Standing Committee on the Model Code of Professional Conduct

Report on Conflicts of Interest

November 21, 2011
INTRODUCTION

1. The Standing Committee on the Model Code of Professional Conduct (the “Standing Committee”) was established by the Federation of Law Societies of Canada in September 2010 in recognition of the fact that the Model Code of Professional Conduct (the “Model Code”) must evolve over time in response to changes in the law and changes made by individual law societies as they implement the Model Code. The members of the Standing Committee are

   - Chair, Gavin Hume, Federation Council member, President, Law Society of British Columbia, past chair of the LSBC Ethics Committee, associate counsel Harris & Company, Vancouver

   - Gérald Tremblay, Federation Vice-President and president elect, former Batonnier of the Barreau du Québec, président, Groupe de travail sur la révision du Code de déontologie des avocats, Barreau du Québec, partner McCarthy Tetrault, Montreal

   - Mona Duckett, Federation Council member, former President of the Law Society of Alberta, partner Dawson, Stevens, Duckett, Edmonton

   - Susanne Boucher, Federation Council member, President Law Society of Nunavut, Senior Counsel, Public Prosecution Service of Canada

   - Darrel Pink, Executive Director, Nova Scotia Barrister’s Society

   - Jim Varro, Director, Policy and Tribunals, Law Society of Upper Canada

   - Kris Dangerfield, Senior General Counsel, Law Society of Manitoba

Staff support to the Standing Committee is provided by Frederica Wilson (Federation Director, Policy and Public Affairs) and Daphne Keevil Harrold (Federation Policy Counsel).

2. When the Model Code was originally adopted in October 2009 it did not include a rule on conflicts of interest. At that time, the Federation appointed a special committee to review the relevant law, the report of the Canadian Bar Association Task Force on Conflicts of Interest (the “CBA Task Force”), and other sources, and recommend an appropriate rule for inclusion in the Model Code. The Advisory Committee on Conflicts of Interest (the “Advisory Committee”) conducted an extensive review that included consultation with representatives of the CBA Task Force. In the course of its work, the
Advisory Committee also sought the assistance of Professor Brent Cotter, a scholar on legal ethics. The Advisory Committee submitted two reports to the Council of the Federation, the first in June 2010, the second in February 2011, recommending adoption of a rule on conflicts of interest that included a current client provision based on the approach taken by the Supreme Court of Canada in *R. v. Neil* (“Neil”).

3. In March 2011 recognizing that the Advisory Committee was ultimately not unanimous in its recommendation on the current client provision, and wishing to bring a fresh perspective to the issue, the Council adopted the rule on conflicts of interest without the current client provision. Council referred the "current client" section of the rule to the Standing Committee, with the request that it make a recommendation on an appropriate rule "having regard to the public interest."

**THE STANDING COMMITTEE’S WORK ON CONFLICTS OF INTEREST**

4. The Standing Committee has worked intensively on the current client rule over the past seven months. In considering the appropriate rule on current client conflicts, committee members reviewed material from a number of sources, including the reports of the Advisory Committee, the responses to those reports from the CBA, the leading court decisions on conflicts of interest, drafts of an alternative approach to the current client rule considered but ultimately rejected by the Advisory Committee, and conflict of interest rules in other jurisdictions, including the rules proposed or implemented by the law societies of Manitoba, Alberta, and British Columbia and those in force in the United States. The Standing Committee also sought the advice of Professor Cotter and consulted with practice advisors from the law societies in Alberta and British Columbia.

5. Members of the Standing Committee devoted particular attention to the recommendations of the CBA Task Force and the responses of the CBA to both Advisory Committee reports. In September 2011, prior to finalizing its draft rule, the Standing Committee invited members of the CBA Task Force to review the draft and provide comments on it. The CBA’s submissions contained a number of helpful suggestions, many of which have been incorporated into the rule being recommended.

6. Attached to this report as Appendix “A” is the Standing Committee’s recommended rule on conflicts of interest, together with related changes to the Definitions section of the Model Code (the “Recommended Rule”). A blackline version, showing changes from the rule proposed by the Advisory Committee is attached as Appendix “B”.

**THE RECOMMENDED RULE**

7. 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”). As the members of the Standing Committee drafted the rule, we sought the guidance of Professor Cotter to ensure that the rule successfully captured these principles. His opinion is attached as Appendix “C”.

8. It is the view of the members of the Standing Committee that the approach of the Advisory Committee to the current client conflicts of interest rule was correct as it respected relevant jurisprudence and focused on protecting the public interest. Committee members concluded, however, that there would be merit in taking a fresh approach to the drafting of the rule, in part to attempt to address some of the concerns expressed about the earlier version. As a result, the Recommended Rule differs in a number of ways from the rule recommended by the Advisory Committee. The most notable difference is the absence of a specific section in the rule referring to conflicts between current clients. The Standing Committee has opted instead to open the rule with a general prohibition on acting where there is a conflict of interest. The commentary that follows this general prohibition makes it clear that the rule applies to all situations, including those involving conflicts of interest between current clients.

9. The definition of conflict of interest included in the Definitions section that opens the Model Code, and referred to in the commentary to rule 2.04 (1), has been amended to make specific reference to the duty of loyalty. 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) also highlights the importance of the duty of loyalty.

10. The general rule prohibiting a lawyer from acting where there is a conflict of interest is followed by an exception permitting a lawyer to act where 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 there being any material adverse effect upon either the representation of or the loyalty to the clients. The draft rule on consent and the commentary that follows it contain important clarifications on the use of implied consent and consent obtained in advance in order to provide reasonable, principled relief from the strict prohibition. The ability to obtain consent in advance and, in certain
circumstances, to infer consent would permit a lawyer to act in situations otherwise proscribed by the general prohibition on acting when there is a conflict of interest.

11. Although the Standing Committee focused on the current client issue, members of the committee also considered other aspects of the rule on conflicts of interest and made a number of other amendments to different parts of the rule including the provisions on concurrent representation, joint retainers, and acting against former clients.

**RESPONSE OF THE CBA**

12. Prior to finalizing the rule, the Standing Committee provided a draft to members of the CBA Task Force with an invitation to provide any feedback they may have. A copy of the CBA's response is attached as Appendix "D" to this memorandum. As indicated above, this feedback was given full consideration by members of the Standing Committee and resulted in some changes to the final draft of the rule.

13. While commenting favourably on the revised rule, the CBA indicated in its submission that the Task Force members could not support the rule unless certain changes were made to the commentary to rule 2.04(1), the general prohibition provision discussed above. In particular, the CBA proposed deleting the words from the "bright-line" rule articulated by the Supreme Court in its decision in *Neil*. The Standing Committee considered this suggestion, but concluded that the proposed change might lead some to conclude that the rule was intended to depart from the approach to current client conflicts taken by the Supreme Court. Indeed, in response to concerns expressed by both Professor Cotter and the practice advisors from the Law Society of the Alberta, members of the Standing Committee added language to the commentary to make it clear that the duty to avoid conflicts of interest arises even if the matters are unrelated.

14. The Standing Committee members found much that was helpful and positive in the CBA’s submissions on the draft rule, and made a number of the changes proposed by the CBA. The Standing Committee did not, however, accept those suggestions that would have changed the intent or scope of the rule, or might, as in the case of the proposed changes to the commentary outlined in paragraph 13 above, have increased the possibility of misinterpretation.

**WALLACE v. CANADIAN NATIONAL RAILWAYS**

15. As the Standing Committee’s deliberations were nearing an end, a long-awaited decision in a conflicts case involving an “unrelated matters current client” situation was released by the Saskatchewan Court of Appeal. *Wallace v. Canadian National Railways, et al*, involved a law firm taking on a class action case against a client, Canadian National that the firm represented on unrelated legal matters. Canadian National’s application to have the law firm disqualified from acting in the class action case was...
successful in the lower court. The Saskatchewan Court of Appeal overturned this decision, applying an exception articulated by the Supreme Court in Neil allowing for consent to be inferred in the case of professional litigants.

16. Members of the Standing Committee discussed the decision and concluded that it is consistent with the “bright-line” test from Neil and with the approach to current client conflicts reflected in the rule that the Standing Committee is recommending for adoption.

LESSONS FROM OTHER JURISDICTIONS

17. In recommending a rule that reflects the principles articulated by the Supreme Court in Neil with respect to current client conflicts, members of the Standing Committee were mindful that rules incorporating those principles have been in effect in two Canadian jurisdictions for a decade. The codes of professional conduct of both the law societies of British Columbia and Alberta provide that lawyers must not act for a client whose interests are adverse to those of a current client. Similar provisions are in place in most American jurisdictions and are included in the American Bar Association’s Model Rules of Professional Conduct.

CONCLUSION AND RECOMMENDATION

18. 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. We unanimously recommend that the Recommended Rule be approved by the Council of the Federation for inclusion in the Model Code.
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” means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary

A lawyer-client relationship may be established without formality.

When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

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

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

“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 written communication recording the consent as soon as practicable;

“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;

“The **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 act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

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.

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.

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

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

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.

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.

Accordingly, factors for the lawyer’s consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

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.

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

2. 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.

3. 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.

4. 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.

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.

5. A lawyer has a sexual or close personal relationship with a client.

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.

6. 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.

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

- affect the lawyer’s independent judgment and fiduciary obligations in either or both roles,
- obscure legal advice from business and practical advice,
- jeopardize the protection of lawyer and client privilege, and
- disqualify the lawyer or the law firm from acting for the organization.

7. Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on 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.

2.04(2) Consent

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**

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.

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.

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**

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.

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

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.

2.04 (3) Dispute

Despite 2.04(2) a lawyer must not represent opposing parties in a dispute.

Commentary

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

2.04 (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

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.

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.

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.

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 2.04 (26)).

Joint Retainers

2.04 (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

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 (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 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 (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.

2.04 (7) When a lawyer has advised the clients as provided under subrules (5) and (6) 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 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.

2.04 (8) Except as provided by subrule (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
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 (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
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. 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

2.04 (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
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.

2.04 (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

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 another lawyer in the lawyer’s firm to act against the former client.

Acting for Borrower and Lender

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practise 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 (5) to (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).

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 (5) to the lending client before accepting the retainer,

(b) provide the advice described in subrule (6), or

(c) obtain the consent of the lending client as required by subrule (7), 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 subrules (17) – (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**

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)** Subrules (17)-(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.

**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 confidential information relevant to a matter referred to in subrule (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

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 information relevant to a matter referred to in subrule (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

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 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 subrule (20) or (22).

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 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 subrules (17) to (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

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.
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

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.

**Commentary**

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.

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 disclose 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.
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” means a person who:

(a) consults the lawyer and on whose behalf the 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.

(c) 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.

When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

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

A “conflict of interest” or “conflicting interest” arises when there is means the existence of a substantial risk that the lawyer’s loyalty to or representation of the client would be materially and adversely affected by the lawyer’s own interest 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 written communication recording the consent as soon as practicable;

“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, act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

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.

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.

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

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

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.

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.

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

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

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.

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

2. 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.

3. 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.

4. 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.

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.

5. A lawyer has a sexual or close personal relationship with a client.

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.

6. 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.

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

- affect the lawyer’s independent judgment and fiduciary obligations in either or both roles,
- obscure legal advice from business and practical advice,
- jeopardize the protection of lawyer and client privilege, and
- disqualify the lawyer or the law firm from acting for the organization.

7. Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on 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.

2.04 (2) **Consent**

A lawyer must not act or continue to act represent a client in a matter when there is, or is likely to be, a conflicting 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, the client consents.

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

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.

Disclosure and consent

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.

The lawyer 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 any interest in or connection with the matter, if any.

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 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 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. 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.

Consent in Advance

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.

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

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.
Acting Against Current Clients

2.04 (3) **A-Dispute**

Despite 2.04(2) a lawyer must not represent a client whose interests are directly adverse to the immediate legal interests of opposing parties in 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. 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

2.04 (4) A
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 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's risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the clients 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 between the clients.

Commentary

This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation, as distinguished from joint retainers as discussed below, permits law firms to act 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.

An example is a law firm acting for a number of sophisticated clients in a matter, for example, such as competing bids in a corporate acquisition, in which, although the clients' interests are immediately divergent and may conflict, the clients are not in a dispute. A law firm may agree to act provided that each client is represented by a different lawyer in such circumstances provided the requirements of the firm are met. In particular, the firm will not be able to properly represent the clients if the matter is subject to the arrangement and the arrangements are the same. Whether or not a risk of impairment of representation exists is a question of fact.

In some situations, although 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 the clients would consent, the law firm lawyers should not accept a concurrent retainer. For example, in a if the matter is one in which one of the
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

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;
the extent of prejudice to any party;
the good faith of the parties;
the availability of suitable alternative counsel; and
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 (75) Before a lawyer accepts employment from more than one client 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
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 (75). 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 (86) 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 (97) When a lawyer has advised the clients as provided under subrule (7) subrules (5) and 2.04(8(6)) 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 or 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 an issue or contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

2.04 (108) Except as provided by subrule (11), 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
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 (119) 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 conflict of 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 Against Former Clients

2.04 (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

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.

2.04 (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:
   (v) 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;
   (vi) 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;
   (vii) the extent of prejudice to any party;
   (viii) the good faith of the parties;
   (ix) the availability of suitable alternative counsel; and
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 (75) to (449), 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, subrules (17) – (26):

(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, and those defined as a client in the definitions part of this Code;
(b) “confidential information” means information obtained from a client 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
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 relevant to a matter referred to in subrule (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

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 relevant to a matter referred to in subrule (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 subclause subparagraph (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, with a transferring lawyer referred to in subrule (20) or (22).
### 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 member and employee of the lawyer’s law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained:

- a) complies with subrules (17) to (26), including
- b) i. does not disclose confidential information of clients of the firm or and
  ii. 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 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.

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
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

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.

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).

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### 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.

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**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.

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**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.
OPINION OF PROFESSOR BRENT COTTER

November 6, 2011
I INTRODUCTION

I have been asked to provide advice and comment on the most recent draft conflict of interest rule in the Federation of Law Societies of Canada’s Model Code of Professional Conduct [the Code], with particular attention to the aspects of the rule related to ‘current client’ conflicts.

The present draft represents the work of the Federation of Law Societies of Canada’s [FLSC] Standing Committee on the Model Code of Professional Conduct [Standing Committee], which was asked to develop new language as a result of an impasse encountered with respect to the previously drafted versions of the rule on ‘current client’ conflicts.¹ Most other provisions of the Code have been approved by the Council of the FLSC in the spring of 2011 any decision on this aspect of the Code was deferred and a request made to the Standing Committee to develop a new version of the conflicts rule.

The advice sought in this opinion is in relation to the Standing Committee’s newly drafted rule, the degree to which it is consistent with the existing jurisprudence on conflicts of interest, and the degree to which it establishes a suitable regulatory regime for the legal profession in the public interest. It is my understanding that the objective of the Standing Committee has been to design a conflicts of interest rule that achieves the objectives of the Advisory Committee, including its ‘public interest’ orientation, but in language that takes into account some of the objections to earlier drafts of the rule. This is reflected in the language of the mandate given to the Standing Committee on this issue, set out below. It is against this objective that I offer an assessment of the presently drafted rule and its application to ‘current client’ conflicts of interest.

II BACKGROUND

In previous formulations of the rule on conflicts of interest, the drafters of the Model Code, and the FLSC’s Advisory Committee on Conflicts of Interest [Advisory Committee] in particular, took its mandate to be the development of a modern rule on conflicts of interest that articulated the present standard on conflicts from both a legal and ethical perspective and that best protected the public interest. That rule, in its previous formulations, has been seen to be generally acceptable to the FLSC and to the leadership of the legal profession, with one major exception. Those aspects of the draft rule related to ‘current client’ conflicts were subject to significant criticism by the Canadian Bar Association [CBA]. This critique was developed in the 2008 Report of the Canadian Bar Association’s Task Force on Conflicts of Interest and was advanced in subsequent correspondence with the FLSC, in its April 2010 submission, in a legal opinion

¹ Previous drafts of the ‘current client’ rule were criticized by the Canadian Bar Association. A recent draft received majority, but not unanimous, support from the FLSC’s Advisory Committee on Conflicts of Interest. See Federation of Law Societies Advisory Committee on Conflicts of Interest: Supplementary Report, February 14, 2011
commissioned by the CBA and submitted to the FLSC in February of 2011 and most recently in a formal response to the Standing Committee in September of 2011.

In previous opinions I endorsed the FLSC’s approach to ‘current client’ conflicts as being consistent with the existing jurisprudence on conflicts of interest and as being responsive to the public interest, the latter being the mandate of provincial and territorial law societies in Canada with respect to the governance of the legal profession in their respective jurisdictions.

In February of 2011 the Advisory Committee submitted a Supplementary Report to the Council of the FLSC. The Advisory Committee’s most recent deliberations, at the request of the FLSC Council, had been focussed on consideration of the CBA Response to its earlier work, and in particular the Committee had been asked to ‘concentrate specifically on the critique of the proposed current client rule’. The product of those deliberations - the Supplementary Report – included the following recommendation:

**Recommendation on “current client” rule**

34 The Committee gave serious consideration to an amendment to the current client rule that would permit a lawyer to act for a client whose legal interests are adverse to the legal interests of a current client in an unrelated matter where no conflicting interest exists and the lawyer makes full disclosure to the clients. In the end, however, the majority of the Committee has concluded that we prefer the rule as originally proposed to Council with one small change. The Committee unanimously recommends inserting the word ‘legal’ before ‘interests’ in the first line of Rule 2.04(3) so that the rule would read:

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

35 While agreeing with this amendment, two members of the Committee would support the disclosure approach subject in one case to further work being done on the provision relating to a lawyer acting when disclosure cannot be made, and in the other to clarification (by way of commentary) of some of the language proposed by the CBA Task Force relating to this same element of the rule (“the lawyer reasonably concludes that acting for the client is in the interests of justice having regard to all relevant circumstances”).

36 The possibility of finding an alternative approach to regulation of conflicts of interest in the case of acting against current clients was attractive for a number of reasons. Members of the Committee agreed that while protection of the public must be the foremost consideration, any regulation should interfere as little as possible with the
business interests of lawyers and to the extent possible ought not to prohibit conduct where there is no risk of harm. We were also mindful of the desirability of ensuring client choice of counsel wherever possible, and of creating a rule that would eliminate or minimize attempts to create conflicts of interest for purely strategic reasons. We engaged with representatives of the CBA Task Force with an open mind and the sincere hope that we would find an alternative approach in this area that would lessen our differences while ensuring that the public interest was protected and the duty of loyalty was not undermined.

...  

39 Although there are some questions of interpretation of the language of the bright line test from Neil, particularly the phrase “directly adverse to the immediate interests”, the Committee is not proposing to add clarification to the commentary at this time. In the original proposed current client rule, the Committee included the word “legal” before “interests” in the second line of the rule (and is now recommending the same change in the first line) to clarify, in accordance with the Court’s decision in Strother, that conflicting business interests will not themselves constitute a conflict of interest for the lawyer. Additional guidance from case law and law society ethics committees can be expected over time.

The Council of the FLSC gave consideration to this Report and its recommendation on the ‘current client’ rule in the spring of 2011. The Council elected not to adopt the recommendation, and referred the ‘current client’ question to the newly established Standing Committee, requesting that it:

consider the Supplementary Report [of the FLSC’s Advisory Committee on Conflicts of Interest, dated February 14, 2011] and the formulation of the Current Client Rule, having regard to the public interest . . .

III THE STANDING COMMITTEE’S NEW APPROACH

The Standing Committee’s draft rule in relation to ‘current client’ conflicts of interest represents a significant change in approach. Rather than a specific rule that is applicable to ‘current client’ conflicts, the new draft takes a step back and sets out a broader approach to conflicts of interest, within which ‘current client’ conflicts are addressed. The new draft articulates an expanded definition of a ‘conflict of interest’, subsumes ‘current client’ conflicts within that definition and by necessary implication makes the other, general provisions of the conflicts rule applicable to ‘current client’ conflicts, where relevant. For example, Rule 2.04(2), the general rule that provides for client consent to a conflict of interest, would have application to all conflicts, including ‘current client’ conflicts of interest. The previous draft Rule 2.04(3)
Acting Against Current Clients has been deleted from the new draft Rules on Conflicts of Interest.

I have attached the most recent draft of Rule 2.04 as an Appendix. Not all the changes have application to the ‘current client’ rule, but I highlight and reproduce the following provisions as relevant to the issue:

- the new definition of ‘conflict of interest’;
- a new Commentary to the Rule 2.04(1) prohibition against conflicts of interest that makes specific reference to the nature of the lawyer’s fiduciary responsibilities and the importance of the duty of loyalty, and offers a brief comment on the existing Supreme Court of Canada jurisprudence on conflicts of interest directly relevant to ‘current client’ conflicts, followed by a series of ‘examples’ of conflicts of interest;
- a newly draft rule on Consent [ie., client consent to conflicts of interest] of general application followed by a Commentary on Consent, including a new Commentary on “Implied Consent” and “Consent in Advance”;
- the deletion of the previous ‘current client’ conflict of interest rule;
- a new rule prohibiting a lawyer from representing opposing parties in a dispute; and
- an amendment to the rule related to Acting Against Former Clients, and a modest narrowing of its application.

The new definition of ‘conflict of interest’ is:

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

The prohibition against conflicts of interest now reads:

Duty to Avoid Conflicts of Interest

2.04 (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.

Relevant aspects of the Commentary related to the prohibition state:

Commentary

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.

... 

The fiduciary relationship, the duty of loyalty and conflicting interests

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.

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 may arise 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.

Accordingly, factors for the lawyer’s consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

This is followed by a series of examples of conflicts of interest.

The new draft provision on Consent, Rule 2.04(2), states:

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 materially adversely affecting 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.

The new draft Commentaries on Consent in Advance and Implied Consent provide:

Consent in Advance

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.

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**

In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and *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.

The previous draft rule related to Acting Against Current Clients has been deleted. Draft Rule 2.04(3) had stated:

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

The prohibition against representing opposing parties is Rule 2.04(3):

**2.04 (3) Dispute**

Despite 2.04(2) a lawyer must not represent opposing parties in a dispute.

The rule related to former clients provides:

**Acting Against Former Clients**

**2.04 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 new matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

**IV THE NEW DRAFT CONFLICT OF INTEREST PROVISIONS AND THEIR APPLICATION TO ‘CURRENT CLIENT’ CONFLICTS**

I begin by noting two significant improvements in the draft rule related to conflicts of interest generally. The consolidated rule on Consent [to Conflicts of Interest], Rule 2.04(2) and the associated Commentaries, represent a better and more comprehensive approach to client consent than the language in law society Codes or the previous approach by the FLSC’s own Model Code Committee. Second, associated with this change and relevant to some aspects of ‘current client’ conflicts, is the introduction of more precise commentary on ‘Implied Consent’
The introduction of the latter concept parallels the approach to consent to, or waiver of, conflicts of interest in the American Bar Association’s Model Rules that in limited circumstances authorizes the use of ‘advance waivers’ of conflicts. I will make some observations about consent in advance to ‘current client’ conflicts later in these comments, following my comments on the newly articulated scope of conflicts of interest. The concepts of implied consent and consent in advance are relevant and applicable to the topic of client consent to ‘current client’ conflicts.

The central question to be answered is how this new draft deals with ‘current client’ conflicts themselves. It will be noted at the outset that that there is no longer a ‘current client’ conflict rule. The features of the previous draft ‘current client’ rule were a) the prohibition against ‘representing a client whose interests are directly adverse to the immediate legal interests of a current client, even if the matters are unrelated’, b) with the proviso that such a conflict could be waived if both clients were to consent, and c) implicitly supplemented by the more general requirement, in the definition of a conflict of interest, that a lawyer not act if 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 other duties.

In order to achieve the Standing Committee’s objective of developing a new ‘formulation of the Current Client Rule, having regard to the public interest’, it is my opinion that the new language must maintain fidelity to the requirement that any rule dealing with ‘current client’ conflicts be based upon the principle of loyalty to client. Michel Proulx and David Layton stated in Ethics and Canadian Criminal Law, “The leitmotif of conflicts of interest is the broader duty of loyalty.” This principle has been adopted by the Supreme Court of Canada in ways that are specifically applicable to ‘current client’ conflicts of interest. It is critical that any rule of professional ethics on this or any other point, at the very least, measure up to the standard established in the jurisprudence.

While others have noted that the jurisdiction of law societies in relation to the actions and behaviour of lawyers does not precisely coincide with the more limited jurisdiction of courts in relation to lawyers, we should nevertheless make every effort to have the standards as consistent as possible whether law society and court jurisdiction overlaps or not. This has been done in any number of other areas. Associated with this, the legal profession might impose

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2 Michel Proulx and David Layton, Ethics and Canadian Criminal Law (Irwin Law, 2001), at p. 287.
4 This is the central point of Neil in its application to ‘current client’ conflicts. Professional regulators may establish a minimum standard for professional conduct that exceeds legal requirements but it would be unprecedented for a regulator to set out a professional standard below the level established in the jurisprudence.
6 This was most notable in the work of law societies to develop more sophisticated conflicts of interest rules following Macdonald Estate v. Martin [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41. In a similar vein, following a
professional requirements upon lawyers that exceed the standards established in law. It would be unusual, and in my view problematic, for the legal profession to seek to establish standards of conduct for lawyers that are at a level ‘below’ the legal standard. While this would not only be ineffective where courts exercised jurisdiction over lawyer behaviour, it would reflect poorly on the legal profession for it to establish lower standards for lawyer conduct in circumstances that are only distinguishable by virtue of the fact that they are not normally subject to court supervision.

The new draft establishes rules for ‘current client’ conflicts in the following ways:

i) It introduces a definition of conflict of interest of general application, including its application to ‘current client’ conflicts, which elevates the language from that of a Commentary to that of a more precise and comprehensive definition;

ii) The definition of a ‘conflict of interest’ includes a specific reference to a conflict existing ‘when there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected … [my emphasis];

iii) It provides an extensive Commentary entitled “The fiduciary relationship, the duty of loyalty and conflicting interests” that: a) articulates the scope of the lawyer’s duty of loyalty grounded in the law governing fiduciaries; b) sets out in brief the applicable jurisprudence regarding ‘current client’ conflicts; and c) identifies factors for consideration in determining the existence of conflicts;

I make the following observations regarding this new approach:

First, in combination with the definition of a ‘conflict of interest’ and other language in the new draft that makes reference to duty to avoid conflicts of interest grounded in the duty of loyalty, the Standing Committee’s approach appears to be based upon the language of the Supreme Court in Neil.

Second, it will be noted that the new approach no longer includes an express prohibition, by rule, against ‘current client’ conflicts of interest. Nevertheless, the prohibition is set out in the interplay of i) the language in the definition of a ‘conflict of interest’ and its reference to the duty of loyalty, ii) the Commentary reference to concept of the ‘duty of loyalty’ and ‘[a]rising from the duty of loyalty … as set out in this rule, the duty not to act against the interests of the client and thus avoid acting where there is a conflict of interest’; iii) the adoption in the Commentary of the ‘bright line rule’ in Neil that a lawyer ‘must not represent one client whose

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decision of the Supreme Court of Canada in R. v. Cunningham, [2010] 1 S.C.R. 331; [2010] S.C.J. No. 10, the Law Society of British Columbia promptly amended its Code of Professional Conduct to align its articulation of professional standards for lawyers with that set out in the jurisprudence (in this case by setting out a requirement that lawyers disclose information sought by a court in cases where counsel seeks to withdraw from a case on the basis of non-payment of fees).

7 This exercise of jurisdiction is not limited to the disqualification of lawyers representing clients in litigation. The circumstances that led to Neil and to Strother were, in each case, the behaviour of lawyers that would not typically have attracted the attention of the courts in the context of conflicts litigation.
legal interests are directly adverse to the immediate legal interests of another client without consent’; and iv) this rule made applicable to unrelated matters by the further language of the Commentary to the effect that ‘This duty arises even if the matters are unrelated.’ Associated with this last point, the list of factors does not include the question of ‘whether the matters are related’, further reinforcing the point by implication that ‘current client’ conflicts are not limited to ‘related matters’.

Third, when the new language of the Commentary is read in conjunction with the Rule 2.04(10), Acting Against Former Clients, it is implicit, but clear, that a distinction is intended to be drawn between the two situations. That is, a lawyer is prohibited from acting former clients in cases where the matters are related, whereas the prohibition in relation to acting against current clients applies even if the matters are unrelated.

VI CONCLUSION REGARDING THE STANDING COMMITTEE’S APPROACH TO ‘CURRENT CLIENT’ CONFLICTS

I would sum up the Standing Committee’s general approach to ‘current client’ conflicts in the following way. First, it preserves the ‘client consent’ requirement to enable lawyers to act in the case of conflicts of interest. This is consistent with the approach previously taken by the Advisory Committee and represents a rejection of other suggested approaches that would have enabled lawyers to act in ‘current client’ conflicts with ‘notification’ to the adversely affected current client. The adopted approach maintains fidelity to the concept of client autonomy and is consistent with requirements articulated in the jurisprudence. Second, the Standing Committee’s draft Rule incorporates a helpful articulation of ‘client consent’ through a) a statement of general application on requirements for client consent; and b) the introduction of the concept of ‘consents in advance’. Both of these elements are improvements to the draft Rule.

Third, the Standing Committee’s draft significantly reworks the approach to ‘current client’ conflicts of interest. I would have preferred an approach that more directly addresses such conflicts in the context of a ‘Rule’ rather than a ‘Commentary’. Nevertheless, it is clear from the language of the definition of a ‘conflict of interest’ and the associated Commentary that the focus is on ‘loyalty to client’ and that the draft maintains fidelity to the ‘bright line rule’ in Neil that ‘a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent ... even if the matters are unrelated’.

On balance, and taking into consideration other language in the new draft, the newly drafted language is consistent with the existing jurisprudence and meets the goal of the Standing Committee that of developing a suitable ‘formulation of the Current Client Rule, having regard to the public interest’.
I appreciate that a principled ‘current client’ rule may be seen to impose a burden on lawyers and law firms, and create a vulnerability in circumstances where lawyers or clients are tempted to engage in inappropriate behaviours by manufacturing conflicts of interest and thereby achieving tactical advantages. Additionally, the strictures of the rule make it difficult for lawyers and law firms to take on client work without the concern that every new file may carry within it the seeds of risk that the law firm will be required to decline high quality and lucrative retainers in the future.

Nevertheless, in my opinion, it would be inappropriate for the legal profession to moderate one of the fundamental principles and indicia of the profession – loyalty to one’s client – in order to address these challenges.

W. Brent Cotter, Q.C.

VII SUPPLEMENTARY OBSERVATIONS

1 Other jurisdictions

In recent years conflict of interest rules have presented new issues and challenges for law firms. This has prompted proposals for the amendment of conflicts rules themselves and invited new interpretations of existing rules. While these are most often articulated as issues related to client access to counsel and issues related to the mobility of lawyers, the real concerns relate to the implications for large law firms trying to compete in national and increasingly transnational arenas.

One example of this challenge is found in the efforts of the Solicitors Regulation Authority of England and Wales [SRA] to address the concerns of large London law firms, and to balance the interests of the law firms, client concerns and the public interest on the subject of conflicts of interest. In England and Wales, these issues have been overtaken by the development of a new Code of Conduct which orients the requirements away from ‘rules’ and toward ‘required outcomes’. The new Code came into effect in October 2011, and it is too early to tell whether this new approach will apply to ‘current client’ conflicts in ways that accommodate the concerns of large London law firms and, at the same time, meet the SRA’s responsibility to protect the public interest.

In the United States, large law firms in New York, Washington, D.C. and elsewhere have made efforts to moderate the impacts of the American Bar Association’s Model Rules of Professional Conduct dealing with ‘current client’ conflicts. These efforts have primarily been focused on i) achieving interpretations of the existing standards that moderate the impact of strict rules in the United States that largely prohibit ‘current client’ conflicts without client consent, and ii)
the development of understandings related to the use and enforceability of ‘advance waivers’ [similar to the concept of ‘consents in advance’ introduced in the Standing Committee’s draft].

It is worth noting two things about these US developments. First, nearly all US jurisdictions have a ‘current client’ conflict rule based on the American Bar Association’s Model Rule 1.7, which provides:

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

I note in passing that the ‘current client’ provisions proposed by the Standing Committee are consistent with this Rule.

Second, none of the US efforts appear to challenge the legitimacy of the Rule itself, despite the fact that the language of the rule defines ‘current client’ conflicts broadly, and establishes a prohibition against such conflicts, absent client consent. Rather, the legal profession in the US, including large firms who appear to be most adversely affected, has sought to narrow the range of those who might be regarded as current clients (ie., by seeking interpretations that exclude subsidiaries of a corporate client from being defined as clients) or by seeking endorsement for ‘strong’ advance waivers. In my view this suggests that while the legal profession in the US have argued for modifications at the periphery of the ‘current client’ rule, they are otherwise
satisfied with and are able to conduct their law practices effectively despite the rule’s constraints.

2 Wallace v. Canadian National Railways et al

While I was in the late stages of preparing this opinion the Saskatchewan Court of Appeal decided the case of Wallace v. CN et al. This case is the first recent appellate court consideration of a ‘current client’, unrelated matters situation. The case involves a law firm, McKercher, which while representing CN on certain legal matters commenced the representation of Wallace in proposed class action litigation against CN and others. The class action was unrelated to the matters on which McKercher was representing CN. The Court of Appeal concluded that CN was a ‘professional litigant’, within the exception noted in Neil, and had provided its [irrevocable] implied consent to McKercher to the effect that it could act for clients directly adverse in interest to CN on unrelated matters.

While not central to its decision, a part of the Court’s ruling gave consideration to Neil and the ‘bright line rule’. The Court concluded on this point that the ‘bright line rule’ is qualified by the requirement that there must also be shown to be a ‘substantial risk’ to the current client before the rule is to be applied. In my opinion, the Court gave only cursory consideration to the issues under debate, both in the jurisprudence and in the consideration of the question under way within the legal profession presently. In addition, the Court misinterpreted the approaches taken by law societies, including the Law Society of Saskatchewan, to address the issue. The case is a nevertheless a new contribution to the jurisprudence, and deserves consideration by the legal profession and law societies.

RESPONSE OF CBA TASK FORCE ON CONFLICTS OF INTEREST
TO DRAFT RULE
Response of the CBA Task Force on Conflicts of Interest to the FLSC Standing Committee on the Model Code Draft Conflicts of Interest Rule and Commentary

September 21, 2011

The CBA Task Force on Conflicts of Interest welcomes this opportunity to continue to assist in the development of the Model Code by responding to the memorandum of September 2, 2011 from the Chair of the Standing Committee on the Model Code of Professional Conduct.

It may be useful to repeat the perspectives from which the Task Force addresses issues relating to conflicts of interest including in this response.

The composition of the Task Force is designed to ensure an appropriate diversity of perspective. Several of our members come to these issues from the client perspective as corporate or government lawyers. Other members of the Task Force come from small and solo practices and others come from large firms. The Task Force reflects perspectives from across Canada, from major centres and remote communities and across areas of practice. In its work, the Task Force has consulted broadly and openly. The Task Force has operated by consensus and without dissent amongst its members. The Task Force has reported to, and is fully supported by, the CBA Board of Directors and Council who broadly represent and reflect the legal profession including in-house counsel.

Our response to your proposal is based on the following principles, none of which we think to be controversial.

- The law societies govern the profession in the public interest. This self-governance is important to the rule of law and pursuit of justice.

- Effective self-governance must be open and principled. The rationale for regulatory decisions must be properly articulated. The profession does not participate in self-governance by the sufferance of their governors. Effective self-governance in the public interest requires both consideration of the input of the governed and a sufficient degree of acceptance of regulation adopted by the governors.

- The rules of conduct adopted by the law societies must be in the public interest (which includes public confidence in the administration of justice and the public interest in a self-governing legal profession) though in the event of any divergence the public interest is paramount.

- The proper consideration of conflict of interests must reflect two important and sometimes opposing objectives.
First, clients are entitled to proper representation and, accordingly, the rules of conduct must regulate the circumstances in which lawyers may act with potentially inconsistent duties and interests.

Second, access to justice and legal services requires that clients have access to the lawyers chosen by the clients who can best provide the legal services required taking into account the relative scarcity of some legal services in some contexts and the existing lawyer-client relationships in which clients have invested.

Proper regulation also considers the interests of the regulated in the sense that regulation must be proportionate to the objective sought to be realized. Regulation must be reasonably required and must not be broader than is reasonably required. The legitimate self-interest of the profession in this respect is not irrelevant. Regulation which is not reasonably necessary to achieve proper objectives is not acceptable.

With this introduction, we offer the following commentary and analysis with respect to the amendments to the Model Code being considered by the Standing Committee.

**Duty to Avoid Conflicts of Interest**

The Rule

The proposed rule is as follows:

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.

A conflict of interest is defined to mean:

The existence of 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.

There are two principal differences between this proposal and the proposal previously made by the Advisory Committee. The first is that the proposed rule of conduct only applies where there is a substantial risk of material and adverse effect. The second is that the rule applies to material and adverse effect on loyalty as well as client representation.

Starting with the addition of loyalty to the definition of a conflict of interest, we support this change as we understand it. The proposed rule appears to distinguish between the representation which the lawyer undertakes on behalf of the client and the duty of loyalty which is imposed by law. Specifically, we understand loyalty to refer to the duty of loyalty, aspects of which include the duty to act in good faith, the duty of commitment to the client’s cause, the duty of candour and the duty of confidentiality.

On this understanding, we accept that situations of substantial risk of material and adverse effect on these duties of loyalty are properly regulated by the requirement of client consent. While it may be that this addition is redundant, we think that adding the reference to loyalty enhances understanding of the rule. It is entirely proper that lawyers be directed to consider the
potential impairment of their obligations of good faith, commitment, candour and confidentiality by their own self-interest or their duties to others.

Further, this addition is consistent with the evolution of Canadian common law. The decision of the Supreme Court of Canada in MacDonald Estate can be explained as a situation in which there was a substantial risk that the law firm’s duty to their existing client would materially and adversely affect the duty of confidentiality owed to the former client of the transferring lawyer. Similarly, the decision of the House of Lords in Hilton may be explained as a situation in which the duty of candour owed to one client actually impaired the duty of confidentiality owed to another client. Clearly, existing fiduciary law protects against material impairment of the duties of loyalty imposed by law as well as the duty of representation assumed by the lawyer.

It may be worth noting that there is a limited circularity to the use of the word loyalty rather than referring specifically to the components of the duty of loyalty mentioned above. Specifically, the duty of loyalty includes the duty to avoid conflicting interests. It would not be appropriate for the regulatory duty to avoid conflicting interests to include a circular duty to avoid substantial risk of conflicting interests. However, there is elegant simplicity in the addition of the word loyalty to the definition and we do not see this possible misunderstanding of the proposed rule to be of material concern.

However, we do think it important that the commentary be revised to make clearer what is intended by this change. There is some risk that the proposed rule could be understood as contemplating a more amorphous loyalty than is intended. We would be concerned, for example, if loyalty was thought to include an obligation to generally advance the commercial interests of a client beyond the retainer assumed by the lawyer as was rejected in Strother.

As to the proposed rule, we support the rule as drafted. Our criticism of the previously proposed rule was that it applied where there was no genuine risk of material impairment. The revised rule does not do so.

We would prefer the rule adopted by the Canadian Bar Association which expressly permits retainers which do not create substantial risk of material impairment. However, there is obviously controversy as to the proper interpretation of the so-called “bright line” rule from Neil. The wisdom of the proposed rule as drafted is that it avoids this controversy by focusing on what all agree is the proper objective namely regulation of situations of substantial risk of material impairment of the fundamental duties owed by lawyers to their clients.

The Commentary

We offer a number of suggested changes to the proposed commentary to this Rule as attached.

We propose changes to the commentary to clarify the concept of loyalty and the impact of including loyalty in the definition of a conflict of interest. We think that these changes should not be controversial.

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1 Macdonald Estate v. Martin, [1990] 3 SCR 1235
2 Hilton v. Barker Booth and Eastwood (a firm), [2005] UKHL 8
3 Strother v. 3464920 Canada Inc., [2007] 2 SCR 177
We propose changes to the references to the Neil case and to use of the phrase “directly adverse to immediate interests”. We are concerned that the commentary as currently drafted misinterprets the general rule described in Neil and the implications of the Neil case. While we recognize that others take different views, we do not see that the commentary must resolve this controversy. We could not support the proposed amendments to the Model Code if the commentary is not revised in this regard.

Some consider that the Neil case creates a rule which applies even where there is no substantial risk of material impairment. As you know, there are cases interpreting Neil which disagree with this interpretation. Others appear to conclude that the Neil decision inherently concludes that all situations of “direct adversity to immediate interests” bear substantial risk of material impairment. Yet the reasons in Neil say no such thing. And in any event, there is case law holding that the concept of “direct adversity to immediate interests” implicitly applies only where there is substantial risk of material impairment.

In the end, we suggest that this risks being a semantic debate over the words “directly adverse” and “immediate interests” and whether these words inherently apply only where “substantial risk” exists or whether the case law deems “substantial risk” to exist where these words apply even if there is no genuine risk at all. We suggest that Professor Alice Woolley’s observations are à-propos. There is reason to think that:

[Judges are] less concerned with carefully articulating the applicable rules, and more concerned with reaching the right outcome on the facts, all things considered. The rules matter, but more in general terms than in specific ones. Neither of these cases addresses the particular Neil/CBA dispute, but they may suggest that that dispute is of more theoretical than practical significance.

We urge that the Standing Committee avoid this ultimately sterile debate by leaving the focus of the commentary on the rule which properly regulates situations of “substantial risk”. The commentary should guide lawyers to reach the right outcome on the facts, all things considered, rather than attempt to resolve this semantic debate.

In this regard, we suggest that the commentary should avoid oversimplifying the Neil decision and avoid including the “directly adverse to immediate interests” phrase in the examples portion of the commentary. This phrase is not an example and its inclusion as an example leads inevitably to confusion as to what is intended to be referred to.

We offer the following explanation to other suggested changes to the commentary to this proposed rule. We expect that these suggested changes do not require explanation but we would be pleased to assist if you think otherwise. We suggest that:

- there be an added factor to reflect that changes to ownership or control of the counterparty during a retainer may not necessarily result in there being a conflict of interest which did not previously exist.
- the word "person" be changed to "individual" in the examples section of the commentary to highlight that a lawyer litigating against an individual who is his or her client is seen as creating substantial risk of material impairment.

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5 Savanna Energy Services Corp. v. CanElson Drilling Inc., 2010 ABQB 645
The word “binding” be added to modify “precedent”. We are concerned that this example not be unduly drawn. The concept of positional conflicts is not established in Canadian conflicts law and it is not possible given existing technology for conflicts systems to provide a comprehensive database of positions taken for clients in litigious or transactional matters. Adding the word “binding” properly narrows the example to a situation which is capable of being ascertained and creates risk of material impairment.

The section dealing with sexual or close personal relationships should be expanded so as to include situations bearing the risk of exploitation. While this is not the principal focus of the commentary, we suggest that the sole reference to such relationships in the Model Code should not be as narrow as currently drafted.

Consent

The Rule

We have several concerns with the proposed rule as drafted. These concerns are probably a matter of drafting rather than matters of substance.

The proposed rule opens with the following:

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 adversely affecting the legal interests of any other client.

There are issues with this drafting in respect of the limits to consent as expressed in the phrase “without adversely affecting the legal interests of any other client”.

To situate these issues in their legal context, it is useful to refer to the decision of the Supreme Court of Canada in R. v. Neil and the decision of the English Court of Appeal in Mothev v Bristol7.

In Mothev v Bristol, Lord Justice Millett described what he referred to as the “double employment rule” as follows:

A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other.

This is the same concept that is captured in proposed model rule 2.04(1) and in the Neil and Strother decisions.

Lord Justice Millett went on to mention other fiduciary rules which are less well understood in Canada including what he called the “actual conflict rule”. Lord Justice Millett wrote in Mothev v Bristol that:

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7 Mothev (t/a Stapley & Co) v Bristol & West Building Society, [1996] EWCA Civ 533
... the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see Moody v Cox and Hatt [1917] 2 Ch. 71; Commonwealth Bank of Australia v Smith (1991), 102 ALR 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule".

In Neil, Justice Binnie stated the limitation to consent as follows “the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other”.

While not framed in this way in Canada, proposed rule 2.04(1) may be understood as being a “potential conflict” rule. Clients may waive “potential conflicts”. The limit to consent set out in proposed rule 2.04(2) is in respect of “actual conflicts” as described by Lord Justice Millett. In this sense, lawyers may act in situations of “potential conflict” with proper client consent but may not act in situations of “actual conflict” even with consent.

Accordingly, we suggest that the limitation to consent in rule 2.04(2) against acting in “actual conflict” be drafted consistent with the definition used for a “potential conflict” by using the word “material” to modify adversity. While the Neil principles were not expressed so precisely, it is difficult to imagine that the intention of the reasons was otherwise or that immaterial adversity was intended to be prohibited (even without consent).

As to the reference to “legal interests” in the proposed rule, we think that this is a problematic drafting choice. As Lord Justice Millett makes clear (consistent with Neil and with draft rule 2.04(1)), what is being protected from impairment are the lawyer’s duties to the client. The current drafting would apply to situations where the lawyer was uninvolved in legal interests adversely affected. The limit to consent must be actual impairment of the lawyer’s duties to the client rather than extending the limit to include impairment of the client’s legal interests in respect of which the lawyer is not retained and has no duty.

On the balance of the proposed rule, we offer the following substantive comments:

- In 2.04(2)(b)(iii), we think it important to be clear that it is representation of the client that is at issue rather than the interests of the client which are unrelated to representation and that it is the possession of relevant privileged information which should limit inferred consent.

- In 2.04(2)(b) (iv), we think it inappropriate to limit the circumstances from which consent may properly be inferred. If consent is properly inferred and the conditions set out in 2.04(2)(b) (i) to (iii) are met, that should be sufficient.

- The inclusion of “fully informed” in the definition of consent is redundant given the definition of “disclosure” and the requirement of disclosure in the definition of consent.

- The requirement of a “letter” in the definition of consent rather than an email or other form of written communication is anachronistic. The definition of consent should reflect that delivery of the written communication can properly be delayed as immediate delivery may be impossible. The example of in-custody clients in criminal matters provides a cogent example of such a circumstance.
As for the commentary to proposed rule 2.04(2), we suggest a few changes that do not require explanation but we would be pleased to assist if you think otherwise.

Other Proposed Amendments

We make the following suggestions in respect of other proposed model rule amendments:

- In the definition of client, we suggest a change for greater clarity and certainty to state that connection to a client through a business or other relationship is not sufficient to establish a lawyer-client relationship.

- In the “concurrent representation” rule, we suggest a change to rule 2.04(4) (f) to make clear that withdrawal is only required in respect of the concurrent representation because of a dispute in respect of that representation.

- We suggest changing “letter” to “communication” generally for the reason stated above.

- In the “transferring lawyer” rule, we note that the proposed change to rule 2.04(17) (b) contained an obvious typographical error. We also suggest that the proposed changes to 2.04(17) (a) and (b) be revised for clarity. We understand the proposed change to be intended to protect lawyer-client confidential information rather than confidential information generally. We support this objective.

We have previously indicated concern about the meaning of “competing interests” in the concurrent client rule which has yet to be addressed. The limits between joint retainers and concurrent retainers are not entirely clear in the proposed rule. Clarity as to these limits is important given that confidentiality between clients is permitted by the model rule for concurrent retainers and is prohibited by the model rule for joint retainers.

Conclusion

The CBA Task Force on Conflicts of Interest:

- supports proposed rule 2.04(1) as drafted but only on the basis that changes are made to the commentary as noted above.

- is significantly concerned about the drafting of proposed rule 2.04(2) as noted above.

- offers suggestions in respect of the commentary to proposed rule 2.04(2) and to other aspects of Rule 2.04 as noted above.

We are pleased to assist the Standing Committee by providing comment and suggestion regarding proposed changes to the Model Rules. As the memorandum of September 2 does not explain the rationale for the conclusions reached, it may be that we have not sufficiently appreciated the analysis undertaken by the Standing Committee and that further discussion would be useful.

The CBA Task Force appreciates having had the opportunity to provide you with these comments and participate in this process. If it would be useful, we would be pleased to meet with the Standing Committee to discuss our comments and suggestions.
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” means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary

A lawyer-client relationship may be established without formality.

When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee, family member or other entity connected with a client through a business or other relationship, unless there is objective evidence to demonstrate that such an individual or entity had a reasonable expectation that a lawyer-client relationship would be established.

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

“consent” means 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 the consent is memorialized and that each person consenting receives a separate communication recording the consent as soon as practicable;

“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 act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

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.

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

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

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. The duty of good faith, the duty of commitment to the client’s cause, the duty of confidentiality and the duty of candour are aspects of the duty of loyalty as is the duty to avoid conflicting interests which is the subject matter of this rule. The duty to avoid conflicting interests assures the lawyer’s undivided loyalty, free from any material impairment of the lawyer and client relationship.

Because the lawyer’s fiduciary duties can be materially and adversely affected by the lawyer’s own interest or duties owed by the lawyer to another person, the rule guards against material impairment of lawyer’s fiduciary duties as well as against material impairment of representation.

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. 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.

Accordingly, factors for the lawyer’s consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the matters are related;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the availability of alternative qualified lawyers;
- whether the circumstances exist at the outset of the retainer or arose during the course of the retainer, for example, because of a change in the ownership or control of a party involved in the matter;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients’ reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

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.

- It would be a conflict of interest for a lawyer to act as an advocate in one matter against an individual when the lawyer represents that person on some other matter. A conflict of interest would also exist if there is a substantial risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client; for example, when a decision favouring one client will create a binding precedent likely to seriously weaken the position being taken on behalf of the other client. A conflict of interest might arise, for example, where 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.

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 practising in association represent clients on 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...
A conflict of interest may arise when a lawyer, an associate, a law partner or a close 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. The definition of conflict of interest, however, does not include financial interests that do not compromise a lawyer's duties to a 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's sexual or close personal relationship with a client 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.

A conflict of interest may also arise when a lawyer acts not only as a legal advisor but in another role for the client as well, for example, 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. A dual role may result in a conflict of interest or other problems because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, obscure legal advice from business and practical advice, jeopardize the protection of lawyer and client privilege, and disqualify the lawyer or the law firm from acting for the organization.

2.04(2) Consent

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 materially adversely affecting the representation of any 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 arising from representation of one client that might reasonably affect representation of the other; and
iv. such other circumstances from which it may be properly be inferred that the client has consented, including where the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

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.

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.

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

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.

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 memorialized, for example in a retainer letter.

Implied consent

In some cases consent may be impliedly, 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.

2.04 (3) Dispute

Despite 2.04(2) a lawyer must not represent opposing parties in a dispute.

Commentary

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

2.04 (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 acts;
(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

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.

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.

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.

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 2.04 (26)).

Joint Retainers

2.04 (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

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 (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 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 (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.

2.04 (7) When a lawyer has advised the clients as provided under subrules (5) and (6) and the parties are content that the lawyer act, the lawyer must obtain their consent.

2.04 (8) Except as provided by subrule (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

Commentary

Consent in writing, or a record of the consent in a separate 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.

2.04 (8) Except as provided by subrule (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**

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 (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**

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. 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**

**2.04 (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**

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.

2.04 (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

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 another lawyer in the lawyer’s firm to act against the former client.

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 (5) to (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).

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 (5) to the lending client before accepting the retainer,
(b) provide the advice described in subrule (6), or
(c) obtain the consent of the lending client as required by subrule (7), 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 subrules (17) – (26):

(a) “client”, includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a lawyer-client relationship exists between them;

(b) “confidential information” means information obtained by a lawyer from his or her client, or legal advice provided by a lawyer to his or her 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) Subrules (17)-(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.

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 confidential information relevant to a matter referred to in subrule (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

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 information relevant to a matter referred to in subrule (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

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 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 subrule (20) or (22).

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 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 subrules (17) to (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

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.

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.
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.
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

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.
Commentary

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.

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 disclose 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.