethics 14 (2):193-214 (2012)	6

3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

[1] As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. 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 conflicts of interest.

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

[3] The general prohibition and permitted activity prescribed by this rule apply to a lawyer's duties to current, former, concurrent and joint clients as well as to the lawyer's own interests.

Representation

[4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[5] The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the

client's cause, the duty of confidentiality, the duty of candour and the duty not to act against the interests of the client. This obligation is premised on an established or ongoing lawyer-client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

[6] The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v. 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer-client relationship.

[7] Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include:

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(d) the temporal relationship between the matters;

(e) the significance of the issue to the immediate and long-term interests of the clients involved; and

(f) the client's reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

[8] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of conflicts of interest and are not exhaustive.

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a

substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client.

(c) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(d) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

   i. 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.

(e) A lawyer has a sexual or close personal relationship with a client.

   i. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. 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. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. 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.

(f) 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.

   i. These two roles may result in a conflict of interest or other problems because they may

      A. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

      B. obscure legal advice from business and practical advice,

      C. jeopardize the protection of lawyer and client privilege, and

      D. disqualify the lawyer or the law firm from acting for the organization.

(g) Sole practitioners who practise with other lawyers in cost-sharing or other

arrangements represent clients on opposite sides of a dispute.

i. 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.

Consent

3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest

in or connection with the matter.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf 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 stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent**[6]** In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and in *Strother*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume

implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Dispute

3.4-3 Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with Protection of Confidential Client Information

3.4-4 Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in 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 risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

[1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting

representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

[2] An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

[3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-26).

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, 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

[1] 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.

[2] 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 rule 3.4-5. 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 3.3-1, 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.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

3.4-6 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.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication 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 a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer,

(a) the lawyer must not advise them on the contentious issue and must:

i. refer the clients to other lawyers; or

ii. advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

A. no legal advice is required; and

B. the clients are sophisticated.

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary

[1] 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.

[2] 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.

3.4-9 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

[1] 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 conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

[2] 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 Against Former Clients

3.4-10 Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,

(b) any related matter, or

(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] This rule prohibits 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. 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 client if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer 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 other lawyer 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 other lawyer 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

[1] The guidelines at the end of the Commentary to rule 3.4-26 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 another lawyer in the lawyer's firm to act against the former client.

Acting for Borrower and Lender

3.4-12 Subject to rule 3.4-14, 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.

3.4-13 In rules 3.4-14 to 3.4-16, **"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.

3.4-14 Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, 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).

3.4-15 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

[1] 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.

3.4-16 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 rule 3.4-5 to the lending client before accepting the retainer,

(b) provide the advice described in rule 3.4-6, or

(c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-15 and 3.4-16 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.

[2] Rule 3.4-16 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

3.4-17 In rules 3.4-17 to 3.4-26,

(a) **"client"**, includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;

(b) **"confidential information"** means information that is not generally known to the public obtained from a client; 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

[1] 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.

3.4-18 Rules 3.4-17 to 3.4-26 apply 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.

3.4-19 Rules 3.4-20 to 3.4-22 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

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

[2] 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.

[3] 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.

[4] 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

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18(a) 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

[1] The circumstances enumerated in rule 3.4-20(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.

3.4-21 For greater certainty, rule 3.4-20 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.

3.4-22 If the transferring lawyer actually possesses information relevant to a matter referred to in rule 3.4-18(a) 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 subparagraph (i) a copy of any affidavit or solemn declaration executed under clause (a).

Transferring Lawyer Disqualification

3.4-23 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 or 3.4-22 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.

3.4-24 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 or 3.4-22.

Determination of Compliance

3.4-25 Anyone who has an interest in, or who represents a party in, a matter referred to in rules 3.4-17 to 3.4-26 may apply to a tribunal of competent jurisdiction for a determination of any aspect of those rules.

Due Diligence

3.4-26 A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

a) complies with rules 3.4-17 to 3.4-26, and

b)
   i. does not disclose confidential information of clients of the firm and

   ii. any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

[1] When a law firm ("new law firm") considers hiring a lawyer or an articled 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.

[2] 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.

[3] 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

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

[5] **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 rule 3.4-20(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

[6] 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.

[7] Alternatively, if the new law firm applies under rule 3.4-25 for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of rule 3.4-20(b). Ideally, this process should be completed before the transferring person is hired.

[8] **If no conflict exists** Although the notice required by rule 3.4-22 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.

[9] 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.

[10] 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.

[11] 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 rule 3.4-25 for a determination of that issue.

[12] **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

[13] 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.

[14] 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."

[15] 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."

[16] 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.

[17] 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 rule 3.4-20(b), particularly clause (v). Only when the entire firm must be disqualified under rule 3.4-20 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

3.4-27 In rules 3.4-27 to 3.4-41,

"**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

[1] 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).

3.4-28 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.

Commentary

[1] 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.

[2] 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

3.4-29 Subject to rule 3.4-30, 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 consent.

Commentary

[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[2] 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.

[3] 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.

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-32.

3.4-30 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

3.4-31 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

[1] 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

3.4-32 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.

3.4-33 Subject to rule 3.4-31, 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

3.4-34 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

3.4-35 Except as provided by rule 3.4-36, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-36 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 section (Conflicts), in particular, rules 3.4-27 to 3.4-36 (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

3.4-37 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.

3.4-38 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.

3.4-39 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

3.4-40 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.

3.4-41 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.