

CBA Task Force on Conflicts of Interest

Conflicts of Interest:
Final Report,
Recommendations
& Toolkit

August 2008



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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A CANADIAN BAR ASSOCIATION TASK FORCE REPORT

Conflicts of Interest: Final Report, Recommendations and Toolkit

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August 2008

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Message from the Task Force Chair

This Report is the result of a tremendous, perhaps unprecedented, cooperative effort among lawyers and law firms from across Canada. Brought together by a desire to find solutions to the conflicts dilemmas that we are all facing in our varied practices, we have worked diligently to prepare the Report, its recommendations, and the toolkit.

Proof of the urgent need for changes to our codes of conduct is evident in the many thousands of volunteer hours that have been offered by so many to our task – by the hundreds of members of the profession who responded to our consultation paper questions, by all those who came to the many meetings across the country and provided their input and views, by experts on conflicts who shared their knowledge, and by the diverse members of the Task Force who read, listened, discussed, debated, wrote, and edited to prepare this Report for your consideration.

The Task Force is convinced that the current conflicts rules must change. We believe that clarity and harmony in the rules across the country will be beneficial to lawyers and to their clients. Clarity and harmony in the rules will also reduce the tactical use of conflict of interest challenges, a recent development that impedes the efficiency of our legal system and undermines public confidence in both our profession and the administration of justice in Canada.

We are looking forward to discussions with our colleagues about our recommendations and hope that we have provided an acceptable proposal for change.

It has been my honour and my privilege to lead this Task Force. My heartfelt thanks to everyone on the Task Force and everyone who helped us – your generosity with your time and talents is an enormous gift which is greatly appreciated. Thank you. Now, onward.

R. Scott Jolliffe, Chair
CBA Task Force on Conflicts of Interest

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Executive Summary

The Work of the Task Force in Context

The focus of the work of the Task Force is the lawyer-client relationship. This Report and its recommendations consider how the lawyer-client relationship is established, the fundamental duties lawyers owe their clients, and the benefit of written understandings between clients and lawyers.

As a national association representing lawyers across the country, the CBA has a long history of contributing to the development of codes of professional conduct and to the law of professional responsibility, starting with the adoption of the *Canons of Legal Ethics* in 1920.¹ In 1976, the CBA adopted a model Code of Professional Conduct, with major revisions in 1987 and again in 2004. These have been reflected, to varying extents, in law society codes of professional conduct and have been considered in decisions of the courts.

In the 1990s, the CBA took the lead and identified measures that law firms could put in place to protect client confidential information. This work responded to the Supreme Court of Canada decision in *MacDonald Estate v. Martin*² and provided the governing bodies of the legal profession with guidelines, developed in consultation with lawyers across the country, which they could consider when revising their codes of professional conduct.

Of course, the role of the Task Force and the CBA is limited. Our work will only have impact if the regulators and the courts find value in our analysis and recommendations, as they are the decision makers within their respective spheres.

The Supreme Court of Canada reflected on the role of the governing bodies and the judiciary in *MacDonald Estate*:

... it must be borne in mind that the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court's role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law.

In considering protection of client confidential information, the Court took care to emphasize the proper jurisdiction of the governing bodies:

It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.

¹ The 1920 CBA *Canons of Legal Ethics* state in section 3(2): "[To the Client] He should at the time of the retainer disclose to the client all the circumstances of his relations to the parties and his interest in or connection with the controversy, if any, which might influence the client in selection of counsel. He should avoid conflicting interests."

² *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [*MacDonald Estate*].

The issues in *MacDonald Estate* were before the courts in the context of an application to disqualify counsel in legal proceedings. The 2007 Supreme Court of Canada decision in *Strother v. 3464920 Canada Inc.*³ reviewed the jurisdiction of the courts to determine client claims for breach of fiduciary duty for which equitable remedies such as damages,⁴ disgorgement⁵ and injunctive relief⁶ are available. The principal jurisdictions of the courts are to supervise ethics in legal proceedings and to consider claims brought by clients against lawyers for breach of fiduciary duty.

The governing bodies have two important interrelated jurisdictions. The first jurisdiction is the regulatory responsibility to establish professional standards.⁷ The second is responsibility for the enforcement of professional standards and professional discipline.

Governing bodies articulate standards in the codes of professional conduct. When called on, it is for the courts to accept, or reject, the articulated standards, while considering the law generally and the public interest. The Supreme Court of Canada expressed this point as follows in *MacDonald Estate*:

An important statement of public policy with respect to the conduct of barrister and solicitor is contained in the professional ethics codes of the governing bodies of the profession. The legal profession is self-governing. In each province there is a governing body usually elected by the lawyers practising in the province. The governing body enacts rules of professional conduct on behalf of those it represents. These rules must be taken as expressing the collective views of the profession as to the appropriate standards to which the profession should adhere.⁸

The jurisdiction of the courts and the role of the governing bodies of the profession are interwoven. The courts speak through judicial decisions and reasons. The governing bodies speak through studies, codes and discipline decisions. The courts need not accept the established standards but this does not diminish the importance of the standard-making responsibility.⁹ There is a necessary and continuing dialogue, which assists the courts and the governing bodies in exercising their respective jurisdictions in the public interest.

The Task Force hopes that this Report will be of assistance to the governing bodies as they establish appropriate professional standards for the profession and to the courts in their consideration of cases. It is with the greatest respect for the roles of the governing bodies and the courts that the Task Force submits this Report for consideration.

³ *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177 [*Strother*].

⁴ *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.), aff'd, (1988), 66 O.R. (2d) 350 (C.A.).

⁵ *Strother*, supra note 3.

⁶ *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, 10 B.L.R. (3d) 104, 141 O.A.C. 380 (C.A.).

⁷ In Quebec, the *Code of Ethics of Advocates*, R.Q. c. B-1, r.1 is a regulation pursuant to the *Professional Code*, R.S.Q. c. C-26 and the *Barreau du Québec Act*, R.S.Q. c. B-1. As a regulation made by order-in-council, the *Code of Ethics of Advocates* has greater legal authority than the codes of professional conduct established by law societies outside Quebec.

⁸ *MacDonald Estate*, supra note 2.

⁹ Justice Sopinka wrote the introduction to the *Guide 1994 sur les conflits d'intérêts* which was published by the Barreau du Québec after amendments were made in 1993 to the *Code of Ethics of Advocates*. These amendments followed the *MacDonald Estate* decision. In the introduction to the *Guide* Justice Sopinka wrote: "While setting out the appropriate test to be applied in determining if a law firm should be disqualified from acting for a party by reason of a conflict of interest, I emphasized, on behalf of the Court, that it is the legal profession's governing bodies' responsibility, and not that of the courts, to set ethical standards." (translation)

The Conflict of Interest Task Force Recommendations in Context

The Task Force is presenting 21 recommendations for the CBA's consideration. The recommendations propose ways to address the difficulties with the current conflicts rules, recognizing that it is up to the regulatory bodies to decide on codes of professional conduct and up to the courts to decide how to apply the rules in the codes within the context of the law and the public interest.

The Task Force believes that the adoption of these recommendations will provide a principled approach to identifying and managing potential conflicting interests within the lawyer-client relationship, and will continue to protect confidential information entrusted to lawyers. The Task Force also believes that the implementation of these recommendations will increase the opportunities for clients to use counsel of their choice, improve access to legal services throughout Canada, and provide greater clarity on conflict situations for everyone, without compromising the important legal and ethical responsibilities of lawyers that are fundamental to the integrity of the profession and public confidence in the administration of justice in Canada.

After nationwide consultations and in-depth research, the Task Force has concluded that the need for change is pressing.

This summary of the Task Force recommendations describes the context for the recommendations and their intent.

The elements of a conflicting interest

At the heart of the conflicts discussion are immutable principles. Lawyers must never permit their own interests or their duties to others to compromise their work for a client. They must provide zealous representation and protect client confidences. Clients are entitled to expect that their lawyers will act with integrity and provide them with sound legal advice. Simply put, the central public policy purpose of conflicts law and rules is to protect client representation.

The Task Force reviewed Canadian, American, and Commonwealth country jurisprudence as well as codes of professional conduct to assist in the analysis of the scope of a lawyer's duties. With this information, the Task Force concluded that the duty to avoid conflicting interests actually has three components.

A “conflict of duty and interest” prevents a lawyer from acting for a client when the lawyer's self-interest conflicts with the client's interests.

A “conflict of duty and duty” prevents a lawyer from acting when the duty of performance owed to one client conflicts with the duty of performance owed to another client.

A “conflict of duty with relationship” prevents a lawyer from acting when the duty owed by the lawyer to a client impairs the lawyer’s representation of another client in another matter by impairing the lawyer-client relationship in that matter. The focus of this conflict is the lawyer-client relationship, which is essential to effective client representation.

In most situations, a fully-informed client can give consent to the conflict and allow the lawyer to take on the work for another client. Sometimes, however, confidentiality issues may make it impossible for a lawyer to seek client consent. Or, a client may withhold consent for any one of a variety of reasons, including not wanting to bother to answer the request or not wanting to assist the other client.

It is critical to lawyers to have clear principles to apply and rules to follow when they assess whether or not a conflict exists. Assessing possible conflicts is a regular part of the practice of law.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

1. recognize that there are three different types of “conflicting interest”: a “conflict of duty and interest”, a “conflict of duty and duty”, and a “conflict of duty with relationship”;

The Substantial Risk Principle and unrelated matters

The Task Force believes that the correct approach for assessing a conflict is the “Substantial Risk Principle”, which was set out in the Supreme Court of Canada decision in the *Neil* case and supported by the majority in *Strother*. The principle is that there is a conflicting interest when there is a substantial risk that a lawyer’s **representation** of a client would be **materially and adversely** affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.

When a lawyer acts for clients with opposing interests in **related** matters, there is ordinarily a substantial risk that the duties of performance to either or both will be materially and adversely affected. This risk is present because of the relationship of the two matters and the opposing interests of the two clients in those matters. Where matters are **unrelated**, duties of performance are much less likely to conflict and the “conflict of duty and duty rule” is very unlikely to come into play. However, the Unrelated Matter Rule, articulated in *Neil*, says that a lawyer may not represent a client whose immediate interests in a matter are directly adverse to another client even if the two matters are unrelated, unless the clients consent and the lawyer believes that representation of both clients is possible without adverse effects to either.

The Task Force understands that there are occasions when an unrelated mandate against a current client offends the Substantial Risk Principle. But the Task Force does not believe that this occurs in most situations, and therefore takes the position that acting on an unrelated mandate is generally unlikely to offend the Substantial Risk Principle, especially when the matters do not involve litigation.

The Task Force notes that the Unrelated Matter Rule did not exist in Canadian law prior to the Supreme Court's decision in *Neil* and that it can be regarded as *obiter* in that case. Most law societies in Canada, with the exception of Alberta and British Columbia, have not incorporated the Unrelated Matter Rule into their codes of professional conduct. The Task Force believes that an unlimited Unrelated Matter Rule poses practical problems, is unnecessarily restrictive on client choice of counsel and on lawyers, and is not necessary to preserve the overriding objective of protecting client representation.

The Task Force recommendations are based on the view that, absent proper consent, a lawyer may not act on a new matter for a client in a way that is directly adverse to the immediate interests of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer's representation of the current client would be materially and adversely affected by the new unrelated matter.

In the case of an unrelated adverse retainer, the lawyer would be required to examine the potential for material and adverse effect on representation and to seek consent where there is a substantial risk of a material and adverse effect. Obviously, the nature of the two matters and the nature of the two clients will affect this analysis. Litigation may create risks that commercial transactions will not. Not all litigation bears the same risk. The potential for harm to a client relationship may be greater where the client is an individual or where the same lawyer acts in both matters rather than two lawyers in the same firm separately acting on the two separate matters. These are judgments that the lawyer must make in the circumstances and which, of course, are always subject to law society and judicial scrutiny.

In summary, the Task Force recommendations propose that a conflict situation be assessed using the Substantial Risk Principle and that absent a conflicting interest, i.e. a substantial risk of material and adverse effect on representation, a lawyer may act adversely to a current client in an unrelated matter. In other words, client consent is necessary for a lawyer to act adversely to a current client in a related matter or to act in an unrelated matter where there is a substantial risk of a material and adverse effect.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

2. define a "conflicting interest" to mean an interest that gives rise to a "substantial risk of material and adverse effect on representation";
3. provide that, except after adequate disclosure to and with the consent of the client, a lawyer may not act in a matter in which a conflicting interest is present;
4. provide that a lawyer may act in a matter which is adverse to the interests of a current client provided that:
 - the matter is unrelated to any matter in which the lawyer is acting for the current client and
 - no conflicting interest is present;

Duties after a retainer ends

After a retainer has been completed there is no longer a duty of performance. Without a duty of performance, there can be no duty of zealous representation, no duty of undivided loyalty, and no duty to avoid conflicts of interest. There can however be a duty not to undo or undercut subsequently what the lawyer had been retained to do.

After a retainer has ended, in addition to an on-going duty of confidentiality, the Task Force believes that there is also a duty not to attack the work that has been completed for the client.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

5. clarify that the duty of loyalty owed to a client after a retainer has been completed prohibits a lawyer from attacking the legal work done during the retainer or from, in effect, changing sides on a matter that was central to the prior retainer;

Confidentiality and conflicting interests

Client confidentiality must always be safeguarded. Unlike the duty of performance, the duty to maintain client confidentiality does not change or end when the retainer has been completed.

Recognizing the distinction between finite and on-going duties is helpful, as is recognizing the distinction between the duty to avoid a conflicting interest and the duty to maintain confidentiality.

These distinctions are relevant, for example, in the assessment of a “related matter.” In the context of a “conflict of duty and duty”, a related matter is one in which duties of performance likely conflict. In the context of loyalty and a prior retainer, a related matter is one in which the lawyer would likely end up attacking the legal work done during the prior retainer or, in effect, changing sides on a matter central to the prior retainer. In the context of confidential information, a related matter is one in respect of which it is likely that confidential information will be relevant.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

6. recognize that a risk of misuse of confidential information is a potential failure to comply with the duty of confidentiality and is distinct from a conflicting interest;
7. include a rule which explicitly delineates the different duties of loyalty and confidentiality owed to a client after a retainer has been completed;

8. re-affirm the requirement, both during a retainer and after a retainer has been completed, not to misuse confidential client information.

Confidentiality, screens and the timing of their placement

The duty of confidentiality protects the lawyer-client relationship and is fundamental to it.

The Supreme Court of Canada's decision in *MacDonald Estate* almost 20 years ago identified the need for institutional mechanisms to protect client confidentiality and resulted in significant changes to the rules of professional conduct and a substantial body of case law. A 1993 CBA Task Force proposed guidelines on how to protect confidential information. These were largely adopted by regulatory bodies. Today some of the deficiencies with those rules and practices have become apparent, particularly with respect to the inference that lawyers who work together share confidences and with respect to the presumption that the failure to erect confidentiality screens immediately is, by itself, conclusive evidence of a breach of confidentiality.

The Task Force believes that the public is not well served by overly rigid rules that can have serious negative results for clients when it can be shown that there has been no disclosure or sharing of confidential information.

With respect to the inference that lawyers who work together can always be assumed to share confidences, the Task Force considered several different working situations and concluded that this assumption is not grounded in fact. In large firms, for example, lawyers may work in different cities, in completely different practice areas with no knowledge of each other's files and with elaborate screening policies and practices in place. Sole practitioners, on the other hand, may share office space and a receptionist but may maintain a complete separation with respect to clients in such a way that client confidentiality is fully protected.

The Task Force believes that lawyers who practise in space-sharing arrangements should not be regarded as constituting a firm for conflicts purposes if their arrangements are such that client confidentiality is fully protected. Factors such as the configuration of the workplace, the presence of computer programs that limit access to files, and the implementation of rigorous client information protection policies are more relevant than space sharing or the size of the law firm.

With respect to the timing of the erection of confidentiality screens, the Task Force's review of the case law found that failing to put up a screen immediately was often considered fatal to the screen's effectiveness, although courts in Quebec and Alberta have been more tolerant of late screens than Ontario courts. The Task Force finds the mechanical approach followed in some cases – that “timing” should be determinative – troubling. The Task Force believes that courts should be able to decide the alleged conflict on the basis of whether or not confidential information has in fact been misused or disclosed, regardless of the timing of the implementation of a screen.

In the recent *Strother* case, the Supreme Court of Canada expressly recognized the problems that the undue extension of conflicts rules may cause in situations of scarce legal resources. The Task Force found that legal resources may be hard to access for clients with major mandates, and in specialty areas of law, in remote communities, and in other areas where access to legal expertise is restricted. Given the many different situations and settings in which lawyers practise, in large and small firms, in large and small centres, and in specialty areas and remote communities, the Task Force believes that a more flexible, situation-specific approach to assessing conflicts is required when considering a new mandate that may be adverse to a former client. The Task Force believes that the rule established by the Law Society of Upper Canada, which is similar to the approach in other provinces, for example, British Columbia, is appropriate.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

9. provide that a delay in the erection of a confidentiality screen need not require that a law firm cease acting if it can be shown that no disclosure of confidential information occurred;
10. adopt the Law Society of Upper Canada Rule 2.04 (5) which says: Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if
 - (a) the former client consents to the lawyer's partner or associate acting,
 - or
 - (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
 - (i) the adequacy 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,
 - (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.

Confidentiality and law firm staff transfers

Lawyers are not, of course, the only people within a law firm who have access to a client's confidential information. Professional staff (patent and trademark agents, articling students, law clerks, legal assistants, etc.), specialist staff (librarian researchers, process servers, title searchers, etc.), and administrative staff (accountants, computer programmers, etc.) all may have access to confidential information by virtue of their work, although not all of them

are involved directly or substantively in client matters. The Task Force considers that it is a reasonable inference that professional staff may be in a position to share confidences with those with whom they work directly on substantive client matters and that they should be included within confidentiality screens when they are exposed to confidential client information. Specialist and administrative staff should not be governed by these rules but should be advised when employed of their obligation to observe their confidentiality obligations to clients of their former firm.

The Task Force suggests that these categorizations of law firm staff should be applied substantively and not formalistically. If, for example, a specialist staff member has direct and substantive involvement in client matters then the staff person should be subject to full protective measures despite their title or designation.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

11. include commentary to clarify the procedures that should be followed when professional, specialist, and administrative staff transfer from one law firm to another.

Confidentiality and law firm mergers

Courts consistently hold that screening mechanisms must be in place when law firms agree to merge. Unfortunately, this poses many practical problems for merging law firms.

A merger is a complex set of business, professional, and technological arrangements which may take months to complete. At the time of agreement, the merging firms will have separate offices, facilities and systems and the ability to establish protective measures is limited. While some conflicts may be apparent before merger, the ability of the merging firms to determine all conflicts prior to merger is limited for practical and ethical reasons. Once a merger agreement is entered into, significant work is required to search conflicts in the merging firms' conflicts systems.

The Task Force believes that it is appropriate to analyze the merging firm scenario by determining if there was a genuine risk of breach of client confidentiality.

The Task Force is therefore recommending that the guidelines on conflicts from transfer between law firms in the CBA Code of Professional Conduct be amended to:

12. recognize that in the case of a merger of law firms the risk of a breach of client confidentiality does not occur by reason only of entering into a merger agreement and that any necessary screens should therefore be required only when the lawyers in the merged firm start working together or otherwise sharing client information.

Clients and others

The Task Force carefully analyzed the issue of conflicting interests and the duty of confidentiality to clarify the scope of these duties. An outstanding question is to whom are these duties owed? The straightforward answer is that these duties are owed to clients but this raises other questions. Who is the client? And, are duties ever owed to a person who is not a client?

Clients

The Task Force believes that the client is the person who, or entity whose representative, consulted the lawyer. For example, the fact that a corporation consults a lawyer does not necessarily imply that subsidiaries or affiliates of that corporation (or their shareholders, individual directors, officers or employees) are also clients.

Absent evidence that the lawyer is assuming a lawyer-client relationship with a larger group, the Task Force believes that a lawyer-client relationship should extend only to the specific retaining entity and not to affiliated entities or directors, shareholders, or employees. If, however, based upon objective evidence, there are reasons to conclude that the retaining entity or other entities in the group has a reasonable expectation that the lawyer is assuming a lawyer-client relationship with respect to them, then a lawyer-client relationship exists and the attendant duties will be found.

The Task Force believes that the duty of loyalty is owed exclusively to clients because clients are the only ones to whom lawyers owe a duty of performance.

Prospective clients

Recent cases illustrate that sometimes it may be difficult to distinguish between prospective and actual clients, resulting in a lack of clarity regarding the different obligations owed to each. The Task Force believes that it is not appropriate to classify the lawyer-prospective client relationship as a lawyer-client relationship – with all the duties that entails – when, for whatever reason, the lawyer is never retained. The more suitable analysis in such cases is that, while a duty of confidence and solicitor-client privilege will protect preliminary discussions with a prospective client, a prospective client is not owed any duty of performance or a duty of loyalty until the client has decided to retain the lawyer and the lawyer accepts the retainer. To be clear, however, solicitor-client privilege may attach to prospective client communications without it being necessary for the court to conclude that the lawyer had been retained to act for the client.

Non-clients

When a person or entity is not in a lawyer-client relationship with the lawyer, the lawyer owes no duty of performance because a retainer does not exist. A lawyer owes no duty of loyalty to a non-client because there is no lawyer-client relationship to protect.

In appropriate circumstances, however, a lawyer may owe a duty of confidentiality to a non-client in respect of confidential information received from the non-client. While confidential information from a near-client or non-client may not be privileged, a duty of confidentiality owed may affect the ability of the lawyer to act against that near-client or non-client or may require protective measures such as confidentiality screens and separate teams of lawyers.

The Task Force concluded that the duty of loyalty should be reserved exclusively for clients and should not be extended to others. As to the duty of confidentiality, the Task Force concluded that **generally** the duty of confidentiality should be owed only to clients.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

13. clarify that a client is the person who:
 - a. consults the lawyer and on whose behalf a lawyer renders or undertakes to render legal services or
 - b. having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services;
14. clarify that in the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or entity that the individual is representing;
15. clarify that the definition of client does not extend to near-clients, affiliated entities, directors, shareholders, employees, or family members unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established;
16. clarify that lawyers owe a duty of loyalty only to clients and that this duty should not be extended to others; and
17. clarify that lawyers owe a duty of confidentiality to clients and that a similar duty of confidentiality may extend to near-clients and non-clients when they have disclosed confidential information to the lawyer in the course of the retainer, reasonably expecting that it would be protected, and the lawyer knows or ought to know that the information is confidential.

Engagement Letters

Canadian rules of professional conduct do not currently require lawyers to use engagement letters when a client retains their services, although the Alberta Code of Professional Conduct requires lawyers to provide clients with written information about fees and disbursements.

The Task Force believes that engagement letters have great value in practice. They identify the client, i.e. the person to whom the lawyer owes fiduciary duties. They clarify the expectations of both the client and the lawyer and they improve client service. Engagement letters are also useful in risk management because they define the scope of the mandate and can address the possibility of future conflicts.

Some respondents to the Task Force consultations suggested that making engagement letters mandatory would “level the playing field”, but others raised concerns including possible client resistance, administrative costs, difficulties in urgent situations, and the appropriateness of written agreements for all clients.

Although, overall, engagement letters can be seen to have a positive influence on the lawyer / client relationship, the Task Force stopped short of recommending that they be made mandatory.

The Task Force is therefore recommending that the CBA Code of Professional Conduct be amended to:

18. encourage strongly the use of engagement letters as the preferred way to:
 - a. define and determine the nature and scope of the lawyer-client relationship; and
 - b. clarify the expectations that lawyers and clients have regarding this relationship.

Next steps

The Task Force recognizes that its role and that of the CBA are limited. The governing bodies have regulatory responsibility to establish professional standards and the responsibility for their enforcement and for professional discipline. When called on, it is for the courts to accept, or reject, the articulated standards, while considering the law generally and the public interest.

Nevertheless, as a national association representing lawyers from across the country, the CBA has an important role to play in analyzing the conduct rules and the law, and engaging in a dialogue about ways to improve Canada’s system of justice.

The Task Force is therefore recommending that the CBA:

19. undertake the work necessary to transform the Task Force recommendations into rules and commentaries in the CBA Code of Professional Conduct;

As non-lawyers are not personally subject to the rules of professional conduct, the Task Force suggests that bodies such as the Association of Legal Administrators and law clerks associations may wish to consider adopting ethical rules to reinforce the ethical obligations of their members.

The Task Force is therefore recommending that the CBA:

20. communicate recommendation 11 with respect to the transfer of professional, specialist, and administrative staff to their appropriate professional associations so they may consider adopting parallel provisions in their codes of conduct.

The Task Force understands that its work will only have impact if the governing bodies and the courts find value in its analysis and recommendations.

The Task Force is therefore recommending that the CBA:

21. forward the Task Force Report to the Federation of Law Societies of Canada for the Federation's consideration in the development of its model code of conduct, noting the importance of having harmonized conflicts rules in place across Canada.

Taken together these 21 recommendations provide a clear message about the ways to implement practical solutions to the conflicts problems that lawyers face each day. These improvements will benefit everyone – lawyers, law firms, courts, and, most important of all, clients.

How to analyze a potential conflict of interest

This diagram sets out the thought process required when opening a new matter. It is a graphical depiction of the four steps needed to consider conflicts and confidential information in a disciplined way, consistent with the recommendations of the Task Force. It is not a flow chart or decision tree that explicitly describes every step of this process.

STEP 1 Information collection

The first step is to obtain the information you will need for the analysis. This is split into two rows. In the first row, you must identify the client, determine what the lawyer is retained to do and determine who may be affected by the work to be undertaken. All this information is needed to undertake the analysis (and to draft a proper engagement letter). Working through the steps in the second row, the lawyer must identify all three of the following: current matters for adverse parties; all current matters where the new client's interests may be adverse; and all related matters for former clients whose interests may be adverse in the new matter.

STEP 2 Assess the issues raised by the information gathered

The three ovals at the start of Step 2 emphasize a key point: conflicts issues must be assessed from three perspectives: the perspective of the new client, the perspective of adverse parties who are or were clients and the perspective of the lawyer and law firm.

Note that a different analysis is required for current matters/clients (all boxes) and former matters/clients (the dark coloured boxes).

In each case where the lawyer/law firm has matters for adverse parties in the new matter and in each case where the lawyer/law firm has matters adverse to the new client, the lawyer must assess (follow all boxes):

- a) whether any of the three conflicting interests are present (performance conflicts, relationship issues, and personal interests), and
- b) whether there is a risk of misuse of confidential information.

In each case where the lawyer/law firm has former matters for adverse parties in the new matter, the lawyer must assess (follow dark coloured boxes):

- a) whether the new matter would require the lawyer to undermine the work done in the former matter, and
- b) whether there is a risk of misuse of confidential information from the former matter.

STEP 3 Possible outcomes

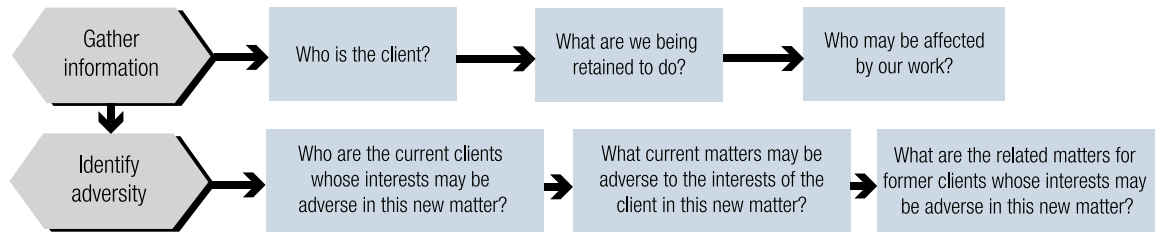
There are four potential outcomes depending on the results of your analysis. Some require further steps (erecting confidentiality screens or obtaining client consent).

STEP 4 Be prepared to reconsider

Remember that facts and circumstances may change as a matter progresses, and that you must always be ready to re-do this analysis.

HOW TO ANALYZE A POTENTIAL CONFLICT OF INTEREST

STEP 1 Facts you will need

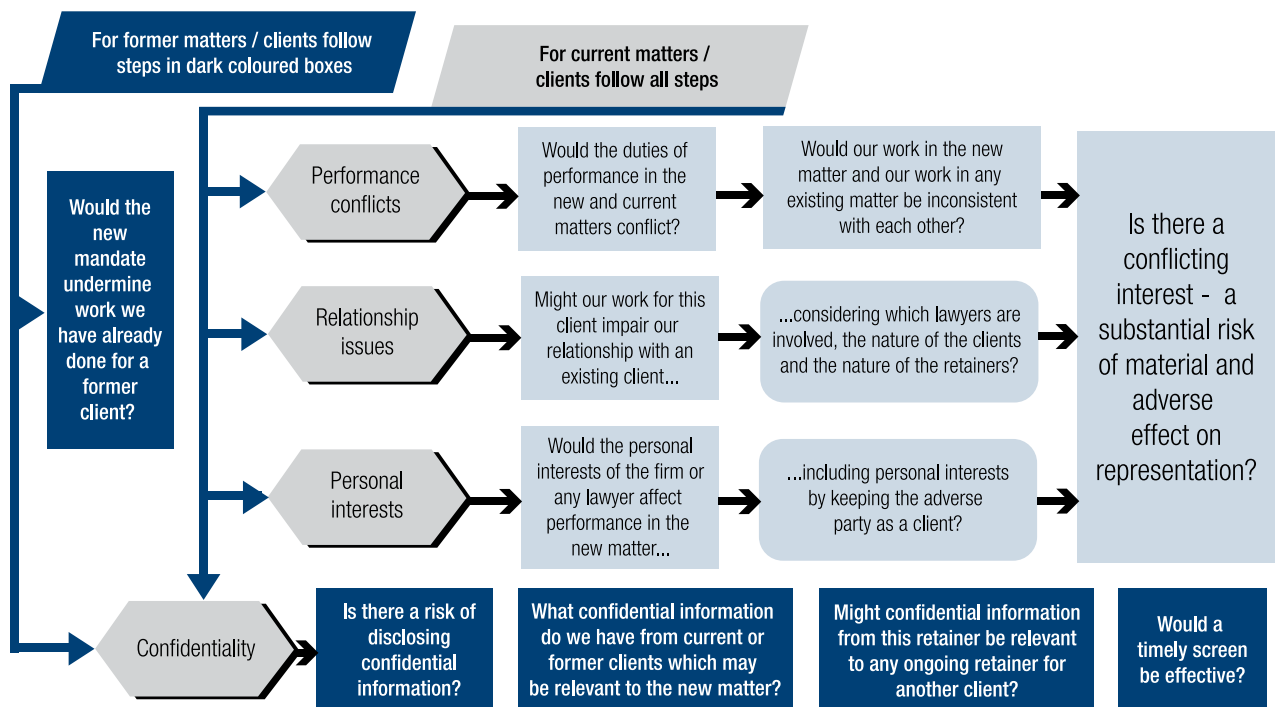


STEP 2 Perspectives to be considered in answering the following questions

Consider issues from new client's perspective

Consider issues from other client's perspective

Consider issues from both lawyer's and firm's perspective



STEP 3 Possible outcomes depending on the results of your analysis

Note - engagement letters are highly recommended

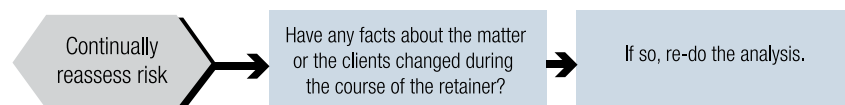
Go ahead - no problem

Go ahead, with timely screen, if appropriate

Go ahead, with informed client consent

Stop - do not act

STEP 4 Reconsideration



Introduction

Concerns about the efficacy of and the practical difficulties imposed by today's conflicts of interest and confidentiality rules¹ have been increasing steadily within the legal profession for some time. In the context of the modern realities of the practice of law in its varied settings throughout Canada, these rules are proving to be overly broad and unnecessarily restrictive. The Task Force has found that the current conflict rules not only create unnecessary inefficiencies in the delivery of legal services but that they also appear to be having a negative impact on clients, limiting the choice of and access to counsel.

In March 2007, the Canadian Bar Association established the Task Force on Conflicts of Interest to consider more practical approaches to managing conflicts for clients and the profession, and to develop a useful Toolkit for lawyers.

This is not the first time the CBA has responded to a need for guidance, if not reform, with respect to the conflicts rules. Following the Supreme Court of Canada decision in *MacDonald Estate* the CBA created a Task Force to develop suitable screening measures to protect client confidentiality when a lawyer starts work with a new firm. In the majority reasons, the court had observed:

It can be expected that the Canadian Bar Association, which took the lead in adopting a Code of Professional Conduct in 1974, will again take the lead to determine whether institutional devices are effective and develop standards for the use of institutional devices which will be uniform throughout Canada.²

The guidelines developed by the 1993 CBA Task Force were generally adopted by the governing bodies and were also incorporated into the CBA Code of Professional Conduct in 2004. These guidelines are being followed today across the country. Significantly, the Supreme Court of Canada repeated the recognition of the important role of the legal profession in its 2007 decision in another conflicts case, *Strother*,³ noting that law societies are “better attuned than the courts to the modern realities of legal practice and to the needs of clients.”

¹ Collectively, we will refer to these as the “conflicts rules.”

² *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [*MacDonald Estate*].

³ *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177 [*Strother*].

The mandate of the Task Force

With a commitment to protect client interests, search for ways to clarify the obligations of lawyers to clients, and ease unworkable restrictions in the modern realities of legal practice, the Task Force set out to fulfill its mandate to:

1. propose practical guidelines for the profession
 - a. in applying the duty of loyalty, and
 - b. in implementing appropriate modifications or waivers of the duty;
2. consider the appropriate scope and content of client engagement letters; and
3. propose practical guidelines for the profession in the application of the duty of confidentiality, particularly in areas of deemed knowledge and relevance of information.

The 16 members of the Task Force represent a cross-section of the legal profession with representatives from small, medium, and large law firms, from both urban and rural settings, and from different practice backgrounds, including in-house and government counsel. The Task Force also includes a liaison with the Federation of Law Societies of Canada.

The Task Force developed a consultation paper that provided information to CBA members on the law on conflicts post-*Neil*⁴ and post-*Strother*, presented preliminary views on how to preserve conflicts principles through a more workable approach, and asked for members to comment on these views.

Input from the consultations

Task Force members have attended meetings and have spoken to groups across the country, soliciting feedback on the consultation paper questions and gathering information on the problems lawyers face in trying to meet their professional duties. In addition, almost 300 members submitted detailed answers to the 15 questions in the consultation paper. The message received from lawyers from coast to coast to coast was clear.

The current conflicts rules are creating unnecessary barriers to access to legal counsel for clients, are proving difficult for lawyers to interpret and implement, and are adding additional cost, inefficiency and uncertainty in the provision of legal services. We often overlook that for every conflict declared there is a client denied choice of counsel.

⁴ *R. v. Neil*, [2002] 3 S.C.R. 631 [*Neil*].

Some lawyers expressed frustration with the current situation – for them, the need for reform is urgent. We were concerned by comments made by senior administrators within the legal aid system. They reported that it is difficult to find lawyers willing to provide legal aid services and that part of the challenge can be traced to the conflicts rules, which, according to one writer, “act as a barrier to lawyers’ willingness to participate in programs that offer short-term, unbundled legal services.” Some changes to the rules are “imperative” to ensure access to justice for citizens who are the least able to afford legal counsel.

Respondents also commented on the realities for sophisticated clients, often described as corporations with in-house counsel who may retain several different law firms to advise on many different types of matters. When they need specialized legal services with respect to, for example, complex tax matters, franchises, or intellectual property, where the number of knowledgeable and experienced practitioners is limited, the conflicts rules may deny them their choice of counsel.

For clients in small, rural or remote communities, conflict issues may require them to travel some distance in order to find a lawyer able to represent them. In the Far North, conflicts rules may eliminate the opportunity for some residents to have any legal representation at all.

Respondents representing Aboriginal clients described how the conflicts rules compromise lawyer-client relationships and have a detrimental effect on clients by failing to accommodate the long-term nature of First Nations retainers, the overlapping elements of land claims, and the complexity of band relationships.

The need for change

In summary, the consultation reinforced the extent to which today’s conflicts challenges affect all types of clients and legal practices and raise concerns in all parts of the country. This is not a “big firm” issue any more than it is a “legal aid”, “big city” or “small town” issue. Collectively, lawyers and their clients are experiencing difficulties with the application of the conflicts rules. The need to find workable solutions is evident.

During the consultation we also heard from a few respondents who expressed concern that our proposed recommendations for change might undermine the core principles of ethical professionalism that are crucial to the system of justice we prize. Throughout our research and deliberations, we have been keenly aware of our responsibility to maintain the integrity of the administration of justice, to protect the interests of clients, and to preserve public confidence in our profession. The Task Force recognizes that for its work to make its way into the codes of professional conduct of the governing bodies and ultimately to be endorsed by the courts, its recommendations must not compromise the important public protections that now exist.

Our recommendations reflect a commitment to the principles and values that are at the heart of the Canadian justice system. Our recommendations rest on the principle that, to the extent possible, the conflicts rules should be effective in achieving their purposes without imposing unnecessary constraints and burdens. We have carefully examined the principles underlying the current conflicts rules, as well as their actual effect, to determine what changes might properly be recommended.

Overview of this Report

To explain the reasons behind our recommendations, we present an analysis of the current law on the duty of loyalty, the duty of confidentiality, identification of “the client”, and engagement letters. It begins with some statistical information on the legal profession today.

Chapter 1 – Perspectives on legal service in the 21st century

We feel that it is important to ground our Report in the context in which we practise law in 2008. Much has changed over the last 20 years, both in the size and make-up of law firms and in the tools that lawyers have available to do their work. These changes have practical impacts on how the conflicts rules intersect with our work and our professional duties. This chapter provides a brief overview of practice realities in Canada today.

Chapter 2 – Conflicting interests

A careful review of Canada’s leading conflicts cases, and of the rules of professional conduct and jurisprudence from other jurisdictions, led us to conclude that the duty of loyalty actually includes the duty to avoid three different conflicting interests.⁵ Identifying the three different components of the duty to avoid conflicting interests clarifies when a conflict might occur such that representation would be materially and adversely affected. The Task Force believes that as long as none of the three conflicting interests is present, there should be no impediment to a lawyer acting against a current client in an unrelated matter.

⁵ The duty to avoid conflicting interests has three components: the duty to avoid a *conflict of duty and interest*, a *conflict of duty and duty* and a *conflict of duty with relationship*. The first two conflicts are well known. These traditional conflicts exist when self-interest, or a duty to another, conflict with performance of a retainer for a client. A *conflict of duty with relationship* exists when the duty owed by the lawyer to another client impairs the lawyer’s relationship with the client and thereby impairs client representation. The concept of *conflict of duty with relationship* focuses on the importance of the lawyer-client relationship to support effective client representation, distinct from the specific duties undertaken on behalf of the client. We discuss these more fully in chapter 2.

Chapter 3 – Confidentiality

The duty of loyalty can be owed only to a client, is specific to the retainer, and may have a limited lifespan. In contrast, a lawyer's duty of confidentiality is owed to a client forever and may be owed to others (near-clients and, in limited circumstances, non-clients).

The challenge for lawyers and law firms is to ensure that a client's confidential information will continue to be protected when other clients are represented, new lawyers join the law firm, or law firms merge. Confidentiality screens have, over the last 15 years, proven themselves to protect client confidences effectively. The Task Force believes, contrary to the current rules and jurisprudence in some provinces and territories, that a delay in the creation of the screen should not automatically lead to disqualification when it can be shown that no disclosure has taken place. This chapter also considers rules to protect a client's confidential information for merging law firms and for professional, specialist, and administrative staff in a law firm.

Chapter 4 – Clients, near-clients and non-clients

Lawyers owe a duty of undivided loyalty to their clients. Accordingly, it is essential to identify clearly the client to whom this duty is owed. This chapter reviews case law on how a client relationship is established, considers different situations that may not result in a client-lawyer relationship, and identifies the elements that are necessary to show that a client-lawyer relationship exists. The Task Force believes that a client should be defined as the person who consults the lawyer and with whom the lawyer has a retainer or to whom the lawyer has provided legal advice. In the case of an individual who consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing. Finally, the Task Force does not believe that the definition of client should extend to so-called near-clients, affiliated entities, directors, shareholders, employees, or family members unless a lawyer-client relationship has been established.

Chapter 5 – Engagement letters

After a review of the benefits of engagement letters and of the relevant case law, this chapter examines the enforceability of conflict waivers in engagement letters. The Task Force concludes the chapter by strongly encouraging the use of engagement letters as the preferred way to define and determine the nature and scope of the lawyer-client relationship, and to clarify both client and lawyer expectations. We stop short, however, of recommending that engagement letters be made mandatory.

Going forward

We offer this Report and our recommendations as our best thinking on a positive way forward. We believe that our analysis will clarify the current law and its unintended impacts and will stimulate a needed reconsideration by the Canadian legal profession and its leadership of codes of professional conduct.

We believe our recommendations will strengthen the CBA Code of Professional Conduct and will provide assistance to the profession and its governing bodies on practical solutions to the conflicts problems that lawyers face each day.

We look forward to discussion, debate and decisions. We look forward to seeing improvements put in place that will benefit everyone – lawyers, law firms, courts, and, most important of all, clients.

To complement its Report and recommendations, the Task Force has prepared a Conflicts of Interest Toolkit which includes model letters and checklists. The Toolkit can be found at pages 183 to 259. The following items are of particular relevance to this chapter:

| | |
|---|----------|
| Conflicts analysis framework | Page 188 |
| Model law firm website terms of use and disclaimer | Page 194 |
| Conflicts of interest systems checklist | Page 190 |
| Ongoing assessment of conflicts | Page 257 |
| Checklist for managing a subsequent and previously foreseeable conflict | Page 258 |
| Avoiding tactical conflicts | Page 200 |
| Action plan for managing a conflicts situation | Page 259 |

Recommendations

Conflicting Interests

That the CBA Code of Professional Conduct be amended to:

1. recognize that a “conflicting interest” is any one of a “conflict of duty and interest”, a “conflict of duty and duty” and a “conflict of duty with relationship”;
2. define a “conflicting interest” to mean an interest that gives rise to a “substantial risk of material and adverse effect on representation”;
3. provide that, except after adequate disclosure to and with the consent of the client, a lawyer may not act in a matter in which a conflicting interest is present;
4. provide that a lawyer may act in a matter which is adverse to the interests of a current client provided that
 - a. the matter is unrelated to any matter in which the lawyer is acting for the current client; and
 - b. no conflicting interest is present;
5. clarify that the duty of loyalty owed to a client after a retainer has been completed prohibits a lawyer from attacking the legal work done during the retainer or from, in effect, changing sides on a matter that was central to the prior retainer;
6. recognize that a risk of misuse of confidential information is a potential failure to comply with the duty of confidentiality and is distinct from a conflicting interest;
7. include a rule which explicitly delineates the different duties of loyalty and confidentiality owed to a client after a retainer has been completed; and
8. re-affirm the requirement, both during a retainer and after a retainer has been completed, not to misuse confidential client information.

Confidentiality

That the CBA Code of Professional Conduct be amended to:

9. provide that a delay in the erection of a confidentiality screen need not require a law firm to cease acting if it can be shown that no disclosure of confidential information occurred;
10. adopt the Law Society of Upper Canada Rule 2.04 (5) which says: Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if
 - a. the former client consents to the lawyer's partner or associate acting, or
 - b. the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
 - (i) the adequacy 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,
 - (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.
11. include commentary to clarify the procedures that should be followed when professional, specialist and administrative staff transfer from one law firm to another.

That the guidelines on conflicts from transfer between law firms in the CBA Code of Professional Conduct be amended to:

12. recognize that in the case of a merger of law firms the risk of a breach of client confidentiality does not occur by reason only of entering into a merger agreement and that any necessary screens should therefore be required only when the lawyers in the merged firm start working together or otherwise sharing client information.

Client

That the CBA Code of Professional Conduct be amended to:

13. clarify that a client is the person who
 - a. consults the lawyer and on whose behalf a lawyer renders or undertakes to render legal services or
 - b. having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services;

14. clarify that 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;
15. clarify that the definition of client does not extend to near-clients, affiliated entities, directors, shareholders, employees, or family members unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established;
16. clarify that lawyers owe a duty of loyalty only to clients and that this duty should not be extended to others; and
17. clarify that lawyers owe a duty of confidentiality to clients and that a similar duty of confidentiality may extend to near-clients and non-clients when they have disclosed confidential information to the lawyer in the course of the retainer, reasonably expecting that it would be protected, and the lawyer knows or ought to know that the information is confidential.

Engagement Letters

That the CBA Model Code of Professional Conduct be amended to:

18. encourage strongly the use of engagement letters as the preferred way to
 - a. define and determine the nature and scope of the lawyer-client relationship and
 - b. clarify the expectations that lawyers and clients have regarding this relationship.

Conclusion

That the CBA:

19. undertake the work necessary to transform the Task Force recommendations into rules and commentaries in the CBA Code of Professional Conduct; and
20. communicate recommendation 11 with respect to the transfer of professional, specialist and administrative staff to their appropriate professional associations so they may consider adopting parallel provisions in their codes of conduct.
21. forward the Task Force Report to the Federation of Law Societies of Canada for the Federation's consideration in the development of its model code of conduct, noting the importance of having harmonized conflicts rules in place across Canada.

Three key Supreme Court of Canada decisions

This Report makes reference to several court decisions including these three leading Canadian cases on conflicts of interest.

- *MacDonald Estate v. Martin*⁶ considered the adequacy of measures to prevent the disclosure of confidential client information when a lawyer changed firms.
- *R. v. Neil*⁷ involved a motion to stay a prosecution because the accused's lawyer had breached his duty of loyalty by letting an associate act for an adverse party involved in the proceeding. Since *Neil*, lawyers have been required to get consent from clients before they act "directly contrary to the immediate interests of a current client", even in unrelated matters. The decision is seen as extending the duty of loyalty lawyers owe current clients.
- In *Strother v. 3464920 Canada Inc.*⁸ the court required a lawyer to disgorge his personal benefits when he let his personal stake in a business, which was in competition with a client's business, conflict with his duty to tell the client that his earlier advice (that changes in tax law effectively closed the client's business) might no longer be accurate. The Supreme Court decision was split 5-4, and the case is significant in underscoring the importance of engagement letters.

In this Report, we refer to these cases as *MacDonald Estate*, *Neil* and *Strother*.

⁶ *MacDonald Estate*, *supra* note 2.

⁷ *Neil*, *supra* note 4.

⁸ *Strother*, *supra* note 3.

CHAPTER 1

Perspectives on Legal Service in the 21st Century

Fundamentally, the expectations a client has of a lawyer and the duty a lawyer has to a client have remained constant over the years. Clients expect lawyers to act with integrity and to provide them with sound legal advice. Lawyers are expected to be competent, protect client confidences and provide zealous representation. Lawyers must never permit their own interests or the interests of others to compromise their work for a client. These core principles are immutable.

This chapter considers the current environment in which these core principles operate, and consequently the practice context in which the conflicts rules are being applied today.

By the numbers: access to lawyers in Canada

Canada has a population of just over 31 million people, of whom approximately 75,000 are lawyers. Theoretically, there is a lawyer for every 415 residents.⁹

The raw numbers might suggest that a conflict would be easy to avoid and that clients could readily find another lawyer should a conflicts situation arise. The reality is very different for a number of reasons:

- only about 50,000 lawyers are in private practice, the rest are in-house counsel for corporations or governments or doing other work;¹⁰
- 91% of lawyers practise in British Columbia, Alberta, Ontario and Quebec;¹¹
- nearly 50% of lawyers practise in Canada's four largest cities – Vancouver, Calgary, Toronto and Montreal.¹²

Since over half of Canada's residents live in the 10 most populated cities, the concentration of lawyers in large urban areas to a large extent matches the concentration of the Canadian population.¹³ However, even in these urban areas, people from many linguistic and cultural

⁹ Comprehensive data on lawyers are not available. This section provides best estimates based on available information.

¹⁰ Federation of Law Societies of Canada, "2006 Law Societies Statistics", online: Federation of Law Societies of Canada <<http://www.flsc.ca/en/pdf/statistics2006.pdf>> and Barreau du Québec, "Rapport annuel 2006-2007", online: Le Barreau du Québec <http://www.barreau.qc.ca/pdf/publications/rapports-annuels/2006-2007.pdf>.

¹¹ British Columbia = 13%, Alberta = 10%, Ontario = 38%, Quebec = 30%, according to the Federation of Law Societies of Canada, 2006 Law Societies Statistics and Barreau du Québec, Rapport annuel 2006-2007.

¹² Law Societies of British Columbia, Alberta, and Upper Canada and the Barreau du Québec.

¹³ Statistics Canada, "Census 2006", online: <<http://www12.statcan.ca/english/census/index.cfm>>.

communities may not have access to a large pool of lawyers with their language background or cultural experience. In 2006, for example, according to the latest census data, 20% of Canadians have a first language other than English or French and over 1.1 million people have an Aboriginal identity.¹⁴

In remote areas lawyers are scarce. Nunavut, with a population of 31,000, has 40 lawyers but only 18 of them are in private practice – one lawyer for every 1,725 residents.¹⁵

Similarly, as laws and regulations have become increasingly complex, and the practice of law in some areas particularly specialized, the relative scarcity of experienced lawyers in specialty areas has put serious limitations on clients' choice of appropriately skilled and experienced counsel.

Where a small number of lawyers serve a small community – whether for reasons of geography, language, culture, or practice focus – there is an increased risk that a conflict will limit a client's choice of counsel and a related risk of a client's reduced access to justice.

Generally speaking, the type of client and the size of the law firm are linked. Legal problems experienced by individuals and small businesses can usually be resolved by one or perhaps two lawyers. Large corporate and institutional clients often require a greater range of legal services from a larger team of lawyers.

In fact, the nature of sole practitioner or small firm practice¹⁶ and of large firm practice is quite different. The Final Report of the Sole Practitioner and Small Firm Task Force of the Law Society of Upper Canada¹⁷ provides some insight on these practice differences.

[Solo/small firm] respondents indicated that 77% of their clients are individuals, as compared with only 30% for the non-[solo/small firm] group ... Not surprisingly, the [solo/small firm] group indicated that only 26% of its clients are businesses, organizations or government while the non-[solo/small firm] group estimated that 70% of all of its clients come from those groups.

In order of magnitude, [solo/small firm] group lawyers reported the following main areas of practice: real estate (46%), civil litigation (39%), wills, estates, trusts (35%), corporate and commercial (33%) and family (26%). Non-[solo/small firm] group lawyers reported civil litigation (44%), corporate commercial (37%), real estate (20%), wills, estates, trusts (8%) and family (6%).

Given that [solo/small firm] group lawyers represent mostly individuals and non-[solo/small firm] group lawyers represent institutional clients, it is not surprising to see that 61% of the [solo/small firm] group practices in the areas of family law and estates, wills and trusts, while only 14% of the non-[solo/small firm] group does.¹⁸

¹⁴ *Ibid.*

¹⁵ Federation of Law Societies Total Membership Chart, as of December 31, 2006, Of the 40 lawyers, 22 are exempt from insurance requirements. We have assumed that the number of insured lawyers represents those in private practice.

¹⁶ For ease of reference, we sometimes refer only to small firm practice which will include sole practitioners.

¹⁷ See also: The Law Society of British Columbia, "Report of the Small Firm Task Force" (2007), online: The Law Society of British Columbia <www.lawsociety.bc.ca/publications_forms/report-committees/docs/SmallFirmTF.pdf>.

¹⁸ Law Society of Upper Canada, "Final Report of the Sole Practitioner and Small Firm Task Force", (2006), online: The Law Society of Upper Canada <www.lsuc.on.ca/media/convmar06_solepracfinal.pdf>.

It is worth noting as well that the Ontario Sole Practitioner and Small Firm Task Force identified differences in the services offered by solo and small firm lawyers as opposed to those offered by lawyers in larger firms.

[Sole and small firm] lawyers are located throughout Ontario, in small and large communities, in urban and rural locations. They provide the vast majority of lawyer services in the rest of the GTA [Greater Toronto Area] outside of Toronto and in the Non-Urban areas of Ontario; legal aid services throughout the province; and virtually all lawyer services available in languages other than English, French or Italian. They are the most likely group to include lawyers from diverse backgrounds able to address the cultural, linguistic and community needs of Ontario's diverse population.¹⁹

There are about 3,500 law firms in Canada:

- 50 to 60 have more than 50 lawyers;
- 30 have more than 110 lawyers;
- 11 have more than 400 lawyers and a presence in several of Canada's largest cities.²⁰

Overall, about 65% of Canadian lawyers in private practice outside Quebec work alone or in a firm of less than 10 lawyers (about 30,000 lawyers). About 20% of lawyers are in firms of more than 50 lawyers (about 5,500 lawyers).²¹

The types of conflicts issues that may arise vary, to some extent, according to a lawyer's practice situation. For instance, small firm practitioners may be more likely to face conflicts due to prior joint retainers – a husband and wife who retained the lawyer when they were buying a home together or writing their wills but are now divorcing and one of them would like to use the lawyer's services again. Lawyers practising in larger firms may be more likely to face conflicts when colleagues in another part of the firm are asked to act for a client with an interest adverse to their client.

Legal practice and potential conflicts: realities of the 21st century

Many lawyers do legal work for a variety of clients in a variety of contexts. Other lawyers do not represent clients at all. They teach. They act as mediators or arbitrators. They use their legal skills in other fields, such as the media, business, the not-for-profit world and politics. Because they are not representing clients, they encounter conflicts issues infrequently, although, if they remain members of their law society, they must continue to adhere to their code of professional conduct. This section looks at some of the conflict situations that may arise for lawyers whose work involves representing clients.

¹⁹ *Ibid.*

²⁰ Lexpert, "The 30 Largest Law Firms in Canada", *Lexpert Directory* (2008) online: Lexpert <http://lexpert.ca/Directory/files/1-Canada-Top30Firms.pdf>.

²¹ Federation of Law Societies of Canada, 2006 Law Societies Statistics, *supra* note 10.

In-house counsel

In-house counsel are employees of a corporation. They have one client, or client group and, so long as they protect their client's confidential information from outsiders and do not put their personal interests ahead of their client's, it would seem that, in the past, they would have had limited opportunities to run afoul of the conflicts rules.

However, the role of in-house counsel has changed significantly in several ways over the last few decades, as part of a much more dynamic and global business environment. Mergers and acquisitions have resulted in some extremely large Canadian corporations that have many subsidiaries and related entities, with business interests not only in Canada or North America but around the world. At the same time, the size of in-house legal departments has steadily increased.

Within a large organization, different departments and business lines may have disparate, and even sometimes competing, interests. When a large organization has many subsidiaries and related entities, there may be occasions when the interests of commonly-owned entities diverge.²² In-house counsel have continually to answer the question, "who is my client", so as to fulfill duties of confidentiality and loyalty and to obtain instructions from the person within the organization who has the authority to give them.

Today's in-house counsel have a significant and multifaceted relationship with their client and, therefore, tend to face different conflicts issues than those that arise for counsel in private practice. An example is the legal relationship that in-house counsel have with a corporation's employees. In-house counsel may be called on to deal with pension issues where corporate and employee interests may be opposed rather than aligned. Another example of possibly tricky territory is the perception of management, Board members, and shareholders that the role of in-house counsel is to represent their interests.

When in-house counsel retain external counsel, in-house counsel wear two hats. For external counsel, they are the client, or at least the client's representative. Within the corporation, they are the corporation's lawyer; the corporation is their client. As such, one of their jobs is to ensure that external counsel fulfill their legal and ethical obligations, and that the confidentiality of the corporation's strategies and business information is not inappropriately disclosed.

A particularly challenging application of the conflicts rules to in-house counsel arises with respect to their mobility. When in-house counsel leave a corporation for a job in a law firm the conflicts issues may be simple because the in-house counsel has had only one former client, not many.²³ However, when in-house counsel move from one corporation to another the industry expertise and experience that make them a valuable asset to their new employer must be separated into general expertise and experience which is not confidential, and particular information about their former employer that is.

To fulfill their professional responsibilities, in-house counsel must be vigilant to recognize and avoid conflict situations in today's corporate environment.

²² *Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Communications Corp.)* F. 3d (3d Cir. 2007) provides a useful example.

²³ In *Canadian Pacific Railway Co. v. Aikins, MacAulay, Thorvaldson*, [1998] M.J. No. 77, the Manitoba Court of Appeal found that a lawyer who had left his role as in-house counsel at CPR did not have a conflict when his new law firm was involved in litigation against CPR, recognizing that otherwise in-house counsel from a specialized field would find it difficult to move into private practice.

Government lawyers

Government lawyers have many roles. Some are much like in-house counsel for a government department, Crown corporation, or other government agency. Some design regulatory or other legislative systems. Some work on legal policy. Some draft legislation. Some carry out the Attorney General's responsibilities related to the conduct of litigation on behalf of the Crown. Some are prosecutors.

Government lawyers are subject to a variety of obligations created by legislation, the common law, policies, and the terms and conditions of their employment, which sometimes require them to weigh their duties as public servants and their duties as lawyers and then to assess which interest or obligation prevails in the circumstances. As public servants, government lawyers are expected to keep government information confidential and to remain loyal to the Crown. As lawyers, they are expected to be members of a law society, to observe codes of professional conduct to the extent it is appropriate, and to serve the client, the Crown, resolutely. Sometimes, but not always, this can result in competing obligations.

One example is the *Public Servants Disclosure Protection Act*²⁴, which came into force on April 15, 2007. This Act creates a two-fold regime for employees in the federal public sector: one for the disclosure of wrongdoings in the public service; and the other to protect against reprisals for making or for cooperating in an investigation of such a disclosure.²⁵ Government lawyers have a delicate task to determine which regime applies to them and to balance the duty of disclosure of a wrongdoing by a client, the protection of lawyer-client information, and the duty of confidentiality of a client's affairs.

Governments today are significant consumers of legal services, frequently retaining external lawyers and law firms to assist them. Government lawyers must be sure that they protect their client's interests and maintain access to external counsel of choice, being alert to conflicts rules.

Finally, when government lawyers transfer to private practice their public sector obligations remain in place in perpetuity.

Sole practitioners and lawyers working in small firms

As has already been discussed, sole practitioners and lawyers in small law firms tend to be retained by individuals and small businesses. These clients may develop a close relationship with their lawyer and expect that their lawyer will be able to act for them whenever they need them. So, for example, when they want their lawyer to accept a joint retainer on a transaction to minimize costs, they may be surprised by the advice to seek independent legal advice and reluctant to follow it.

²⁴ S.C. 2005, c. 46.

²⁵ The Public Sector Integrity Commissioner investigates the disclosures of wrongdoing and complaints of reprisal and has the power to make recommendations for corrective action and to apply to the Public Servants Disclosure Protection Tribunal. The Tribunal has the power to order disciplinary or remedial action if it determines a reprisal occurred.

Family members may be similarly distressed to learn that they are not the lawyer's client and that the person who retained the lawyer is. This can be upsetting, for example, to the children of an elderly person who believe that their decisions are in the elderly person's best interests and want the lawyer to follow their instructions.²⁶ While the lawyer's duty to the client is clear, the expectations of family members may be difficult to manage, especially if they are not aware of the conflict of interest requirements.

In small and remote communities, only a few lawyers may be located within a reasonable travelling distance. Client access to legal services is in jeopardy when every lawyer in town has a conflict of interest in a case, such as a family or small business dispute requiring multiple lawyers.

In the North, private practice lawyers often rely on government work to make their practice financially viable, yet the adverse party for their individual clients is often the government. In fact, government employment and subsequent government work are a method of attracting (and keeping) lawyers in the North.

Sole practitioners and small law firms may share office space and have other cost-sharing arrangements, for example for some equipment and support staff. They must be careful to maintain the necessary separation so as not to create a conflict situation even though they are not partners or profit-sharing.

While it would seem that sole practitioners and small firm lawyers would be less likely to face a conflict situation because of the limited number of clients passing through their offices, the reality is that they too face many conflicts issues. Considering that these lawyers are the main legal resource for most Canadians and, for the most part, the only legal counsel available outside the larger urban areas, the impact of conflicts rules on them and on their potential clients' access to their services is significant.

Legal aid lawyers

Legal aid services report that it is difficult to find private practice lawyers willing to take on legal aid mandates or to work as duty counsel.²⁷ This is, at least in some part, attributable to the conflict rules. For example, in the context of duty counsel work, it is virtually impossible to do the required conflicts check before providing summary advice to someone awaiting a court-scheduled hearing.

In smaller, remote communities, the presumption that lawyers within a firm share information means that two lawyers from the same firm are unlikely to be able to represent opposing clients (such as co-defendants), often leaving one client unrepresented – the firm may be the only one in the area that takes legal aid mandates, and travel to another location is often financially impossible for the client.

²⁶ Even though the elderly relative often pays the lawyer's account.

²⁷ From submissions to the Task Force from Legal Aid Manitoba and the Legal Services Society, British Columbia.

Jurisdictions, such as Quebec, where staff lawyers provide legal aid services, treat each legal aid office as a separate corporation to avoid conflict problems.²⁸ Manitoba amended its legal aid legislation in 2004 to clarify that a lawyer employed by Legal Aid Manitoba could act for a legal aid client against another legal aid client represented by a lawyer employed by Legal Aid Manitoba without breaching a rule of professional conduct.²⁹

To the extent that the conflicts rules (as opposed to funding issues) are limiting the number of lawyers willing to take on legal aid work, they are contributing to the increasing number of unrepresented individuals who are appearing in criminal and civil courts and to the lack of access to justice experienced by the least advantaged citizens in Canada.

Lawyers working in large law firms

In 1989, *Canadian Lawyer* magazine reported that the 20 largest Canadian law firms ranged in size from 95 to 310 lawyers.³⁰ When *MacDonald Estate*³¹ was decided in 1990, there were only two law firms with offices in two or more of Vancouver, Calgary, Toronto and Montreal.

Less than 20 years later, all but two³² of the country's 20 largest firms have a significant presence in two or more of Vancouver, Calgary, Toronto and Montreal, and the size of the 20 largest firms has doubled.³³ The current reality, that a firm's lawyers may work in different cities and seldom meet or communicate with each other, weakens the presumption that lawyers in the same firm should automatically be assumed to share information about a client that was the basis for the *MacDonald Estate* decision.

As previously noted, 10 Canadian law firms now have over 400 lawyers and work out of several large cities.³⁴ Large corporate and government clients often retain many of them for various files, due to the complexity of the work required and the need for a variety of specialists to handle it. Indeed, it would not be surprising to learn that the federal government is a current client of almost every one of the large firms.

The work done for large corporate and government clients may involve multiple parties, increasing the complexities of identifying and managing conflicts.

²⁸ *Loi sur l'aide juridique*, L.R.Q., c. A-14 at 31.

²⁹ *Legal Aid Manitoba Act*, 20(2), C.C.S.M. c. L105.

³⁰ "The 1990s and the Mega-Firms" *Canadian Lawyer* L.R.Q., c. A-14. *Magazine* (March 1989).

³¹ *MacDonald Estate*, *supra* note 2.

³² Both of which are significant multi-office firms in Atlantic Canada.

³³ The largest 20 firms now range in size from nearly 200 lawyers to over 700 lawyers.

³⁴ By contrast, there are 100 law firms in the United States with 400 or more lawyers. Even if a major American company retains 10 law firms for various pieces of work that leaves 90 other law firms to represent the other parties in the matter.

In 2002, for example, when Air Canada sought bankruptcy protection under the *Companies' Creditors Arrangement Act*, many businesses required the insolvency expertise housed in the large law firms. Each of the large firms necessarily took on multiple mandates, putting confidentiality screens in place, as required. If this could not have been done, some clients would have been unable to obtain the specialized advice that they sought.

Another illustrative example is the bidding that took place for BCE. Expertise in securities, telecommunications, competition, federal investment regulations and investment/lending was required by the parties. They included bidders, lenders looking to finance the successful bid, BCE, the BCE independent committee, bondholders, shareholders and others. In this type of situation, securing consent to act from a client with a possible conflicting interest is often problematic. It may be impossible to ask for reasons of confidentiality. Or the client may withhold consent, not for good reason but to subvert a deal. If this happens, there is no practical recourse, and a party may not be able to secure the necessary specialized legal advice.

These multiple mandates may arise suddenly. When Barings Bank collapsed after the discovery of a massive fraud on a Thursday in 1995, hundreds of clients raced to find London counsel while law firms scrambled to coordinate the retainers and reconcile dozens of inconsistent conversations between firm clients and individual partners. Clients who waited until Monday morning to seek counsel found themselves without experienced lawyers.

From a geographic point of view, Canada is a very large country. From the perspective of clients seeking highly specialized legal advice, it is a very small country, with conflicts challenges sometimes making it difficult for them to use their law firm of choice.

Lawyers working in a specialized field or boutique office

Looking back a few decades, lawyers practised in a distinct area of law – criminal, family, corporate, tax, labour, civil liability – but only a few confined their work to a more specialized area. With increasingly complex regulatory schemes and a more global business environment today we see much more specialization, with some lawyers focusing on only one area of law, or a boutique law firm or large law firm practice group serving a distinct niche market. Areas of specialization include competition law, derivatives, insolvency, franchises, oil and gas resources, environment, aboriginal, maritime, intellectual property, and regulatory affairs, to name a few.

Clients want to retain lawyers with the specialization they need, and are often unhappy when a conflict that cannot be managed gets in the way. One example is in the area of intellectual property representation. An intellectual property lawyer or boutique may act for a foreign law firm that has retained Canadian lawyers and agents to secure the Canadian part of a world-wide trade-mark or patent portfolio. This may be a limited mandate involving already public information with little or no direct client contact. If a conflict arises later with another client,

the international firm may simply not respond to a request for conflict clearance for the unrelated matter, leaving the law firm with no choice but to send the clients elsewhere and leaving the clients without their first choice of counsel, even though there is no prejudice to the performance of the limited mandate or risk of disclosure of confidential information.

In the field of Aboriginal law, some First Nations or bands may be allies on some issues but opponents on others; some files are never closed; treaty negotiations can take so long that it may become difficult for a law firm to take on any new clients without having to work through complex conflicts issues, created by the inflexibility of the rules rather than the client's need for protection.

When a small number of lawyers serve a small number of clients with specific legal service interests, conflict situations often arise and may not always be simply resolved through client consents and confidentiality screens.

Family law lawyers

Family law lawyers often work with people who are going through a traumatic time and may be particularly emotional and vulnerable. Often the interests of children or declining elderly relatives are involved, increasing the tension and stress felt by clients. The conflicts rules protect a client's interests but sometimes can limit a client's options regarding choice of counsel. This is especially true when both a husband and wife have consulted a lawyer about another matter (for example, buying a family home) and now one of them wishes to retain the lawyer to handle the divorce. Paying for independent legal advice may be beyond the reach of an average client and yet essential to the lawyer who must confirm that the client is giving informed consent to the retainer given the conflict situation.

Again, in a small town or remote community, the availability of counsel is limited, and clients may not be able to travel to find a lawyer who does not have a conflict.

Lawyers practising criminal law

Having choice of counsel is a fundamental constitutional right of people accused of a crime or suspected of being involved in criminal activity and detained by the police.

All accused individuals face serious consequences on their lives, and sometimes on their liberty. If convicted, these possible consequences are multiplied. Individuals or companies accused or suspected of a crime will consider the appropriate counsel for their case, taking into account the expertise of particular counsel in relation to the specific accusations made against them (whether formally accused in court or during a police interrogation), the relevant law, and the area of expertise of the particular lawyer.

Lawyers practising criminal law commonly work as sole practitioners or in small firms. Many criminal lawyers share office space and have other cost-saving measures in place with other lawyers without being real partners. Conflicts rules can create difficulties when there is a presumption that the sharing of space has led to a genuine risk of the sharing of a client's confidential information, even absent any profit-sharing, partnership ties, or practice integration.

Two new operational realities: technology and mobility

Technology

It is difficult to imagine practising law without computers, software practice programs, e-mail, the Internet, cellular phones, and many of the other electronic devices that are part of the 21st century. Yet less than 20 years ago, when the Supreme Court of Canada decided *MacDonald Estate*, some of these tools of the trade had not been invented and most were not widely available.

The guidelines for ethical screens that the CBA developed following the decision in *MacDonald Estate*, and that were largely adopted throughout Canada, did not envisage the electronic world in which today's lawyers practise. The effect of modern technology was not fully considered because, to some extent, it was unknown.

In the context of the conflicts rules, there are two ways to look at these new technologies. On the one hand, the click of a button can send a document around the world. On the other, confidentiality screens can be controlled by sophisticated software that allows access to documents only by authorized persons with the required password. It is also now possible to determine whether or not a lawyer has accessed an electronic document and to review all e-mail communications that have taken place.

Objective sources of information about the use of confidential information may have changed how risks of disclosure should be assessed.

The mobility of lawyers

It is also much more common for lawyers to move between firms than it was 20 years ago. In 2002, most of the provincial governing bodies entered into the National Mobility Agreement. Since then, a Territorial Mobility Agreement has been signed including the three territories. According to the Federation of Law Societies of Canada, nine jurisdictions have fully implemented the agreement.³⁵ The agreement permits lawyers, subject to the applicable rules, to practise in another reciprocating jurisdiction for up to 100 days in a calendar year. Taken together with the growth of multi-office law firms, the National Mobility Agreement changes the practice landscape. While it may be easier to find a non-conflicted lawyer because the search can include a lawyer from another jurisdiction, the web of potential conflicts increases as the old province-based practise patterns dissolve.

Tactical actions to remove counsel

It would be remiss to conclude this chapter on 21st century practice realities without noting that the use of conflicts rules has become a tactic to delay, divert or otherwise inconvenience an opponent. Conflicts challenges are occurring more and more often, and have reached the point where members of the judiciary are voicing their concerns.

Until very recently, applications to remove lawyers were so rare an event that, at least in this jurisdiction, few judges or lawyers seemed to be more than vaguely aware that such a remedy existed ... since *MacDonald Estate v. Martin*, the application to disqualify has become a growth area ... an application to disqualify has become a weapon.³⁶

Without clear rules that recognize practice realities and that can be easily understood and applied, the number of conflicts challenges will continue to escalate, increasing the “length, cost and agony of litigation”³⁷ without necessarily increasing the protection of clients.

³⁵ British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador.

³⁶ *Robertson v. Slater Vecchio*, 2007 BCSC 987 (CanLII) at para. 60 [*Robertson*], citing *Manville Canada Inc. v. Ladner Downs* (1992), 63 B.C.L.R. (2d) 102 (S.C.) at para. 53-54.

³⁷ *Ibid.*

CHAPTER 2

Conflicting Interests

A lawyer's duty of loyalty includes:

- a duty to avoid conflicting interests;
- a duty of commitment to the client's cause;
- a duty of candour with the client on matters relevant to the retainer; and
- a duty not to misuse confidential information.³⁸

The focus of this chapter is primarily the duty to avoid conflicting interests and the duty of commitment to the client's cause. The duty to avoid conflicting interests includes the duty to avoid conflicting personal interests and the duty to avoid conflicting duties to others. The further duty of commitment to the client's cause is described as ensuring that "a divided loyalty does not cause the lawyer to 'soft pedal' his or her representation of a client out of concern for another client"³⁹ and, as such, may be considered to be an extension, or elaboration, of the duty to avoid conflicting interests.

This chapter will first consider these duties with respect to current clients, then with respect to former clients, concluding with recommendations.

PART 1: Current Clients

The duties of loyalty and performance

The duty of loyalty, an essential element in Canada's system of justice

In Canada, judicial consideration of a lawyer's duty of loyalty to a client proceeds under the jurisdictions of the court regarding the administration of justice and the law of fiduciaries. The importance of the duty of loyalty to the administration of justice is highlighted in the following excerpt from the decision of the Supreme Court of Canada in *Neil*.⁴⁰

³⁸ *Neil*, *supra* note 4 at para. 19.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at paras. 12 and 13.

[The duty of loyalty] endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265, and *Tanny v. Gurman*, [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2; *Smith v. Jones*, [1999] 1 S.C.R. 455. As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen*, (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:

... the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.

The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests. ...

These words provide stirring affirmation of the role of the lawyer and the importance of that role to clients and to society. The courts and the profession are properly assiduous to ensure that this role is not impaired.

A relationship based on trust

That lawyers are fiduciaries of their clients has long been clear.⁴¹ This was considered in *Neil*⁴² as follows:

The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 405. The lawyer fulfills squarely Professor Donovan Waters' definition of a fiduciary:

In putting together words to describe a "fiduciary" there is of course no immediate obstacle. Almost everybody would say that it is a person in whom trust and confidence is placed by another on whose behalf the fiduciary is to act. The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interests, never the fiduciary's own. The "relationship" must be the dependence or reliance of the beneficiary upon the fiduciary.

(D. W. M. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al., eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81, at p. 83)

Fiduciary duties are often called into existence to protect relationships of importance to the public including, as here, solicitor and client. Disloyalty is destructive of that relationship.

⁴¹ While the theoretical basis for the duty of loyalty differs in Quebec civil law, the duty of loyalty described in *Neil* is clearly part of Quebec law. See, for example, *Métro Inc. c. Regroupement des marchands actionnaires Inc.*, [2004] R.J.Q. 2665 (C.A.); *Procureur général du Québec c. Bande de Betsiamites* [2005] 3 C.N.L.R. 155 (C.A.); *Côté v. Rancourt*, [2004] 3 S.C.R. 248, and the very useful annual "Guide sur les conflits d'intérêts" published by the Barreau du Québec.

⁴² *Supra* note 4 at para. 16.

The duty to avoid conflicting interests

It was the duty to avoid conflicting interests that was particularly in issue in *Neil*. The following excerpt from *Neil*⁴³ focuses on judicial elaboration of the fiduciary duty to avoid conflicting interests:

The general duty of loyalty has frequently been stated. In *Ramrakha v. Zinner*, (1994), 157 A.R. 279 (C.A.), Harradence J.A., concurring, observed, at para. 73:

A solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may, develop a conflict of interests. ... The logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.

The duty of loyalty was similarly expressed by Wilson J.A. (as she then was) in *Davey v. Woolley, Hames, Dale & Dingwall*, *supra*, at p. 602:

The underlying premise . . . is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

More recently in England, in a case dealing with the duties of accountants, the House of Lords observed that “[t]he duties of an accountant cannot be greater than those of a solicitor, and may be less” (p. 234) and went on to compare the duty owed by accountants to *former* clients (where the concern is largely with confidential information) and the duty owed to *current* clients (where the duty of loyalty prevails irrespective of whether or not there is a risk of disclosure of confidential information). Lord Millett stated, at pp. 234-35:

My Lords, I would affirm [possession of confidential information] as the basis of the court's jurisdiction to intervene on behalf of a **former** client. **It is otherwise where the court's intervention is sought by an existing client**, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation. [Emphasis added.]

(*Bolkiah v. KPMG*, [1999] 2 A.C. 222 (H.L.))

The similar approach of the law societies regarding the duty to avoid conflicting interests is also noted in *Neil*.

⁴³ *Ibid.* at paras. 25 to 27.

The CBA Code of Professional Conduct makes the same general statement⁴⁴:

The lawyer ..., except after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Commentary

Guiding Principles

1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment on behalf of, advice to, or loyalty to a client or prospective client.
2. The reason for the Rule is self-evident. The client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from compromising influences.
3. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to another client, whether involved in the particular matter or not, including the obligation to communicate information.

In *Neil*⁴⁵, the following general statement of the duty to avoid conflicting interests was adopted:

I adopt, in this respect, the notion of a "conflict" in § 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."

The majority reasons in *Strother*⁴⁶ began to the same effect:

A fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client.

This reaffirmation of the traditional view is supplemented by the so-called bright line rule in *Neil* which will be addressed later in this chapter.

⁴⁴ See chapter V – Impartiality and Conflict of Interest between Clients.

⁴⁵ *Neil*, *supra* note 4 at para. 31, as confirmed in *Strother*, *supra* note 3, at para. 56.

⁴⁶ *Strother*, *supra* note 3 at para. 1.

The retainer defines the duty of performance

The fiduciary duties described above must be distinguished from the obligation that each lawyer undertakes to his or her client under the retainer. Some commentaries and some decisions have tended to confuse the fiduciary obligations imposed by law with obligations of performance accepted by retainer.

Before proceeding to consider the evolution of the duty to avoid conflicting interests, it is useful to consider differences between these fiduciary duties, on the one hand, and duties of performance (or duties of care), on the other. The majority reasons put it this way in *Strother*⁴⁷:

When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement. The solicitor-client relationship thus created is however overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis factum puts it well:

The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency. [para. 95]

Not every breach of the contract of retainer is a breach of a fiduciary duty. On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. ...

The obligation of a lawyer to perform the work for which the lawyer is retained may be called the “duty of performance”⁴⁸ or the “duty of care.”⁴⁹ This is a positive duty in the sense that the lawyer is obliged to take positive steps on behalf of the client. The scope and subject matter of the duty of performance is ordinarily subject to agreement between lawyer and client. Once a retainer is accepted, the lawyer must competently perform the work undertaken. If the lawyer does not perform competently or fully, the lawyer may be liable for breach of contract or in

⁴⁷ *Ibid.* at para. 34. Although the lawyer’s retainer is said to be governed by contract, it should be remembered that lawyers may assume a duty of care without there being a contract for legal services. For example, a lawyer who provides legal advice on a purely voluntary basis nevertheless would ordinarily owe a duty of care in respect of that advice.

⁴⁸ The phrase “duty of performance” is taken from the *Restatement (Third) of Agency* (American Law Institute, *Restatement (Third) of the Law Governing Lawyers*, vol. 2, (St. Paul, Minn.: American Law Institute Publishers, 2000) [the Restatement]). The *Restatement (Second) of Agency* previously referred to “duties of service and obedience” rather than duties of performance and loyalty. In her article “Disloyal Agents” *Alabama Law Review*, Vol. 58, No. 4, Spring 2007, Professor Deborah DeMott wrote:

“It’s conventional to distinguish among an agent’s duties. Restatement (Third) of Agency uses the terminology of duties of performance and duties of loyalty. An agent’s duties of performance include the duty to act only as authorized by the principal; to fulfill any obligations to the principal defined by contract; to act with the competence, care, and diligence normally exercised by agents in similar circumstances; and to use reasonable effort to provide the principal with facts material to the agent’s duties to the principal. An agent’s duties of performance are often defined by agreement between principal and agent.

An agent’s duties of loyalty stem from the agent’s basic obligation to act loyally for the principal’s benefit in matters connected with the agency relationship. ...”

⁴⁹ In *Hodgkinson v. Simms* [1994] 3 S.C.R. 377, Justice La Forest wrote for the majority as follows:

At the same time, however, it is only by having regard to the often subtle differences between these causes of action that civil liability will be commensurate with civil responsibility. For instance, the fiduciary duty is different in important respects from the ordinary duty of care. In *Canson Enterprises Ltd v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 571-73, I traced the history of the common law claim of negligent misrepresentation from its origin in the equitable doctrine of fiduciary responsibility; see also *Nocton v. Lord Ashburton*, [1914] A.C. 932, at pp. 968-71, *per* Lord Shaw of Dunfermline.

negligence. Where the lawyer breaches the duty of performance, in some circumstances the lawyer may also breach professional and ethical responsibilities requiring the provision of competent legal services.⁵⁰

The duty of loyalty and the duty of performance

In contradistinction, a fiduciary duty is ordinarily a negative duty i.e. a duty not to do something as opposed to a duty to do something.⁵¹ For example, fiduciaries are not permitted undisclosed conflicting personal interests and fiduciaries are not permitted to take advantage of opportunities arising in the context of their role as fiduciary. The duty of loyalty may be seen as a series of negative duties: the duty not to have conflicting interests, the duty not to withhold information, and the duty not to disclose, or abuse, confidential information.⁵² In contrast to the duty to perform the work for which the lawyer is retained, the duty of loyalty prohibits certain conduct.

While it may be observed that fiduciary duties ordinarily support and protect the duties of performance owed to individuals by fiduciaries, the fiduciary duty of loyalty owed by a lawyer to a client has another purpose in that it seeks to protect both the specific client as well as public confidence in the integrity of the administration of justice. As the majority reasons said in *Strother*:⁵³

On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. The foundation of this branch of the law is the need to protect the integrity of the administration of justice: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1243 and 1265. “[I]t is of high public importance that public confidence in that integrity be maintained”: *R. v. Neil*, [2002] 3 S.C.R. 631, 2002 SCC 70, at para. 12.

Nevertheless, it is clear that the primary purpose of the duty of loyalty is to avoid impairment of the duty of performance, i.e. the representation of the client, whether in litigation or in other matters.

⁵⁰ Rule 2 of Chapter II of the *CBA Code of Professional Conduct* provides that “The lawyer should serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.”

⁵¹ Arthur B. Laby, “Resolving Conflicts of Duty in Fiduciary Relationships”, (2004) 54 *American University Law Review* 75 at page 106: “The application of prophylactic rules demonstrates that the fiduciary’s duty of loyalty is primarily a negative duty to be followed without exception and regardless of the benefits that may redound to the fiduciary or the principal. Its philosophical underpinnings, in this sense, can be found in the writings of Immanuel Kant. Kant divided all duties between perfect and imperfect duties, and the duty of loyalty may be categorized as a perfect duty, “a duty which permits no exception in the interest of inclination.”

⁵² While phrases “duty of commitment to the client’s cause” and “zealous representation” could connote a positive duty consistent with the duty of performance, the cases cited in Neil, *supra* note 14, and the description of the duty, i.e. “ensuring that a divided loyalty does not cause the lawyer to ‘soft pedal’ his or her defence of a client out of concern for another client”, indicates that, in reality, this is a further negative duty. It is not obvious that these phrases are articulating a duty that is materially different than the duty to avoid conflicting interests.

⁵³ *Strother*, *supra* note 3. at para. 34.

Conflicting interests: England, Australia and New Zealand

The law of England is usefully summarized in *Snell's Equity*.⁵⁴ At para. 7-13, the authors write as follows:

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This obligation of loyalty has several facets, which are addressed separately below. Millett L.J. provided a non-exhaustive list of those facets in his judgment in *Bristol & West Building Society v Mothew* (which is “widely regarded as a masterly survey of the modern law of fiduciary duties”): “A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.”

The obligation of fiduciaries not to place themselves in a position where duty and personal interest may conflict is the classic conflict of interest rule. It was examined by the Supreme Court of Canada in *Strother*⁵⁵, and is the position in England, as well as Canada. This aspect of the duty of loyalty has been referred to as the “conflict of duty and interest rule.”⁵⁶ It requires that fiduciaries not permit their self-interest to conflict with their duties of performance.

A conflict of duty and duty

Para. 7-16, in *Snell* refer to a different type of conflict of duties:

A further, more recent, development has been the recognition of a rule which prohibits a fiduciary from acting in a situation where there is a conflict between the duties which he owes to more than one principal. This rule has developed out of the rule regarding conflicts between duty and interest, but it too has developed into a separate doctrine and so it is addressed separately below.

This rule has been referred to as the “conflict of duty and duty rule.” This aspect of the duty of loyalty requires that fiduciaries not assume duties of performance which conflict with each other. Like conflicting self-interest, a conflicting duty of performance owed by a fiduciary to anyone else may improperly impair performance of the obligations owed by a fiduciary to his or her principal.

A recent statement of the “conflict of duty and duty rule” is *Bristol & West Building Society v. Mothew*.⁵⁷ *Mothew* was a case in which a lawyer acted for the purchasers of a house and for the lending society from whom the purchasers were borrowing the money to finance the purchase

⁵⁴ John McGhee, ed., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2006).

⁵⁵ *Strother*, *supra* note 3 at paras. 50 and 70 which concluded “[Strother’s] personal interest ... came into conflict with Strother’s fiduciary duty to avoid conflicts of interest in performing the contractual obligations assumed under the 1998 retainer” and that “Strother could not with equal loyalty serve Monarch and pursue his own financial interest which stood in obvious conflict with Monarch making a quick reentry into the tax-assisted film financing business.”

⁵⁶ Professor Finn, now Justice Finn of the Federal Court of Australia, distinguished between the “conflict of duty and interest rule” and the “conflict of duty and duty rule” both being aspects of the duty of loyalty owed by a fiduciary.

⁵⁷ [1998] Ch. 1 (C.A.) [*Mothew*].

of the home on the security of a first charge. The lawyer knew that the purchasers were arranging for existing debt to be secured by a second charge but, in error, reported otherwise to the lender. Lord Justice Millett, as he then was, stated the applicable fiduciary principle⁵⁸ 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: see *Clark Boyce v. Mouat* [1994] 1 A.C. 428 and the cases there cited. This is sometimes described as “the double employment rule.” Breach of the rule automatically constitutes a breach of fiduciary duty. But this is not something of which the society can complain. It knew that the defendant was acting for the purchasers when it instructed him. Indeed, that was the very reason why it chose the defendant to act for it. The potential conflict was of the society’s own making: see *Finn, Fiduciary Obligations*, p. 254 and *Kelly v. Cooper* [1993] A.C. 205.

Conflicting duties of performance

The “conflict of duty and duty rule” was discussed soon after *Mothew* by Lord Millett in *Bolkiah v. KPMG*⁵⁹. *Bolkiah* involved accountants acting against a former client in a related litigation support matter.⁶⁰ The House of Lords concluded that KPMG should be restrained from acting against their former client Bolkiah in a closely related matter because KPMG possessed confidential and privileged information from their prior retainer for Bolkiah which was relevant to the new retainer for KPMG. As is ordinarily the case with any former client, the duty of performance owed to Bolkiah by KPMG came to an end when Bolkiah ceased to be KPMG’s client. Lord Millett touched on this point as follows:

... It is otherwise where the court’s intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

Where a fiduciary acts for a client and the fiduciary’s partner acts for another client in the opposite interest on the same matter, the partnership owes conflicting duties of performance and the “conflict of duty and duty rule” applies. In this situation, duties of performance which are opposite impair each other and therefore those duties conflict.

More recently the House of Lords again addressed the “conflict of duty and duty rule” in *Hilton v. Barker Booth and Eastwood (a firm)*.⁶¹ The case dealt with lawyers acting for two clients at the same time on the same matter. Lord Walker of Gestingthorpe, speaking for all members of the Committee, held at para. 31 that:

⁵⁸ Parenthetically, consent did not avoid the obligation of undivided loyalty. As Millett L.J. stated “Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see *Finn*, p. 48. I shall call this “the duty of good faith.” But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal. That this may not be possible does not excuse a breach of the obligation.”

⁵⁹ [1999] 2 AC 222 [*Bolkiah*].

⁶⁰ The fact that the retainer was a litigation support retainer led Lord Millett to conclude that “an accountant who provides litigation support services of the kind which they provided to Prince Jefri must be treated for present purposes in the same way as a solicitor.”

⁶¹ [2005] 1 WLR 567, [2005] 1 All ER 651 [*Hilton*].

The solicitor's duty of single-minded loyalty to his client very frequently makes it professionally improper and a breach of his duty to act for two clients with conflicting interests in the transaction in hand. Lord Jauncey of Tullichettle, giving the judgment of the Privy Council in *Clark Boyce v. Mouat* [1994] 1 AC 428, 435 said:

“There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other.”

The decisions in *Mothew* and *Hilton*, and the comment in *Bolkiah*, deal with acting for two principals in the same matter where duties of performance owed to parties with opposite interests must necessarily conflict. There is no doubt that, absent proper consent, the “conflict of duty and duty rule” prohibits lawyers acting for more than one client in the same matter.

Conflicting duties: unrelated matters

The English Court of Appeal, on a leave application, recently considered the “conflict of duty and duty rule” where the retainers are not in the same matter. In *Marks & Spencer plc v. Freshfields Bruckhaus Deringer*,⁶² Lord Justice Pill considered whether the “conflict of duties rule” only applied to “same transaction” cases in the following part of his reasons:

Mr Brindle submits that *Bolkiah*, despite the generality of Lord Millett's terminology, was a “same transaction” case, as was an earlier case *Bristol and West Building Society v. Mothew* [1998] Ch 1 where Millett LJ (as he then was) had made a general statement to the same effect as that I have cited from *Bolkiah* at 234H.

Mr Brindle submits that the principle cannot extend beyond the same transaction situation. He gave examples which indicate situations with no possible conflict of interest arising from the fact that a solicitor's firm, which may of course have a number of branches spread around the country and abroad, is in one transaction acting contrary to a client for whom it acts on another. I would accept that there must be a degree of relationship between the two transactions, but I am quite unable to accept the submission that the language used by Lord Millett in *Bolkiah* and the comparative strictness, with respect, with which he has stated the principles in this area of the law is confined to same transaction cases.

Moreover, while there must be limits upon the application of the principle, it is, in my judgment, a sound one and I accept the submission of Mr MacLean on that point. **The court must consider what the relationship is between the two transactions concerned.** As stated in the judgment of Lawrence Collins J, the transaction, which was the subject of submissions before him and before this court and upon which the his [sic] judgment was mainly based, was the retention of Freshfields to advise in relation to Marks and Spencer's contractual arrangements with Mr George Davies in relation to Per

⁶² [2004] EWCA Civ 741.

Una, a project which is known as “Project George.” The judge stated: “I think it is well-known that since it was introduced it is one of Marks and Spencer’s most successful and profitable lines.” (Emphasis added)

In these reasons, Lord Justice Pill essentially holds that the “conflict of duties rule” applies when duties of performance may impair each other and that the “relationship between the two transactions” must be examined in order to determine whether duties of performance conflict. Lord Justice Pill accepts that there must be “a degree of relationship between the two transactions” for a conflict to arise and that, by inference, no conflict arises where there is no relationship between the two retainers.

This application of the “conflict of duty and duty rule” to related matters is entirely consistent with the underlying principle of this rule and with the underlying duty of loyalty. When a lawyer acts for clients with opposing interests in related matters, there is a substantial risk that the duties of performance to either or both will be materially and adversely affected. This risk is inherent in the relationship of the two matters and the opposing interests of the two clients in those matters.

A duty of undivided loyalty

A significant recent Australian⁶³ appellate case regarding the duty of loyalty is *Spincode Pty Ltd v. Look Software Pty Ltd & Ors.*⁶⁴ While *Spincode* considers duties of loyalty owed to a former client (and is an important case similar to *Re Credit Suisse First Boston Canada Inc.*⁶⁵ in that regard), the duty of loyalty to a current client is usefully considered in the following excerpt of the reasons of Justice Brooking in which he reviews, with approval, the work of Professor Finn:

“Duty of loyalty” is a phrase used in recent years by judges and others in discussing whether a solicitor who acts or has acted for one client may be prevented from acting for another. The currency of the expression in this connection is undoubtedly the result, at least in part, of the writings, before his appointment to the Bench, of Professor Finn. I have not noticed any reference to a duty of loyalty in his work *Fiduciary Obligations* (1977), although Chapter 22, headed “Conflict of Duty and Duty”, begins with the words “To ensure a loyalty which is undivided” Writing in 1988, Professor Finn said that the “fiduciary” standard enjoined one party to act in the interests of the other - to act selflessly and with undivided loyalty. Later in the same paper he described the fiduciary principle as insisting upon a fine loyalty in the service of the interests of another. Chapters 21 and 22 of a fairly recent work on lawyers are entitled “Duties of Loyalty”, while Chapter 12 of a very recent book on lawyers is headed “Conflict of Interest: Loyalty.” Professor Finn considers at some length in a later paper questions which arise when solicitors or other fiduciaries act either in “same-matter conflicts” (where the fiduciary acts in the same matter for different parties having adverse interests in it) and “former-client conflicts”, where a solicitor or other fiduciary, having acted for a client in a particular matter, later acts against that client in the same or a related matter. Near the outset of the discussion of “same-matter conflicts” this is said:

⁶³ For a comparison of Australian and English law, see: Sandro Goubran, “Conflicts of Duty: The Perennial Lawyers’ Tale – A Comparative Study of the Law in England and Australia” (2006) 31(1) Melbourne University Law Review 88.

⁶⁴ [2001] VSCA 248 [*Spincode*].

⁶⁵ (2004), 2 B.L.R. (4th) 109 (Ontario Securities Commission) [*Re Credit Suisse*].

“These are in the very heartland of fiduciary law, though English law in contrast with some Commonwealth jurisdictions (particularly Canada and New Zealand) has been slow to appreciate the full significance of this. **The agent or adviser acting for two parties with adverse interests in the same matter not only owes each party those common law duties of care, skill, and the like appropriate to the function assumed, he also owes each a duty of loyalty.** We are only now beginning to appreciate how much the latter can overshadow the former in importance. Loyalty’s effect is twofold. First, if the fiduciary is being remunerated by either or both of the parties, the ‘conflict of duty interest’ theme in the fiduciary’s obligation requires him to disclose to each client that he is being remunerated by the other. Secondly, much more importantly, until each client agrees to the contrary, or unless there is a legally acknowledged custom to the contrary, each client is entitled to, and is entitled to assume that he has, the undivided loyalty of the fiduciary he has engaged. **The rule here is simple and inexorable: ‘Fully informed consent apart, an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal.’**” (Footnotes omitted.)

This paper was given in 1991. In a paper delivered in 1987 the learned author frequently refers to a fiduciary’s duty of loyalty. The 1987 paper, like so much of Professor Finn’s work, has proved influential.⁶⁶ (Emphasis added)

To the same effect is the New Zealand Court of Appeal decision in *Farrington v. Rowe McBride & Partners*.⁶⁷ *Farrington* was a case in which lawyers had acted for a plaintiff in a personal injury claim and then assisted the plaintiff in investing the settlement with another client whose finances were administrated by the lawyer. The investment was lost. The Court of Appeal found a breach of fiduciary duty as there was an undisclosed conflict in the lawyer’s duty to the plaintiff as their client and to the borrower as their client. Justice Woodhouse, writing for the Panel, stated:

A solicitor’s loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting.

“No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment” (*Fullwood v Hurley* [1928] 1 KB 498, 502 per Scrutton LJ).

And there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both.

To summarize, the English, Australian and New Zealand authorities show that the fiduciary duty to avoid conflicting interests includes the so-called “conflict of interest and duty rule” and the “conflict of duty and duty rule.” While the “conflict of duty and duty rule” is at its simplest

⁶⁶ *Spincode*, *supra* note 64 at para. 42.

⁶⁷ [1985] 1 NZLR 83 (C.A.) [*Farrington*].

where a lawyer acts for two or more clients with adverse interests in the same matter, the rule applies to any situation where the duty of performance owed to a client conflicts with the duty to anyone else, client or otherwise and whether in the same matter or not.

Where a lawyer, or a law firm, acts for different clients in different, but related, matters the duties of performance owed to the different clients may conflict and thus breach the “conflict of duty and duty rule.” By definition, where matters are not related, it is difficult to see how duties of performance could conflict and how the “conflict of duty and duty rule” could come into play.

Conflicting interests and the Unrelated Matter Rule

R. v. Neil and *Strother v. 3464920 Canada Inc.*

The following bright line rule is stated in *Neil*⁶⁸ and is restated in the reasons of the majority in *Strother*:⁶⁹

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

In *Strother*, the majority reasons also state that:⁷⁰

Exceptional cases should not obscure the primary function of the “bright line” rule, however, which has to do with the lawyer’s duty to avoid conflicts that impair the respective representation of the interest of his or her concurrent clients whether in litigation or in other matters, e.g. *Waxman v. Waxman*, (2004), 186 O.A.C. 201 (C.A.).

This statement of the primary purpose of the bright line rule is consistent with the purpose of the “conflict of duty and duty rule.” Both rules are designed to avoid conflicts that impair client representation.

However, the bright line rule appears to extend the “conflict of duty and duty rule” beyond that found in any other Commonwealth jurisdiction. The bright line rule provides that lawyers may not act in a matter which is directly adverse to the immediate interests of a current client **even if the two mandates are unrelated** (the “Unrelated Matter Rule”).

⁶⁸ *Neil*, *supra* note 4. at para. 29.

⁶⁹ *Strother*, *supra* note 3 at para. 51.

⁷⁰ At para. 646 of *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165, 186 O.A.C. 201 (cited in *Strother*), the Court of Appeal for Ontario restated the traditional rule as follows: “Ordinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other. If there are some simple or routine transactions where a lawyer can act for both parties, the share sale is not one of them.”

The origin of the Unrelated Matter Rule

The Unrelated Matter Rule cannot be explained by concern that duties of performance in the two matters conflict as, by definition, the two matters are unrelated. The Unrelated Matter Rule is clearly an extension of the duty of loyalty as previously understood in the law of Canada, England, Australia and New Zealand. None of the cases or authorities discussed in *Neil* or *Strother* provides authority for this extension. No reasoning for the extension is provided in either case. As the mandates in *Neil* and *Strother* were not unrelated, the extension does not arise out of the facts of those cases nor, presumably, argument before the Court in those cases, and the extension was not required to decide either case.

Further, the definition of “conflict of interest” in *Neil*, which comes from U.S. law and was affirmed by the majority in *Strother*, does not explain or support the Unrelated Matter Rule. As stated in *Strother*:

While the duty of loyalty is focused on the lawyer’s ability to provide proper client representation, it is not fully exhausted by the obligation to avoid conflicts of interest with other concurrent clients. A “conflict of interest” was defined in *Neil* as an interest that gives rise to a

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

(*Neil*, at para. 31, adopting § 121 of the *Restatement (Third) of the Law Governing Lawyers*, vol. 2, at pp. 244-45).⁷¹

This restatement of the “conflict of duty and interest rule” together with the “conflict of duty and duty rule” is consistent with Anglo-Canadian common law as interests and duties which conflict with the duty of performance give rise to a substantial risk of material adverse effect on client representation. The restated standard was applied by the majority in the finding against *Strother* as follows:

In these circumstances, taking a direct and significant interest in the potential profits of Monarch’s “commercial competitio[r]” (as described by Lowry J., at para. 113) created a substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests (*Neil*, at para. 31).⁷²

The Chief Justice, for the minority in *Strother*, clearly challenges the potential extension of the law reflected in the Unrelated Matter Rule. The minority reasons state:

Insistence on actual conflicting duties or interests based on what the lawyer has contracted to do in the retainer is vital. If the duty of loyalty is described as a general, free-floating duty owed by a lawyer or law firm to every client, the potential for conflicts is vast. Indeed, it is difficult to see how a lawyer or law firm could ever act for two competitors. Consider, as in this case, a specialized tax lawyer

⁷¹ *Strother*, *supra* note 3 at para. 56.

⁷² *Ibid.* at para. 69.

who acts for client A and B, where A and B are competitors. Client A may ask for help in minimizing capital gains tax. Client B may seek advice on a tax shelter. The lawyer owes both A and B contractual and associated fiduciary duties. If the duty that the lawyer owes to each client is conceived in broad general terms, it may well preclude the lawyer from acting for each of them; at the very least, it will create uncertainty. If the duty is referenced to the retainer, by contrast, these difficulties do not arise. The lawyer is nonetheless free to act for both, provided the duties the lawyer owes to client A do not conflict with the duties he owes to client B.⁷³

...

Whether an interest is “directly” adverse to the “immediate” interests of another client is determined with reference to the duties imposed on the lawyer by the relevant contracts of retainer. This precision protects the clients, while allowing lawyers and law firms to serve a variety of clients in the same field. This is in the public interest. As Binnie J. observed in *Neil*, at para. 15:

An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue is always to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.⁷⁴

...

For these reasons, I conclude that the starting point in determining whether a conflict of interest arose in a particular case is the contract of retainer between the lawyer and the complaining party. The question then is whether these duties conflicted with the lawyer’s duties to a second client, or with his personal interests. If so, the lawyer’s duty of loyalty is violated, and breach of fiduciary duty is established. This is the position on the authorities which the courts must follow. This does not, of course, preclude law societies from imposing additional ethical duties on lawyers. They are better attuned than the courts to the modern realities of legal practice and to the needs of clients. If the obligations of lawyers are to be extended beyond their established bounds, it is for these bodies, not the courts, to do so.⁷⁵

After *Strother*, we are left with apparent division in the Supreme Court of Canada as to the Unrelated Matter Rule. The majority reasons simply restated the Unrelated Matter Rule that was posited in *Neil*. The minority reasons rejected this extension of the law. This division was not resolved by *Strother* because *Strother* was not an unrelated matter case. While the Chief Justice took the opportunity to articulate reasons against the Unrelated Matter Rule in her minority opinion in *Strother*, no reasons were articulated in favour of the Unrelated Matter Rule in either *Neil* or *Strother*.

⁷³ *Ibid.* at para. 136.

⁷⁴ *Ibid.* at para. 140.

⁷⁵ *Ibid.* at para. 142.

The Unrelated Matter Rule as *obiter*

The Unrelated Matter Rule was not relevant to the facts in either *Neil* or *Strother* so the elaboration of the Unrelated Matter Rule was clearly *obiter dicta*⁷⁶ in both cases. Further, the Unrelated Matter Rule was not addressed in the factums or the oral arguments in either case and in *Neil*⁷⁷ the lawyer was not even a party to the proceeding. Although neither *Neil* nor *Strother* turned on the Unrelated Matter rule, the Rule was set out in those cases.

Without intending to reach a conclusion as to the effect of this *dictum*, it is useful to have in mind the following consideration of the effect of *obiter dicta* in the Supreme Court of Canada:

The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not “binding” in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.⁷⁸

In light of the division between the majority of five and the minority of four in *Strother*, it may be right to see the Unrelated Matter Rule as set out in *Neil* as being closer to the “helpful/persuasive” end of the spectrum.

The ABA Model Rule on unrelated matters

From where did the Unrelated Matter Rule come? While the reasons in *Neil* are not explicit, it appears clear that the answer is to be found in the *Model Rules of Professional Conduct* of the American Bar Association (“the ABA Model Rules”). Rule 1.7 provides that:

1.7(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

⁷⁶ Amongst other issues, the Supreme Court of Canada did not address in *Neil* or *Strother* whether the Unrelated Matter Rule applies beyond litigation in light of the following reasons of the Court in *MacDonald Estate*, *supra* note 2, as to the jurisdiction of the court:

In this regard, it must be borne in mind that the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court’s role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law.

⁷⁷ *Neil* was an appeal by an accused on the basis that his defence was impaired through conflict of interest on the part of defence counsel. Accordingly, while the accused and the Crown were parties to the appeal, defence counsel was not.

⁷⁸ *R. v. Henry*, [2005] 3 S.C.R. 609 at para. 57.

- (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.

1.7(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. (Emphasis added)

While *ABA Model Rule 1.7(a) (2)* is very similar to §121 of the American Law Institute's *Restatement (Third) of the Law Governing Lawyers* (the "*Restatement*") and to the traditional Anglo-Canadian common law, *Model Rule 1.7(a) (1)* is not. *ABA Model Rule 1.7(a) (1)* is essentially the same as the *Unrelated Matter Rule* with one difference. *ABA Model Rule 1.7(a) (1)* provides that "a concurrent conflict of interest exists if the representation of one client will be directly adverse to another client." Restated in the same form, the "bright line rule" in *Neil* would read: a concurrent conflict of interest exists if the representation of one client will be directly adverse to *the immediate interests of* another client.

It appears that the reasons in *Neil*, in effect, imported a part of the *ABA Model Rules*.

Policy supporting the Unrelated Matter Rule

The policy behind *ABA Model Rule 1.7(a) (1)*, as apparently adopted in *Neil*, is explained in the commentary to the *ABA Model Rules*. Comment 6 states *inter alia* that:

Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. (Emphasis added.)

In discussing the Unrelated Matter Rule, it is necessary to keep in mind that the rule is applicable only where a lawyer acts in at least two matters.⁷⁹ The lawyer acts directly adverse to the immediate interests of a client in one matter (the “Adverse Matter”) while concurrently acting for that client in another unrelated matter (the “Unrelated Matter”).

Comment 6⁸⁰ raises concern, in respect of the Adverse Matter, that the lawyer may not zealously represent the client in the Adverse Matter because of the lawyer’s personal interest in protecting the revenues from the current client in the Unrelated Matter. The concern is that a personal interest may impair the duty of performance in the Adverse Matter.

The comment raises concern, in respect of the Unrelated Matter, because the relationship with the current client in the Unrelated Matter may be impaired by feelings of betrayal by virtue of the Adverse Matter or, potentially in litigation, by cross-examination in the Adverse Matter. In respect of the Unrelated Matter, it is not suggested that the duty of performance is impaired by conflicting duty or by conflicting interest but rather because of impairment of relationship between the lawyer and current client arising from the reaction of the current client to the lawyer acting in the Adverse Matter.

The *Restatement* addresses the policy underlying the Unrelated Matter Rule in similar terms:⁸¹

... A client is entitled to be represented by a lawyer whom the client can trust. Instilling such confidence is an objective important in itself. For example, the principle underlying the prohibition against a lawyer’s filing suit against a present client in an unrelated matter (see § 128, Comment e) may also extend to situations, not involving litigation, in which significant impairment of a client’s expectation of the lawyer’s loyalty would be similarly likely. Contentious dealings, for example involving charges of bad faith against the client whom the lawyer represents in another matter would raise such a concern. So also would negotiating on behalf of one client when a large proportion of the lawyer’s other client’s net worth is at risk.

Impairment of client representation

An absolute interpretation of the Unrelated Matter Rule assumes that there is ordinarily a substantial risk of material and adverse effect on client representation. While the *ABA Model Rule* as commonly adopted in the U.S. appears to take an absolute approach, it is significant that the *Restatement*⁸² does not. The *Restatement* takes an absolute position against litigation against current clients but not, as can be seen above, in other contexts.

⁷⁹ While there may be a number of unrelated matters, the analysis is no different where there is one or more unrelated matters.

⁸⁰ The relevant portion of the Comment to Rule 1.7 states that “In addition, the client ...may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client..”

⁸¹ § 121 Comment b. Rationale.

⁸² As adopted in *Neil*, *supra* note 4, and restated in *Strother*, *supra* note 3.

Consistent with the *Restatement*, while ABA Rule 1.7 is expressed absolutely, it is noteworthy that the Comment⁸³ to the Rule seeks only to justify a prohibition against acting as “an **advocate** in one matter against a person the lawyer represents in some other matter.” (Emphasis added)

It is also noteworthy that, where no substantial risk of harm to client representation is found, there is increasingly U.S. authority⁸⁴ for the proposition that the issue of litigation against current clients in unrelated matters is properly left to the appropriate professional disciplinary body rather than to the courts. This is consistent with the traditional judicial approach in Commonwealth jurisdictions to the duty of loyalty (i.e. that the duty of loyalty is concerned with impairment of client representation and that the remaining ethical issues, if any, are for the law societies). It would be ironic if the adoption of an ABA rule were to lead to the result that the Canadian courts would have exclusive, or even primary, jurisdiction over matters which are actually governed by professional disciplinary bodies in the U.S.

In deciding to leave the issue of litigation against a current client in an unrelated matter to the professional disciplinary body in *SWS Financial Fund A. v. Salomon Bros, Inc.*, the U.S. District Court noted that:

A court deciding a motion to disqualify in a case involving mega-firms (like Schiff) and mega-parties (like Salomon Brothers) should not be oblivious to “the way that attorneys and clients actually behave in the latter part of the twentieth century, and what they have come to expect from each other in terms of the continuation or termination of the relationship.” *Drustar*, 134 F.R.D. 226, 229. As the *Drustar* court noted:

The concepts of having a ‘personal attorney’ or a ‘general corporate counsel’ are much less meaningful today, especially among sophisticated users of legal services, than in the past. Clients may have numerous attorneys, all of whom have some implicit continuing loyalty obligations. Attorney specialization and marketing have contributed to this fractionalizing of a single client’s business.

Were this court to rule that disqualification was mandated by Schiff’s breach of Rule 1.7 in this case, the implications would be overwhelming. Clients of enormous size and wealth, and with a large demand for legal services, should not be encouraged to parcel their business among dozens of the best law firms as a means of purposefully creating the potential for conflicts. With simply a minor “investment” of some token business, such clients would in effect be buying an insurance policy against that law firm’s adverse representation. Although lawyers should not be encouraged to sue their own clients (hence the sanctions discussed above), the law should not give large companies the incentive to manufacture the potential for conflicts by awarding disqualification automatically.

Despite the U.S. position, the Task Force, for the reasons discussed in this chapter, does not agree that this reasoning is applicable in all advocacy retainers.

⁸³ The relevant portion of the Comment is set out previously.

⁸⁴ For example, *SWS Financial Fund A. v. Salomon Bros, Inc.*, 790 F. Supp. 139 (USDC, Dale, ND Ill) and *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (USDC, Dale, SDNY) which are each cited in the *Restatement (Third) of the Law Governing Lawyers* See also *Research Corporation Technologies, Inc. v. Hewlett-Packard Company*, 936 F. Supp. 697 (USDC, Ariz. 1996), *The Prudential Insurance Company of America, et al v. Anodyne, Inc., et al.*, 365 F. Supp. 2d 1232 (USDC S.D. Fla. 2005), *Great American Insurance Company v. General Contractors & Construction Management Inc. et al.*, 2008 U.S. Dist. LEXIS 37015 (USDC, S.D. Fla. 2005).

The above review also makes clear that an historic understanding of the lawyer-client relationship (i.e. the personal attorney or the general corporate counsel), which underpinned the *ABA Model Rule*, is not necessarily the modern reality. It is the modern reality that shapes the potential for harm. Modern lawyer-client relationships are more varied, and perhaps evolved, such that mandatory bright line rules which once responded to a different reality are doubtful today, even in the U.S.

The Substantial Risk Principle

Canada, England, the U.S., Australia and New Zealand all have essentially the same fundamental “conflict of interest and duty” and “conflict of duty and duty” rules. These rules support the duty of performance owed to a client by ensuring that other interests and duties do not conflict without informed consent. These rules are in the interest of individual clients and in the public interest in support of the integrity of the administration of justice.

§ 121 of the *Restatement*, which is adopted in *Neil* and *Strother*, integrates these rules into the following principle (the “Substantial Risk Principle”) which prohibits, absent informed consent, a lawyer acting where 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 current client, a former client, or a third person.

However, the Unrelated Matter Rule was not, prior to *Neil*, part of the law of Canada and is not now the law of England, Australia or New Zealand. Whether this extension of the law is now part of the law of Canada is not completely resolved, as it was *obiter* in *Neil* and has been challenged by the minority opinion in *Strother*. In any event, it appears that the Unrelated Matter Rule is a variation of part of Rule 1.7 of the *ABA Model Rules*.

Because neither *Neil* nor *Strother* dealt with an unrelated mandate against a current client, it is not possible to understand fully the court’s intention or its expectation of what impact the Unrelated Matter Rule would actually have on the day-to-day practise of law. What is clear, and consistent with Canadian and Commonwealth law, is the Substantial Risk Principle.

The Task Force believes that the Unrelated Matter Rule, which appears intended to provide guidance to Canadian lawyers, should not be broader than is required by this principle. We entirely accept that there are occasions where an unrelated mandate against a current client offends the Substantial Risk Principle. However, we do not believe that this is always the case. Indeed, we think an unrelated mandate is unlikely to offend the Substantial Risk Principle, especially when the matters do not involve litigation.

The Substantial Risk Principle and the Unrelated Matter Rule

The court in *Neil* and the majority in *Strother* adopted the Substantial Risk Principle. The minority in *Strother* took no issue with the Substantial Risk Principle. If, as we strongly believe to be the case, there are circumstances where an unrelated mandate against a current client does not offend the Substantial Risk Principle, then there is potential inconsistency between the Unrelated Matter Rule and the Substantial Risk Principle to be resolved.

Examination of the reasoning in *Neil* may assist in this consideration. Just before setting out the Unrelated Matter Rule, Justice Binnie stated:

In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and **a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled.** Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied.⁸⁵ (Emphasis added)

These reasons speak of inferred consent in the context of litigation. It logically follows that the consent of businesses, governments, and other clients to commercial and other non-litigious adversity may also be inferred. What is particularly interesting is the observation that “a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled.”

This contradistinction between principled and tactical positions is reinforced by the following excerpt from *Neil*:

In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, **the imposition of exaggerated and unnecessary client loyalty demands**, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, **may promote form at the expense of substance, and tactical advantage instead of legitimate protection.** Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. **Yet it is important to link the duty of loyalty to the policies it is intended to further.** An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests.⁸⁶ (Emphasis added)

⁸⁵ *Supra* note 4 at para. 28.

⁸⁶ *Ibid.* at para. 15.

Finally, in *Neil*, the reasons delivered by Justice Binnie for the court observed that:

If a litigant could achieve an **undeserved tactical advantage** over the opposing party by bringing a disqualification motion or seeking other “ethical” relief using “the integrity of the administration of justice” merely as a flag of convenience, fairness of the process would be undermined.⁸⁷ (Emphasis added)

In *Strother*, the majority reasons state that:

In recent years as law firms have grown in size and shrunk in numbers, the courts have increasingly been required to deal with claims by clients arising out of alleged conflicts of interest on the part of their lawyers. Occasionally, a law firm is caught innocently in crossfire between two or more clients. **Sometimes the claim of conflict is asserted for purely tactical reasons, an objectionable practice criticized in *Neil* at paras. 14-15, and a factor to be taken into account by a court in determining what relief if any is to be accorded.**⁸⁸ (Emphasis added)

Clearly, this is a limitation on the Unrelated Matter Rule. Where a complaint is ‘tactical’ and not ‘principled’, then the result is not to be the same. But when is a complaint merely tactical? We think that the answer is found in the linkage of “the duty of loyalty to the policies that it is intended to further.”

According to the analysis in *Neil* and *Strother*, the policy purpose of the Unrelated Matter Rule is to avoid mandates which create undue risk of harm to client representation. On this reasoning, a complaint made where the Substantial Risk Principle is not engaged must be merely tactical as no substantial risk of harm to representation, by definition, arises. On the other hand, where the Substantial Risk Principle is offended by an unrelated mandate against a current client, there can be no doubt that a complaint would be principled and not merely tactical.

We therefore conclude that the Unrelated Matter Rule and the Substantial Risk Principle are reconcilable. If there is a substantial risk that the lawyer’s representation of the current client would be materially and adversely affected by the matter, the lawyer may not act, whether or not the matter is unrelated.

While it might be argued that it is for the courts to determine what is tactical and what is not, we note that the overwhelming volume of legal work is performed outside of the courts and that lawyers must have a principled basis under which to analyze conflicts. While courts will, of course, provide remedies where the Substantial Risk Principle is offended, including injunctive relief, lawyers must be able assess the possible conflicts in a situation in the first instance. The courts provide the safeguard for cases improperly taken on by lawyers. However, the courts never see the cases which lawyers do not undertake. As Justice Binnie noted above “an unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation.” A common principle which practitioners and judges can apply consistently is required in order to ensure that the duty is neither unnecessarily expanded nor attenuated.

⁸⁷ *Ibid.* at para. 14.

⁸⁸ *Supra* note 3 at para. 36.

Accordingly, we conclude that the appropriate interpretation of *Neil* and *Strother* (which also reconciles the minority reasons in *Strother*) is that, absent proper consent, a lawyer may not act directly adverse to the immediate interests⁸⁹ of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer's representation of the current client would be materially and adversely affected by the new unrelated matter.

We reach this conclusion reliant on the caution found in *Neil* that rules must be firmly grounded in principle and that rules which are overbroad are also harmful to our legal system. Just as we conclude that the *ABA Model Rule* is overbroad, we accept the core policy logic of that rule. Client representation can be impaired by more than conflicting interests and conflicting duties. The central public policy purpose of conflicts law and rules is to protect client representation. Our conclusions and recommendations seek to extract the true benefit from the *ABA Model Rule* without taking on burdens which do not advance the desirable public policy.

A material and adverse effect on representation

The definition of a “conflicting interest” adopted from the *Restatement* and applied by the Supreme Court of Canada in *Neil* and *Strother* is:

substantial risk that the lawyer's **representation of the client** would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.⁹⁰ (Emphasis added)

Fundamental to this definition is that **client representation** must be protected against conflicting interests. There is a subtle but important difference between this formulation and the traditional “conflict of interest and duty” and “conflict of duty and duty” principles. The traditional principles protected the duty owed by a fiduciary from conflicting personal interests or duties owed to others. This new formulation protects **client** representation rather than simply the **duty** of performance owed to a client.

It is well understood that a conflicting interest involves a lawyer's own interest or the lawyer's duty to someone else. Ordinarily, the “someone else” is a current client but it is the fact that there is a conflicting duty that matters rather than to whom that duty is owed.

It is noteworthy that protecting against conflicting interests is not about preserving client confidential information.⁹¹ Client confidential information must be preserved whether or not there is a conflicting interest or duty and whether or not the lawyer's representation of the client is completed. Lawyers may be disqualified by the courts for a conflict of interest **or**

⁸⁹ The phrase “directly adverse to the immediate interests” has not received much judicial attention. The word “immediate” is not found in the ABA model rule. It may be that this phrase is inherently capable of the limitation argued here. Said another way, where the Substantial Risk Principle is not engaged, it may be that a mandate is not directly adverse to the immediate interests of the current client.

⁹⁰ *Neil*, *supra* note 4 at para. 31, as confirmed in *Strother*, *supra* note 3, at para. 56.

⁹¹ Although misuse of confidential information may sometimes be guarded against by avoiding conflicting interests.

to protect confidential information. While the courts sometimes say that a disqualification to protect confidential information is a disqualification because of a “conflict,”⁹² this is inaccurate and misleading.

The Substantial Risk Principle uses the phrase “materially and adversely affected.” To state the obvious, if the effect on representation is beneficial rather than adverse then there is no **conflict**. Representation is protected from **impairment** by guarding against adverse effects on representation. However, the adverse effect must also be material as well as adverse.

According to the *Restatement*, materiality is to be determined by reference to the lawyer’s representation of the client. Said another way, one examines the duties of performance to determine materiality of the adverse effect. This is sensible because it is material and adverse effect on representation that is of concern and therefore materiality is to be assessed in reference to representation. Some adverse effects may not be material when considered in the context of what a lawyer has actually been retained to do. This is not a question of likelihood of the adverse effect occurring, but rather a question of the significance of the adverse effect in relation to the retainer. The lawyer’s duty to another client, for example, may conflict in respect of something which is fundamental to the retainer or something which is entirely unimportant. Materiality is ordinarily assessed based upon the nature of the lawyer’s retainer, but the importance to the client is also to be considered. Where a client has indicated that an element of the retainer is of particular import, or a particular conflict is of particular concern, the effect will be material.

There is no conflicting interest unless there is a “substantial risk” that a material adverse effect will occur. The *Restatement* suggests that the risk must be “significant and plausible” although “not certain or even probable”, requiring more than the “mere possibility” of adverse effect.

Justice Dickson of the Supreme Court of British Columbia recently held in *Le Soleil Hotel & Suites Ltd v. Le Soleil Management Inc.*,⁹³ that there was sufficient likelihood of adverse effect if there was a “serious risk.” This is the only case found which considers the degree of likelihood required for a conflicting interest to exist. This is consistent with the *Restatement*.

On the issue of the permitted likelihood of adverse effect, it is noteworthy that the CBA Code and some law society rules of professional conduct appear to permit greater risk of adverse effect than is permitted under *Neil* and *Strother*. This difference would be usefully reconciled.

⁹² For example, see *Groupe-Tremca Inc. v. Techno-Bloc Inc.*, 1999 CanLII 9113 (F.C.A.) and *Greater Vancouver Regional District v. Melville* [2007] 9 W.W.R. 451 (B.C.C.A.).

⁹³ 2007 BCSC 1748.

Applicable rules of professional conduct

Provincial and Territorial Codes and the CBA Code of Professional Conduct

Subsequent to *Neil*, the CBA Code of Professional Conduct⁹⁴ expressly adopted⁹⁵ the bright line rule including the Unrelated Matter Rule.

In June 2004, Chapter 6 of the *Alberta Code of Professional Conduct* was amended to include Rule 3(a) which states that:

“Except with the consent of the client, a lawyer must not represent a person whose interests are directly adverse to the immediate interests of a current client.”

The commentary provides that:

“a lawyer must not, without consent, undertake a new representation or take a step in an existing representation that is directly adverse to the client’s immediate interests, **even if the matters are wholly unrelated**” (Emphasis added).

In 2001, before *Neil* was decided by the Supreme Court of Canada, the *British Columbia Professional Conduct Handbook* was amended⁹⁶ to provide that:

- 6.3 A lawyer must not represent a client for the purpose of acting against the interests of another client of the lawyer unless:
- (a) both clients are informed that the lawyer proposes to act for both clients and both consent, and
 - (b) the matters are substantially unrelated and the lawyer does not possess confidential information arising from the representation of one client that might reasonably affect the other representation.

This rule appears to apply to unrelated matters and to be a stricter test than the bright line rule which limits the prohibition to matters which are “directly adverse to the immediate interests” of the current client.

⁹⁴ Chapter V, Commentary 4.

⁹⁵ CBA Council at the 2004 CBA Canadian Legal Conference.

⁹⁶ In December 2003, the Benchers of the Law Society of British Columbia passed a motion to “approve in principle amending Chapter 6 of the Professional Conduct Handbook to permit clients to give informed consent to the use of screens to enable a law firm acting for the client to meet the requirements of Rule 6.3(b), where the firm is not otherwise able to meet those requirements” However, the amendment has not been made.

In Manitoba, Newfoundland & Labrador, Prince Edward Island and Saskatchewan, the *Codes of Professional Conduct* provide that “the lawyer shall not ..., save after adequate disclosure to and with the consent of the clients or prospective clients concerned ... act or continue to act in a matter when there is or is likely to be a conflicting interest.”

In New Brunswick, the *Code of Professional Conduct* provides that “the lawyer shall avoid all influences that compromise the duty of loyalty and the exercise of impartial and independent judgment and action owed by the lawyer to the client.”

In Nova Scotia, the *Legal Ethics and Professional Conduct Handbook* provides that “a lawyer has a duty not to ... act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.”

In Ontario, *Law Society Rule 2.04(4)* prohibits a lawyer acting against a current client in the same matter, or any related matter, but not in unrelated matters.

In Quebec, section 3.00.01 of the *Code of Ethics of Advocates* provides that a lawyer owes the client a duty of competence as well as obligations of loyalty, integrity, independence, impartiality, diligence and prudence. Section 3.06.06 requires that a lawyer must avoid acting in all situations where there is a conflict of interests. Section 3.06.07 provides *inter alia* that there is a conflict of interest where opposing interests are represented or where the lawyer represents clients where it is possible to prefer the interests of one client over another or where the lawyer’s judgment and loyalty could be unfavourably affected.

As can be seen, the Unrelated Matter Rule has not been adopted by the provincial law societies other than in Alberta and, in effect, British Columbia.

Rules of Professional Conduct in England, Australia and New Zealand

The *ABA Model Rules* form the basis for most of the U.S. state bar rules and the Unrelated Matter Rule thus applies to nearly all American lawyers. The situation is very different in England, Australia and New Zealand.

England

The *Solicitors Regulation Authority* (“SRA”) is the independent regulatory body of the Law Society of England and Wales. Effective July 1, 2007, the SRA brought amendments to the Solicitors Practice Rules. The relevant rule is Rule 3.01 which follows:

3.01 Duty not to act

- (1) You must not act if there is a conflict of interests (except in the limited circumstances dealt with in 3.02).
- (2) There is a conflict of interests if:
 - (a) you owe, or your firm owes, separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict; or
 - (b) your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.
- (3) For the purpose of 3.01(2), a related matter will always include any other matter which involves the same asset or liability.

The SRA Rules do not include an Unrelated Matter Rule. Rule 3.01 is similar to the U.S. § 121 of the *Restatement*.

Guidance is provided by the SRA, in the form of commentary, to Rule 3.01 as follows. This guidance follows the logic of *Marks & Spencer plc v. Freshfields Bruckhaus Deringer*.⁹⁷

Conflict is defined – 3.01

2. Conflict is defined as a conflict between the duties to act in the best interests of two or more different clients, or between your interests and those of a client. The definition appears in 3.01(2). This will encompass all situations where doing the best for one client in a matter will result in prejudice to another client in that matter or a related matter.
3. The definition of conflict in 3.01(2) requires you to assess when two matters are “related.” Subrule 3.01(3) makes it clear that if the two matters concern the same asset or liability, then they are “related.” Accordingly, if you act for one client which is negotiating with publishers for the publication of a novel, an instruction from another client alleging that the novel is plagiarised and breaches copyright would be a related matter.

4. However, there would need to be some reasonable degree of relationship for a conflict to arise. If you act for a company on a dispute with a garage about the cost of repairs to a company car, your firm would not be prevented from acting for a potential bidder for the company, even though the car is a minor asset of the company and would be included in the purchase. If you act for a client selling a business, you might conclude that your firm could also act for a prospective purchaser on the creation of an employee share scheme which would cover all the entities in the purchaser's group, this work perhaps requiring the future inclusion of the target within the scheme and consideration as to whether this raised any particular issues.
5. In each case, you will need to make a judgment on the facts. In making this judgment, you might want to consider the view of your existing client where you are professionally able to raise the issue with him or her. You should also take care to consider whether your firm holds any confidential information from your existing client which would be relevant to the new instructions and if so, to ensure that you comply with **rule 4 (Confidentiality and disclosure)**.

You or your firm is permitted to act with clients' consent in defined circumstances of conflict subject to suitable safeguards.

6. This reflects the fact that there may be circumstances in which, despite peripheral or potential conflict, the clients' best interests are served by you, or your firm, being able to act for two or more clients who are able to give informed consent. The circumstances in which you could act despite a conflict are set out in **3.02**.

Australia

The Law Council of Australia is similar in nature to the CBA and ABA in that regulation of Australian lawyers is either through state law societies or statutory bodies. Like the ABA and CBA, the Law Council of Australia publishes *Model Rules of Professional Conduct*. The chapter entitled "Relations with Clients" opens with the following statement of general principle:

Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law. (Emphasis added)

Rules 8.2, 9.1 and 9.2 provide that:

- 8.2 A practitioner must avoid conflict of interest between two or more clients of the practitioner or of the practitioner's firm.

- 9.1 A practitioner must not, in any dealings with a client:
 - 9.1.1 allow an interest of the practitioner or an associate of the practitioner to conflict with the client's interest;
 - 9.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client.
- 9.2 A practitioner must not accept instructions to act or continue to act for a person in any matter when the practitioner is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

While the statement of principle and the rules are rather general, they are consistent with § 121 of the *Restatement (Third) of the Law Governing Lawyers* and there is no suggestion or introduction of the Unrelated Matter Rule.

New Zealand

The New Zealand Law Society also provides coordination rather than direct regulation of lawyers. In New Zealand, there are 14 district law societies each of which are independent bodies with their own statutory authority. However, the New Zealand Law Society also publishes *Rules of Professional Conduct*.

The New Zealand Law Society Rule 1.07 provides that:

1.07 Rule

1. In the event of a conflict or likely conflict of interest among clients, a practitioner shall forthwith take the following steps:
 - (i) advise all clients involved of the areas of conflict or potential conflict;
 - (ii) advise the clients involved that they should take independent advice, and arrange such advice if required;
 - (iii) decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved.
2. Once a situation of the type described in paragraph 1.07(1) (iii) arises, it is not acceptable for practitioners in the same firm to continue to act for more than one client in a transaction, even though a notional barrier known as a Chinese Wall may be or may have been constructed. Such a device does not overcome a conflict situation.

Commentary

- (1) Practitioners are referred for further guidance to *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA) and *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC).
- (2) In taking the steps under paragraph 1(i) of this rule practitioners should note the duties under Rule 1.08 and under the Privacy Act 1993.
- (3) Practitioners are referred to *Re A; High Court Auckland*, AP59 – SW01; 19.12.01; Fisher, Williams, Harrison JJ, in which the full court held (at paragraph 43) that a conflict of interest arises in any situation where the interests of the two clients become opposed, and that the risk of disclosure is an immaterial factor.

The *New Zealand Rules of Professional Conduct* do not include the Unrelated Matter Rule.

The need for clear and uniform rules throughout Canada

Our review of the Canadian and Commonwealth rules of professional conduct clearly indicates that the Unrelated Matter Rule was not found in these rules before *Neil*. The rules are consistent with the Substantial Risk Principle. Generally, the Unrelated Matter Rule has not been added to these rules despite *Neil*.

It is noteworthy that the rules of professional conduct across Canada try to say essentially the same thing differently. The Task Force strongly supports greater uniformity and clarity in this well-established area of professional regulation. Material difference and complexity at the provincial level are unnecessary and counter-productive. Clients, lawyers and the public are all best served by clear and uniform rules that are easily and well understood by all concerned.

The desirability of greater uniformity and clarity is reinforced by recent changes⁹⁸ permitting substantially increased lawyer mobility between Canadian jurisdictions. The fact that lawyers increasingly practise in two or more Canadian jurisdictions argues forcefully for more consistent rules of professional conduct.

⁹⁸ As of November 3, 2006 nine (9) jurisdictions within Canada (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland & Labrador) had fully implemented the National Mobility Agreement (NMA). The Northwest Territories, Nunavut and Yukon and the 10 provinces have signed a Territorial Mobility Agreement. The Barreau du Quebec has signed the NMA, but has not yet implemented it.

PART 2: Former Clients

Duty of confidentiality owed to a former client

When there is no longer a relationship to be protected and when the fiduciary's undertaking is completed, one might reasonably expect that fiduciary obligations would also come to an end.

As Lord Millett stated in *Bolkiah v. KPMG*:⁹⁹

The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

While Lord Millett holds that the fiduciary relationship comes to an end, he also states that the duty to preserve confidentiality of information survives. No one doubts a lawyer's duty of confidentiality survives after completion of the retainer. One could view this duty as arising from the law of confidential information¹⁰⁰ rather than being a surviving fiduciary duty. This approach has some attraction as it least interferes with the principle that fiduciary duties end when the retainer ends. However, it seems disingenuous to suggest that the duty of confidentiality is a fiduciary duty during the retainer but not thereafter. Such a suggestion also diminishes the significance of a lawyer's duty of confidentiality, and the remedies available, by treating this duty as being no different than the duty of confidence which protects ordinary confidential information.

Other duties owed to a former client

In *Strother*, the majority reasons stated that *MacDonald Estate* dealt with the issue of loyalty. This statement supports the conclusion that the surviving duty of confidentiality is a surviving fiduciary duty. The majority reasons also signalled that the nature and scope of other surviving fiduciary duties is a matter for subsequent examination by the Supreme Court of Canada in an appropriate case:

⁹⁹ *Bolkiah*, *supra* note 59.

¹⁰⁰ The decision in *Lac Minerals Ltd v. International Corona Resources Ltd*, [1989] 2 S.C.R. 574 makes clear that the law of confidence and law of fiduciaries regarding confidential information have much in common. However, there are important differences. As Justice La Forest noted "a claim for breach of confidence will only be made out, however, when it is shown that the confidant has misused the information to the detriment of the confidant. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted" and "another difference is that breach of confidence also has a jurisdictional base at law, whereas fiduciary obligations are a solely equitable creation. Though this is becoming of less importance, these differences of origin give to the claim for breach of confidence a greater remedial flexibility than is available in fiduciary law. Remedies available from both law and equity are available in the former case, equitable remedies alone are available in the latter." There can be no doubt that a client need not show detriment in order to obtain a remedy against a lawyer regarding confidential information. It would be surprising to learn that the full armament of equitable remedies was not available to such a client. This must be a surviving fiduciary duty rather than a mere duty of confidence.

However, this is not a case where a *former* client alleges breach of the duty of loyalty, as in *Stewart v. Canadian Broadcasting Corp.*, (1997), 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)); *Credit Suisse First Boston Canada Inc., Re*, (2004), 2 B.L.R. (4th) 109 (O.S.C.); and *Chiefs of Ontario v. Ontario*, (2003), 63 O.R. (3d) 335 (S.C.J.). The issue of loyalty to a former client was dealt with in *MacDonald Estate v. Martin* (not Neil), and raises complex issues not relevant here.¹⁰¹ (Emphasis added)

If Lord Millett in *Bolkiah* had simply held that the fiduciary obligations of zealous representation and avoidance of conflicting interests end with the retainer then there would be no conceptual difficulty. When the lawyer completes the retainer, by definition the lawyer has no obligation to further perform the retainer. A lawyer's duty of zealous representation and duty to avoid conflicting interests must end when the lawyer has no further obligation of representation and no remaining duty of performance with which another duty, or personal interest, might conflict.

However, Lord Millett clearly says that the only surviving duty is the duty to preserve confidentiality. In Canada and Australia,¹⁰² this is not so clear.¹⁰³ While neither the Supreme Court of Canada nor the High Court of Australia has resolved the question, some Canadian and Australian courts have found that there is more that survives than a duty to preserve confidentiality of information.

The duty not to undermine prior work

In *Re Regina and Speid*¹⁰⁴, Justice Dubin (as he then was) wrote for the Ontario Court of Appeal that:

A client has a right to professional services. Miss Nugent had that right as well as Mr. Speid. It was fundamental to her rights that her solicitor respect her confidences and that he exhibit loyalty to her. A client has every right to be confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed.

Justice Dubin did not find that the surviving obligation was merely the preservation of confidential information, but rather he found a surviving fiduciary duty not to take a subsequent adversarial position with respect to the same subject-matter.

The British Columbia Court of Appeal recently examined the scope of surviving fiduciary duties in *Greater Vancouver Regional District v. Melville*. Justice Levine wrote:

¹⁰¹ *Strother*, *supra* note 3 at para. 53.

¹⁰² The recent legal discussion in Australia provides a valuable resource to Canadian lawyers concerned about the law of lawyers and the law of fiduciaries in that context. *Spincode*, *supra* note 75, provides consideration of the duty of loyalty to a former client. The law of Australia after *Spincode* is considered by Mark Bender in his paper "Taking up the Cudgels: When may a lawyer act against a former client?", Murdoch University Electronic Journal of Law, Vol 13, No 2, November 2006 and by Sandro Goubran in his paper "Conflicts of Duty: The Perennial Lawyers' Tale — A Comparative Study of the Law in England and Australia", *supra* note 63.

¹⁰³ For a critical note on *Strother* on this point, see James Edelman, "Unanticipated fiduciary liability" (2008) 124 *Law Quarterly Review* p. 21-25.

¹⁰⁴ (1984), 8 C.C.C. (3d) 18 (O.C.A.) at p. 22.

It is well-settled that a lawyer may owe a former client a continuing fiduciary duty of loyalty. In the three cases cited in *Strother*, lawyers whose retainers for former clients had ended when they undertook to act contrary to those clients' interests were found (in *Stewart*) liable for damages for breach of the fiduciary duty of loyalty, and (in *Credit Suisse* and *Chiefs of Ontario*) were disqualified from continuing to act for the new client.

What is important for the analysis in this case is that all of the decisions were fact-specific, and turned not only on the use of confidential information received during the prior retainer, but on the particular positions taken by the lawyers in their subsequent actions. Some of the language used in these cases is general enough to support the appellants' position that when a lawyer acts against a former client on the very issue for which the solicitor was retained by that client, the confidence of the public in the administration of justice and the integrity of the legal profession cannot be maintained. On closer reading, however, it is apparent that both the extent of the continuing fiduciary duty of loyalty, and whether it has been breached, turn on the particular facts of the case, in which one of the factors considered is the use of relevant confidential information received from the former client.¹⁰⁵

Most recently, the Nova Scotia Court of Appeal also concluded in *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd*¹⁰⁶ that a duty of loyalty was owed to a former client even where no confidential information was involved. In reasons which closely reviewed the Canadian jurisprudence and authorities, Justice Cromwell concluded for the Court that:

In my view, lawyers have a duty not to act against a former client in the same or a related matter and this duty may be enforced by the courts. Although in general, the focus of the analysis will be on whether, by acting, the lawyer is placing at risk the former client's confidential information, the duty is not limited to situations in which that is the case. The chambers judge was right not to limit the duty in that way.¹⁰⁷

and that:

... the approach to the question of whether two matters are related is entirely different in a *MacDonald Estate* situation than it is in the case of an alleged disqualifying conflict of interest where confidential information is not at risk. The purpose of assessing the relationship between the two retainers in *MacDonald Estate* is to determine whether an inference should be drawn that confidential information obtained in the course of the first retainer is relevant to the second. **When, as here, confidential information is not at risk, the relationship between the two retainers is considered in order to identify whether the second retainer involves the lawyer attacking the legal work done during the first retainer or amounts, in effect, to the lawyer changing sides on a matter central to the earlier retainer. The concept of relatedness for this purpose is much narrower and has an entirely different focus than the concept as applied in the *MacDonald Estate* analysis. (Emphasis added)**

I should add that in this case, no argument was addressed to how far the duty goes beyond the lawyers who actually acted for the former client.¹⁰⁸

¹⁰⁵ *Greater Vancouver*, *supra* note 92 at para. 17-18.

¹⁰⁶ 2008 NSCA 22 (CanLII).

¹⁰⁷ *Ibid.* at para. 49.

¹⁰⁸ *Ibid.* at para. 55-56.

It will be important to note that Justice Cromwell uses the word “related” in two different senses, depending on whether confidential information is involved or not. Where confidential information is not involved, the duty of loyalty owed to a former client is not to attack the legal work done in the first retainer or, in effect, to change sides on a matter central to the earlier retainer. This is a narrowed meaning of “related.” Justice Cromwell also seems to have left open the question of whether this duty is owed by all members of a firm or just the lawyers involved in the prior mandate.

In the face of these appellate authorities as well as *Stewart v. Canadian Broadcasting Corporation*,¹⁰⁹ *Re Credit Suisse*¹¹⁰ and *Chiefs of Ontario v. Ontario*,¹¹¹ it appears that Canadian and English law currently differ on this point. Subject to future Supreme Court of Canada thinking, it appears reasonable to conclude under Canadian law that the duty to preserve confidences is not the only fiduciary duty to survive termination of the retainer.

At the risk of undue repetition, there is no reason to conclude that the duty of zealous representation and the duty to avoid conflicting interests survive the end of the retainer as their function is then spent. However, the Canadian cases clearly support the proposition that there is a residual fiduciary duty not to act against a former client on the very subject matter of the completed retainer. Said simply, there may be a surviving duty not to subsequently seek to undo, or undercut, that which the fiduciary undertook to do, or attempt to do, pursuant to the retainer. This fiduciary duty cannot be explained as being protective of a spent duty of performance. It can however be explained as being protective of the original relationship and of integrity of the administration of justice. Implicit in the existence of this residual duty is concern that the original lawyer-client relationship would be adversely affected if the client had to worry that the lawyer would be subsequently free to seek to undo that which the lawyer had been retained to do. Public confidence in the administration of justice would thereby be harmed.

The duty not to take improper benefit from the relationship

Two other surviving fiduciary duties may also exist after completion of the retainer, although the authorities are less clear.

The first is the obligation of a fiduciary not to improperly benefit from the fiduciary relationship. This obligation is different from the obligation to avoid conflicting personal interests. The *Stewart* case may be partially explained on the basis of this surviving duty. In *Stewart*, the Court was concerned that the lawyer sought to use the fact of his prior retainer as a business development tool without consent. Justice MacDonald found that the lawyer had breached his fiduciary duty in that:

¹⁰⁹ (1997), 150 D.L.R. (4th) 24 at para. 387 [*Stewart*].

¹¹⁰ *Re Credit Suisse*, *supra* note 65 at para. 136: “The Hearing Panel did not find that Stikeman Elliott was prevented from acting against RS in general. Rather, it found that Stikeman Elliott could not, in acting for CSFB, attack the very legal advice it had provided to the TSE and, by extension, RS, in the Retainer. We agree with the conclusions of the Hearing Panel in this regard.”

¹¹¹ (2003), 63 O.R. (3d) 335 [*Chiefs of Ontario*] at para. 146: “There are some things that a law firm simply cannot do. A law firm cannot act for a client under a million-dollar, five-year confidential retainer as general counsel and then, without explicit consent, attack the client for alleged breach of fiduciary duty, deception and bribe-taking in respect of closely related matters.”

He favoured his financial interests over the plaintiff's interests as alleged in sub-paragraph 25(h) of the statement of claim.

He put his own self-promotion before the plaintiff's interests as alleged in sub-paragraph 25(i) of the statement of claim.

By the way he publicized his former client and his former client's case in 1991, he undercut the benefits and protections he had provided as counsel, and therefore, increased the adverse public effect on the plaintiff of his crime, trial and sentencing, which falls within sub-paragraph 25(j) of the statement of claim.¹¹²

The last finding is previously described in this chapter as falling within a surviving duty not to undo, or undercut, that which the lawyer was retained to do in the original retainer. The first and second findings must be seen as breaches of the fiduciary duty not to take improper benefit from the client despite the conclusion of the retainer. While these findings are expressed in terms of conflicting personal interest, this cannot be a proper basis for a surviving duty as the duty to avoid conflicts supports the duty of performance which ends with the retainer. The strength of *Stewart* as authority for a surviving duty not to take improper benefit may be diminished by the existence of the third finding noted above upon which the result in *Stewart* could be entirely explained. A surviving duty not to take improper benefit in this case might also be explained by continued possession of confidential information and the apparent use thereof by the lawyer.

In fact, such a surviving duty not to take improper benefit may underpin *Can. Aero v. O'Malley*.¹¹³ Justice Laskin, as he then was, concluded:

In holding that on the facts found by the trial judge, **there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations** I am not to be taken as laying down any rule of liability to be read as if it were a statute. **The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.** (Emphasis added)

A narrow view of *Can. Aero* is that a fiduciary cannot resign in order to take an improper benefit. This view would focus on the disloyalty of the resignation. However, a broader view would suggest that the result would be no different whether the resignation was *bona fide* for other reasons or a breach of loyalty. The scope of a residual duty not to take improper benefit is not entirely clear as lawyers, like senior executives, are entitled to benefit from the skill,

¹¹² *Stewart*, *supra* note 109 at para. 387.

¹¹³ [1974] S.C.R. 592. [*Can. Aero*].

expertise and general reputation developed through their retainers. A residual duty not to take improper benefit may be tied to the possession of confidential information. This would be consistent with the obligation of a fiduciary not to take improper benefit from confidential information or other proprietary interests in their possession. If the fiduciary remains possessed of such interests after the fiduciary relationship is terminated, the surviving duty is more easily explained.

The duty of candour

Finally, the fiduciary duty of candour is very likely a surviving fiduciary duty. Lawyers have a duty of candour with respect to matters relevant to the retainer. On first impression, one might conclude that the completion of the retainer brings the end of this duty. However, this cannot be correct.

The CBA Code of Professional Conduct provides that “the lawyer must be both honest and candid when advising clients.” The commentary states that:

The duty to give honest and candid advice requires the lawyer to inform the client promptly of the facts, but without admitting liability, upon discovering that an error or omission has occurred in a matter for which the lawyer was engaged and that is or may be damaging to the client and cannot readily be rectified.

The CBA Rule is a statement of the fiduciary duty of candour and the commentary sets out an aspect of the duty of candour. No one would suggest that a lawyer’s disclosure obligation in respect of errors or omissions ends with the retainer. Where a lawyer subsequently discovers an error or omission in respect of a prior retainer, the surviving duty of candour clearly requires disclosure.

*Strother*¹¹⁴ provides a useful illustration of the distinction between termination of the duty of performance in the retainer and survival of the duty of candour with respect to matters relevant to the retainer.

The trial judgment, as stated, was premised on the finding that Monarch did not specifically ask about the possible revival of TAPSF-type shelters in 1998. I agree with the trial judge that *generally* a lawyer does not have a duty to alter a past opinion in light of a subsequent change of circumstances. This was discussed by W. M. Estey in *Legal Opinions in Commercial Transactions* (2nd ed. 1997), at p. 519:

Thus, where an opinion was correct on the date on which it was given but subsequently becomes erroneous due to a change in the law or in the facts upon which the opinion was based, the opining lawyer is not liable for failing to warn the addressee, at the later date, of the effects resulting from the changed circumstances.

¹¹⁴ *Strother*, *supra* note 3 at para. 45.

The rationale behind the general rule is that a legal opinion speaks as of its date, and that being the case, a lawyer is only obligated to exercise due care in rendering an opinion based on the legal and factual circumstances existing at that time. A client cannot assume that the lawyer's opinion has an indefinite shelf life.

Where an opinion is given pursuant to a retainer and the opinion is correct, there is generally no obligation to keep the opinion 'up to date' as circumstances change. To require otherwise would be to extend the duty of performance beyond the termination of the retainer. In contradistinction, where a lawyer subsequently discovers that an opinion was not correct when given then there is undoubtedly an obligation to disclose this fact to the client. This can only be explained by a surviving duty of candour with respect to matters relevant to the [completed] retainer.

Whether the duty of candour is invoked with respect to an error or omission in performance of the retainer, the existence of a conflict of interest with respect to performance of the retainer or anything else that is relevant to the retainer, it cannot be said that the duty of candour ends with the retainer.

Summary with respect to duties owed former clients

The point of the foregoing analysis is to challenge the conclusion of Lord Millett, at least as a matter of Canadian law, that the only surviving fiduciary duty is the preservation of confidential information. However, the intent of this chapter is not to fully develop the nature and scope of a surviving fiduciary duty of candour and duty not to take improper benefit. It is the apparent existence of these duties that is of significance in helping to conceptually support the existence of a surviving duty not to undo or undercut the benefit provided under the spent retainer.

It is this latter concept that is described as the duty of loyalty owed to a former client. It must be emphasized that this duty is fundamentally different than, and much narrower than, the duty of loyalty owed to a current client.¹¹⁵ The termination of the duty of performance with the termination of the retainer explains the difference. Absent a duty of performance, there can be no duty of zealous representation, no duty of undivided loyalty, and no duty to avoid conflicts of interest. There can, however, be a duty not to subsequently undo or undercut that which the fiduciary was retained to do.

The extent of, and justification for, a duty of loyalty owed to a former client will no doubt continue to develop. However, it appears safe to conclude that where a lawyer undertakes a matter for a client, the lawyer may not thereafter seek to undo or undercut the work done for the client in that matter. Perhaps a simple rule to support this principle is that a lawyer may not act against the former client in respect of the **same or closely related matters**¹¹⁶ because

¹¹⁵ It would be helpful, in the avoidance of confusion, if different terms were used for the different duties of loyalty owed to current clients and to former clients. Perhaps the surviving duty owed to a former client might be referred to as the "duty not to undercut prior representation" or the "surviving duty of loyalty" rather than simply as a duty of loyalty.

¹¹⁶ Justice Brooking in *Spincode*, *supra* note 64, in Australia put it as follows "... I think it must be accepted that Australian law has diverged from that of England and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client. That danger can and usually will warrant intervention, but it is not the only ground. ... it may be said to be a breach of duty for a solicitor to take up the cudgels against a former client in the same or a closely related matter."

of the surviving duty of loyalty while a lawyer cannot act against the former client in **related** matters because of the surviving duty of confidentiality. That said, we cannot lose sight of principle through statement of rules.

The duty of loyalty owed to a former client will rarely arise separate and apart from the duty of confidentiality because relevant confidential information usually exists where a lawyer acts against a former client in a related matter and especially in the same or a closely related matter. To guard against those rare cases where this is not so, lawyers must understand that they must go beyond the issue of relevant confidential information in determining whether they may act against former clients. The foregoing analysis has been principally focused on lawyers in private practice. While there is no apparent reason to expect that in-house counsel owe lesser duties to their former employer clients, it is quite possible that in-house counsel owe more complex duties to their former employer clients, as in-house counsel are both lawyers with a client and employees with an employer. Indeed, an in-house counsel is quite commonly a senior corporate officer.

This is not the place to consider the duties of departing employees and departing senior officers. However, it is noteworthy that a senior in-house counsel may assume fiduciary duties and duties of confidence by virtue of employment which are similar to the duties arising from the lawyer-client relationship. These duties may also be supplemented by express non-competition and confidentiality agreements. The information known to in-house counsel by virtue of their employment is obviously deeper and richer than the information known to external counsel by virtue of the lawyer-client relationship. Of course, in-house counsel must be entitled to change jobs, not being indentured for life, and inevitably competitors will be attractive as potential employers. Careful and subtle thought is obviously required to delineate what a departed senior in-house counsel may properly do for, and disclose to, a new employer.

Concerns about the impact of the Unrelated Matter Rule

The fiduciary duty prohibiting conflicts of duty and interest and conflicts of duty and duty, absent proper consent, is well established and of long standing. The Task Force reaffirms the importance of this principle, which directly protects client representation. The Task Force also supports the principle that a lawyer should not impair, or undo, the work previously undertaken for a client. This is a focused restriction which also protects client representation. However, the Task Force has substantial concern with the Unrelated Matter Rule as it appears to be currently understood. This will be the subject of the balance of this chapter.

Restrictions on access to counsel

Ironically, Canada is in some respects a large and in other respects a small country. Because Canada is so diverse and because lawyers practise in quite varied circumstances, it is difficult to usefully generalize about current practice. The practice in large urban firms is quite different than the practice in small urban firms, which is also quite different than the practice in smaller and remote centres.

Where there are many lawyers able to serve many clients, the conflicts rules create no great burden on lawyers or clients. This is because restrictions on choice are least burdensome where equally good alternate choices are easily accessible. For many lawyers and clients, this is the current situation in large urban centres, where clients are served by sole practitioners and smaller firms. This is not to say that harm is not suffered where a client is unnecessarily required to retain another lawyer who is not familiar with the client and vice-versa.

Current conflicts rules have the greatest impact when the number of clients or lawyers is relatively restricted. The Task Force was struck by the situation faced by lawyers and clients in smaller communities, particularly in the North and in relatively remote smaller towns.

The Task Force was told that, in smaller and relatively remote communities, lawyers must routinely act for and against the same individuals, businesses and governments. There are simply not enough clients to sustain legal practice otherwise. Equally, there are not enough lawyers to serve these communities. Inherently, where the 'supply' of clients and lawyers is limited, conflicts are of increased practical concern especially where the community is relatively remote such that accessing lawyers from elsewhere is both problematic and unduly expensive.

The Task Force was forcefully advised that, in the North, government work plays an important role in the economics of legal practice. Said simply, many lawyers indicated that, absent government work, they could not remain in the North. At the same time, government plays a particularly important role in the North. Much client work is in respect of the government. For Northern lawyers and clients, the ordinary difficulty arising from being in a small remote community is compounded by the significance of the government both as a client and as an adverse party.

While it may not be intuitively obvious, the experience of large firms and large clients is more similar to the experience in more remote communities than to the experience of smaller firms in major centres. It is in this respect that Canada is a small country. There are a relatively small number of large law firms in Canada serving a relatively small number of major clients. The Canadian reality is in stark contrast to the U.S., where the AmLaw 200 serves the S&P 500. In both countries, the legal complexity of issues facing major businesses has driven consolidation of law firms so that there are fewer, but larger, law firms that are capable of providing the services required by these clients. In Canada, however, the relative number of firms is small.

This is also true for some of the largest clients irrespective of law firm size. The Task Force particularly noted the importance of government as a client and as an adverse party. There are few law firms that do not serve the government as a client. There are few law firms that do not have the government as an adverse party at the same time. Representatives of government lawyers expressed concern to the Task Force against over-inclusive conflicts rules which could dramatically restrict government access to external counsel. If the strict view of the Unrelated Matter Rule were correct, each and every client with a matter adverse to the government would effectively have a veto in respect of subsequent government retainers.¹¹⁷

The same small-country paradigm applies to specialized expertise. For example, there are relatively few competition lawyers in Canada and relatively few lawyers able to assist on major insolvencies and restructurings. The relatively small number of specialists in Canada, compared to the U.S., makes the web of conflicts of real practical concern. In many major transactions, it is not possible for clients to obtain counsel who do not have an adverse party as a current client in some other matter.

The realities of restricted supply of legal services were acknowledged in *Strother*¹¹⁸ by the majority as follows:

There is no reason in general why a tax practitioner such as Strother should not take on different clients syndicating tax schemes to the same investor community, notwithstanding the restricted market for these services in a business in which Sentinel and Monarch competed. In fact, in the case of some areas of high specialization, or in small communities or other situations of scarce legal resources, clients may be taken to have consented to a degree of overlapping representation inherent in such law practices, depending on the evidence.

The minority reasons in *Strother*¹¹⁹ were to similar effect in the following passage:

Modern commerce, taxation and regulation flow together in complex, sometimes murky streams. To navigate these waters, clients require specialized lawyers. The more specialized the field, the more likely that the lawyer will act for clients who are in competition with each other. Complicating this reality is the fact that particular types of economic activity may be concentrated in particular regions. The obligation of the legal profession is to provide the required services.

It is for these reasons that the Task Force is concerned about overbroad conflicts rules which go further than is required to ensure that client representation is not put at risk.

¹¹⁷ While it is difficult to be certain, the Task Force believes that clients in pre-existing but ongoing adverse retainers are not commonly approached for consent when the adverse party seeks to subsequently retain the same lawyer on a different matter. Lawyers do not appear to recognize that the order in which the retainers arise is irrelevant.

¹¹⁸ *Strother*, *supra* note 3 at para. 55.

¹¹⁹ *Ibid.* at para. 137.

Restrictions on client choice

While the majority in *Strother* put it in terms of implied consent, which may often be the case, members of the Task Force are very much aware of the difficulties facing lawyers and their intended clients where consent is not available for tactical or other reasons where client representation is not at risk.¹²⁰ The unintended consequence of overbroad conflicts rules is found in unnecessary restriction on client choice and in reduced competition with attendant anti-competitive effects.¹²¹

Resource requirements

There can also be no doubt that very substantial time, energy and expense has been expended by Canadian lawyers and law firms attempting to comply with the Unrelated Matter Rule.

In different ways, risk management has become increasingly important in mid-size and larger firms. Many larger firms now have formally appointed internal general counsel or risk management counsel.¹²² Generally, where a formal role has not been established, individual partners have informally adopted these responsibilities. As firms have grown and become more complex and as the legal and ethical shoals have become more difficult to navigate, specialized expertise and experience have become necessary to properly manage our professional responsibilities. This trend may be viewed as an unhappy cost of increased law firm size and complexity, but may also be seen as a positive development which enhances professionalism in a highly competitive environment.¹²³

As a result, and because of collaborative efforts between general counsel and risk management counsel, it can be said with confidence that these firms are applying the Unrelated Matter Rule in practice. This is causing practical problems because (i) it is sometimes not possible to obtain consent because of issues of confidentiality, (ii) there is no practical recourse when consent is declined in situations where there is no actual risk of prejudice to representation, (iii) it is clear that consent is often denied without real justification, and (iv) many lawyers have difficulty identifying this issue and understanding that consent is required because, particularly outside of litigation, the lack of any required relationship between matters causes lawyers not to easily see, or contemplate, the need for consent.

¹²⁰ Indeed, the hope implicitly expressed that governments and other major entities would exercise restraint so that implied consent could soften the rigour of the Unrelated Matter Rule has often turned out to be a false hope. One recent RFP for a provincial Crown corporation required an undertaking that the successful law firm would not act in any (related or unrelated) litigious claim against the provincial government without prior written consent of the Crown corporation in its sole and absolute discretion. Another government sought to require that no law firm retained by that government could bring a constitutional challenge to any of its legislation in any case, whether related or not. Law firms are routinely faced with the fact of express statements of “non-consent” from major entities which, of course, must trump implied consent.

¹²¹ Competition Bureau of Canada report “Self-regulated professions - Balancing competition and regulation” released December 2007: “The Bureau found numerous instances of regulation that may restrict competition more than necessary. Competition concerns arise when regulation exceeds legitimate public policy goals and limits competition, depriving consumers of the benefits of a free and open marketplace.”

¹²² The trend in Canada parallels the experience in the United States. In 2006, an Altman Weil survey of AmLaw 200 law firms reported that 85% had a designated internal general counsel. And 89% were partners. In 2005, Altman and Weil commented that “overall, we expect to see virtually all major firms with designated general counsel in the near future,” and “more mid-sized firms are moving in this direction as well, either in-house or via engagement of a lawyer in another firm.”

¹²³ Chambliss, Elizabeth, “The Professionalization of Law Firm In-House Counsel” (2006) 84 North Carolina Law Review 1515.

Inconsistent interpretations

At the same time, the Task Force has heard from corporate counsel that law firms are inconsistent in their undertaking, or perhaps application, of the conflicts rules and that some lawyers take on matters which push the bounds of conflicts rules beyond what some in-house counsel consider appropriate.

Where there is a broad relationship between a corporate client and a law firm, these issues are of little practical difficulty. Law firms and corporate clients come to understand, or expressly agree on, what adverse retainers, if any, are acceptable and which are not. While conflicts law and codes of professional conduct generally provide “default” rules, corporate clients and law firms commonly come to agreement as to both legal and ‘business’ conflicts thereby either expanding or narrowing the default rules as applied to their particular relationship. The practical importance of thoughtful dialogue, and recognition of the legitimate interests on both sides, is worth highlighting. Corporate clients and law firms may work out mutually acceptable arrangements or part company over time.

Where more practical problems arise is in the context of narrower or sporadic relationships between firms and clients. An unlimited Unrelated Matter Rule is a practical problem.

While it is far more difficult to generalize regarding small firm practice and relationships between lawyers and individuals rather than larger businesses, this is not to say that the same problems do not arise. The Task Force has come to clearly understand that in smaller communities, it is simply impossible for clients to obtain legal services where the adverse party does not also use the same lawyer at least from time to time. As well, the opportunity for tactical objection and costly dispute before the courts appears, unfortunately, to be most apparent where those costs cannot be afforded i.e. in family litigation. The Task Force has observed that the number of motions to remove counsel for alleged conflict is particularly significant in family law cases where, unfortunately, opportunities for combat appear all too attractive.

Unintended consequences

As previously observed, legal and ethical rules must be firmly grounded in principle; over-broad rules are detrimental to an effective and efficient legal system. Accordingly, a principled approach which focuses on the material risk of impairment of the duty of performance is preferable to an over-broad rule with its attendant costs and limitations on the choice of counsel. Where performance of the retainer is not at risk, there is no justification for the expense and loss of freedom of choice that arises from a rule which extends beyond its principled foundation.

Another risk with the rule in *Neil*, as generally understood, is that it provides false comfort and may actually have an unintended negative impact. Since *Neil*, lawyers have mostly followed a rules-based approach which obscures the underlying principles that require consideration of the risk of material impairment of representation. A rote review of “direct adversity” and “immediate interests” tends to divert attention from the core principles. Lawyers may look only for the bright line and not examine the risk of harm to representation¹²⁴ with the result that the current rules-based approach will sometimes lead to a failure to protect representation.

In *Neil*, reasons of the Court suggested that the bright line rule should not cause practical problems because reasonable clients will consent and the courts can deal with unreasonable or tactical refusals. With respect, this is a “court-centric” approach. In many circumstances, consent cannot be sought for reasons of confidentiality. Where confidentiality is an issue, neither consent nor judicial approval is of assistance. Also, the overwhelming majority of conflicts cases seen by the courts are in the litigation context where the courts decide whether or not to remove solicitors of record. In practice, it is non-contentious matters that occupy most of the work of lawyers dealing with conflicts. Yes, the courts see and understand the malignant conflicts cases, but that is only a small part of the picture. The reality for the profession is very different. Where a client unreasonably declines consent or where consent cannot be sought for reasons of confidentiality, the fact is that lawyers and their prospective clients simply cannot and will not go to court for assistance. The costs and delays are prohibitive. It is a rare situation in which a client is willing and able to wait for litigation to determine whether a lawyer or a law firm can be retained.

An unrestricted version of the Unrelated Matter Rule prohibits many client retainers even though there is no genuine risk of material adverse effect on representation. Furthermore, the narrowing of the bright line rule to “direct adversity to the immediate interests” does not completely protect against “substantial risk” of “material and adverse” effect which may arise elsewhere than in the direct adversity/immediate interest paradigm.

The responses to the Task Force consultation indicated strong support for the preliminary view of the Task Force that:

In appropriate circumstances, a lawyer or law firm should be able to act on an unrelated matter which involves another current client, without this necessarily being regarded as a legal conflict of interest or breach of duty. Of course, client confidentiality must always be safeguarded and the lawyer or law firm must remain able to represent zealously the current client’s interests.

Many respondents answered that so long as a client’s confidential information was protected, it should not necessarily be considered a conflict to work for another client on an unrelated matter that is adverse to the client. Factors that respondents considered relevant to the determination of a conflict included the type of legal work done for the client (advice on

¹²⁴ ABA Model Rule 1.7 includes both a version of the bright line rule as proposed in *Neil* (i.e. Model 1.7(a)(1)) as well as the traditional “conflict of duty and duty rule” (i.e. Rule 1.7(a)(2)). The reasons in *Neil* tend to obscure that the traditional “conflict of duty and duty rule” is not replaced by the bright line rule. Duties of performance may conflict where there is no direct adversity to the immediate interests of a current client.

a straightforward contract v. on an elaborate business deal); the sophistication of the client (a small-business owner v. a multi-national with a large in-house counsel department), and the client's expectations (a long-term relationship v. a limited retainer for a specific purpose).

Among the small number of respondents who expressed hesitation with the approach, the most frequent concern related to situations where the adverse retainer was unrelated, yet the lawyer had a relevant understanding about the current client's character and personality (or policies, procedures and business practices in the case of a corporate or governmental client) which could be used to the disadvantage of the current client in the unrelated mandate. A few respondents thought that an adverse retainer might not be appropriate when a matter is contentious and being litigated, when a client is unsophisticated, or when the same lawyer acts for both clients. There was less concern should a different lawyer in the same firm act against the current client.

Some respondents noted that larger clients who used a number of different lawyers or law firms should not be entitled to expect that the lawyers would not act against them in unrelated matters.

Having considered the concerns expressed, the Task Force has concluded that they can be sufficiently addressed when a client's confidential information is properly protected and when there is no substantial risk that the lawyer's representation of a client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

PART 3: Summary

Immutable principles

Canadian law and rules of professional conduct have long recognized that “conflicts of duty and duty” and “conflicts of duty and interest” are impermissible conflicting interests absent proper client consent.

The Task Force does not support any diminution of the “conflict of duty and duty” and “conflict of duty and interest” principles. On the contrary, the Task Force considers it to be fundamental to clients, to the public interest, and to the profession, that lawyers not allow their duties to others or their own personal interests to conflict with their duty to their clients absent proper consent.

Substantial risk of material and adverse effect on representation

In *Neil* and in *Strother*, the Supreme Court of Canada adopted the language of § 121 of the *Restatement* as the standard for establishing when conflicting interests arise:

A substantial risk of material and adverse effect on representation.

The Task Force recommends that the CBA adopt the “substantial risk of material and adverse affect on representation” standard in the rules of professional conduct.

For the same reasons, the Task Force also recommends that the CBA consistently use the phrase “conflicting interests” to include not only “conflicts of duty and duty” and “conflicts of duty and interest”, but also “conflicts of duty with relationship.” This third type of conflicting interest would arise in the context of an unrelated retainer where there is a real risk that the lawyer’s relationship with his or her client would be materially and adversely affected by the unrelated retainer against that client.

Conflicting interests without consent: a bar to acting

Adopting the principle cited in *Neil* and *Strother*, the professional conduct rule would prohibit “conflicting interests” absent consent and state that a “conflicting interest” is one that creates a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”

The rule would recognize that client representation would be materially and adversely affected when the duty owed to the client conflicts with the duty owed to another or with a lawyer’s personal interests. Duties almost certainly would conflict when a lawyer acts both for and against a client in related matters, and client representation might be adversely affected where a lawyer acts against a client in an unrelated matter.¹²⁵

Assessing material and adverse effect on representation

Representation might, for example, be adversely affected when there is the potential for cross-examination of, or otherwise challenging, one’s own client in the adverse matter or by a sense of betrayal on the part of the client by virtue of the adverse matter. The revised CBA Code of Professional Conduct would allow a lawyer to act against a current client in an unrelated matter, but only where there is no substantial risk of material and adverse affect on client representation.

Of course, lawyers must use caution when assessing conflict of duty with relationship, and must consider the issue of materiality from the client’s perspective. Central to the consideration is the possible reaction of a reasonable client to the adverse retainer and how that reaction would affect representation. This consideration would be necessarily informed by the basis upon which the lawyer was retained. Understandings¹²⁶ reached between lawyer and client, best recorded in engagement letters, would be important factors to consider.

¹²⁵ i.e. where there is no conflicting duty of performance.

¹²⁶ A client might well indicate that there were some adverse retainers which would not be acceptable or that no adverse retainers could be tolerated. A lawyer who accepted a retainer on this basis would be bound accordingly. On the other hand, where a client retained a lawyer on the basis that unrelated adverse matters could be accepted, that too would be relevant.

When faced with applications to disqualify counsel for breach of duty with relationship, courts will have to go beyond simply accepting the client’s evidence of his or her reaction. A client may seek tactical advantage by exaggerating feelings of dismay or betrayal. As they do in other situations, the courts will have to rely on an objective, rather than a subjective, standard, considering the reaction of a reasonable client in the circumstances.

Circumstances requiring client consent

The practical effect of this proposed approach would be that client consent would be specifically required before a lawyer could act against a current client in the same, or a related,¹²⁷ matter because of the substantial risk of material adverse effect on representation caused by conflicting duties of performance in the same or related matters.

In the case of an unrelated adverse retainer, the lawyer would be required to examine the potential for material and adverse effect on representation and to seek consent where there is a substantial risk thereof. Obviously, the nature of the two matters and the nature of the two clients will affect this analysis. Litigation may create risks that commercial transactions will not. Not all litigation bears the same risk. The potential for harm to a client relationship may be greater where the client is an individual or where the same lawyer acts in both matters rather than two lawyers in the same firm separately acting on the two separate matters.

Presence of a conflicting interest in unrelated matters

Practically, this recommendation is intended to have the following effect in so far as current client conflicts are concerned:

- Where the duties in the two retainers conflict, there is no need for further examination because there is inherently a conflicting interest.
- Where the duties in the two retainers do not conflict, there may still be a conflicting interest.

Examples of the analysis to be considered in the second situation follow:

The lawyer acts for an individual in litigation with the government. This litigation is very important to the individual. The individual retained the lawyer because the lawyer did not act for the government. During this retainer, the lawyer takes on an unrelated but very lucrative high profile case for the government. There is both a risk that the lawyer’s self-interest in the new retainer may cause the lawyer to “soft-pedal” the interests of the individual client in the litigation against the government in the existing retainer.

¹²⁷ That a matter is “related” provides sufficient circumstantial evidence that a conflicting interest exists. In the context of current clients and the duty to avoid conflicting interests, a “related matter” is one in which it can be inferred that duties of performance will likely conflict. Similarly, in the context of the duty of confidentiality, a “related matter” is one in which it can be inferred that confidential information from one matter is likely relevant to the other matter. Also, in the context of former clients and the duty of loyalty, a “related matter” is one in which it can be inferred that the lawyer would likely be required to change sides on a matter central to the earlier retainer. The use of “relationship” between matters as circumstantial evidence of three different potential problems can be confusing.

The individual may reasonably feel betrayed¹²⁸ that the lawyer has taken on a major case for the government which may adversely affect the relationship with the individual client.

In contrast, a lawyer in a large law firm might act on tax dispute for a corporate client and, during this retainer, another lawyer in the firm might act for the same government on a real estate transaction or as a Crown prosecutor in a non-tax matter. In this circumstance, the lawyers might properly conclude that there was no substantial risk of any effect of any sort at all.

A lawyer might act generally for an individual or for a business. If the lawyer were to take on an unrelated but highly significant action against the existing client during this retainer, the relationship with the existing client might well be impaired with adverse effect on the existing retainers and there could be reason to be concerned that the lawyer's intimate knowledge of the existing client might be misused, even unconsciously, in the new litigation.

In contrast, the same action might be taken against a multinational business for which the lawyer acted in a specialized niche area in an unrelated business line while this large client used other lawyers generally. It might reasonably be concluded that there was no substantial risk of material and adverse effect on either retainer.

A lawyer might be asked by a lender to foreclose on the home of an individual who was a current client. The effect on the lawyer-client relationship might well be very significant. In contrast, a lawyer might be asked to foreclose on commercial property owned by a corporate client who had elected to abandon the property acquired with limited recourse financing. Again, it might reasonably be concluded that there was no risk of any adverse effect at all.

A lawyer might have acted for spouses for years on various intimate legal matters. At the time of their separation, the lawyer might be acting for both spouses regarding changes to their wills. Were the lawyer to act for one spouse in a difficult custody dispute while continuing to advise both on their wills, it is easy to see concerns arising about potential misuse of insights about the adverse spouse, the effect of possible cross-examination on the remaining lawyer-client relationship, and the potential that the continuing wills retainer might impair effective representation of the spouse in the custody dispute.

In contrast, where a lawyer acts for both spouses on completion of the sale of a matrimonial home while negotiating a separation agreement for one spouse, there may be no risk of material and adverse effect.

The point is that, where duties of performance do not conflict, a genuine analysis of the risk of material and adverse effect on representation in either retainer requires consideration of the nature of the two retainers, the nature of the clients involved, the significance of the retainers

¹²⁸ On the other hand, if the individual knew at the outset that the lawyer regularly acted for and against the government, there might well be no genuine risk of harm to the relationship by virtue of yet another government retainer.

to the lawyer and whether the same lawyer acts in both retainers. In some cases, there may be risk of material impairment of the lawyer-client relationship because of a legitimate sense of betrayal or the adversarial position that must be taken. In some instances, the lawyer's general understanding of the character and approach of the client may give rise to an improper advantage. In some instances, a lawyer's self-interest in pleasing one client might carry genuine risk of interference with proper performance of the retainer against that client. But often none of these concerns, or any other concern, may genuinely arise.

Duties owed to former clients

With respect to loyalty and the former client, the Task Force recommends that the CBA consider reformulation of the former client rules in light of *Re Regina and Speid*¹²⁹, *Greater Vancouver Regional District v. Melville*¹³⁰ and *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.*¹³¹

Specifically, the Task Force recommends that the CBA consider a rule which distinguishes between the duty of loyalty and the duty of confidentiality owed after a retainer is completed.¹³²

After a retainer is completed, we recommend an express prohibition against attacking the legal work done during the prior retainer or conduct which amounts, in effect, to undermining the client's position on a matter central to the prior retainer.

We recommend that the use of the “related matter” proxy be limited. It is in the context of assessing the impact of confidential information that the use of circumstantial evidence is justified to avoid examination of that which cannot be examined i.e. confidential information. Otherwise, there may be confusion generated by using one label “related matter” to mean three different things and have three different purposes.¹³³

¹²⁹ *Supra* note 104.

¹³⁰ *Supra* note 92.

¹³¹ *Supra* note 106.

¹³² It would be preferable to deal expressly with duties in respect of completed retainers rather than former clients as it is the end of the retainer which brings an end to the relevant duty of performance. Duties of loyalty are about client representation in the context of a retainer. If there is another different retainer extant, it is the duty of performance in that retainer that must be examined and not a spent duty of performance in a completed retainer. In contrast, duties of confidence are unchanged whether or not a retainer is completed and whether or not another different retainer exists for the same client after the subject retainer is completed.

¹³³ In the context of “conflict of duty and duty”, a related matter is one in which duties of performance likely conflict. In the context of confidential information, a related matter is one in respect of which it is likely that confidential information will be relevant. In the context of loyalty and a prior retainer, a related matter is one in which the lawyer will likely attack the legal work done during the prior retainer or require conduct which amounts, in effect, to the lawyer changing sides on a matter central to the prior retainer. We have seen, in conflicts cases, the unfortunate use of labels or concepts applicable in one context but not to another context. The use of the same label with three different meanings in three different contexts should be avoided.

RECOMMENDATIONS

We therefore recommend that:

The CBA Code of Professional Conduct be amended to:

1. recognize that a “conflicting interest” is any one of a “conflict of duty and interest”, a “conflict of duty and duty” and a “conflict of duty with relationship”;
2. define a “conflicting interest” to mean an interest which gives rise to a “substantial risk of material and adverse effect on representation”;
3. provide that, except after adequate disclosure to and with the consent of the client, a lawyer may not act in a matter in which a conflicting interest is present;
4. provide that a lawyer may act in a matter which is adverse to the interests of a current client provided that
 - a. the matter is unrelated to any matter in which the lawyer is acting for the current client and
 - b. no conflicting interest is present;
5. clarify that the duty of loyalty owed to a client after a retainer has been completed prohibits a lawyer from attacking the legal work done during the retainer or from, in effect, changing sides on a matter that is central to the prior retainer; and

Notes

A “conflicting interest” exists 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 current client, a former client, or a third person. This approach is consistent with the principles stated by the Supreme Court of Canada in the *Neil* and *Strother* decisions.

- A “conflict of duty and duty” occurs when a lawyer’s clients have opposing interests in a related matter.
- A “conflict of duty and interest” occurs when a lawyer’s duties conflict with a lawyer’s self-interest.
- A “conflict of duty with relationship” occurs when the lawyer’s relationship with the client is materially impaired by the lawyer’s duty to another client.

Representation might be materially and adversely affected when:

- the lawyer had to cross-examine a client or otherwise attack the client or the client's credibility, or
- the client would no longer be able to work effectively with/trust the lawyer because of the nature of the adverse matter.

Absent a conflicting interest, a lawyer may act against a current client in an unrelated matter and may act against a current client in a related matter with the client's consent.

The CBA Code of Professional Conduct be amended to:

6. recognize that a risk of misuse of confidential information is a potential failure to comply with the duty of confidentiality and is distinct from a conflicting interest;
7. include a rule which explicitly delineates the different duties of loyalty and confidentiality owed to a client after a retainer has been completed;
8. re-affirm the requirement, both during the retainer and after a retainer has been completed, not to misuse confidential client information.

Notes

After the retainer has been completed, there is no remaining duty of performance to the client. In contrast, the duty of confidentiality continues even after the retainer has been completed.

To complement its Report and recommendations, the Task Force has prepared a Conflicts of Interest Toolkit which includes model letters and checklists. The Toolkit can be found at pages 183 to 259. The following items are of particular relevance to this chapter:

| | |
|---|----------|
| Guidelines to identify conflicts involving lawyer's personal interest | Page 254 |
| Beware the dangers of acting for family and friends | Page 204 |
| Checklist for client waiver of conflict | Page 228 |
| Model letter confirming consent of clients to proceed despite possible conflict | Page 229 |

CHAPTER 3

Confidentiality

The lawyer's duty to preserve client confidentiality is central to the lawyer-client relationship. As the Supreme Court of Canada has explained:

[A] client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.¹³⁴

As one of the fiduciary obligations owed by lawyers to their clients, the duty of confidentiality protects the lawyer-client relationship.

[N]othing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client.¹³⁵

In Canada, consideration of a lawyer's duty of confidentiality must begin with the decision of the Supreme Court of Canada's 1990 decision in *MacDonald Estate*.¹³⁶ *MacDonald Estate* resulted in significant changes in the rules of professional conduct and a substantial body of case law. After reviewing this legal context, this chapter examines the issues and concerns that predominate nearly 20 years after *MacDonald Estate*, reflects on the comments from the Task Force's consultations, and concludes with recommendations regarding the duty of confidentiality.

The possibility of real mischief versus the probability of abuse

MacDonald Estate was a transferring lawyer case. The lawyer, who had previously assisted as an articling student in the defence of an action, was hired as an associate by the firm that acted for the plaintiff in the same action. Without doubt, the lawyer had relevant confidential information which she could not disclose or use. The issue was whether the law firm that hired her should be disqualified from continuing to act for the plaintiff for that reason.

¹³⁴ *MacDonald Estate*, *supra* note 2. The majority judgment of Dickson C.J. and La Forest, Sopinka and Gonthier JJ. was delivered by Sopinka J.

The concurring reasons of Wilson, L'Heureux-Dubé and Cory J. were delivered by Cory J.

¹³⁵ *Ibid.* (per Sopinka J.).

¹³⁶ For example, as a direct result of *MacDonald Estate*, substantial amendments to the *Code of ethics of advocates* were proposed by the Barreau du Québec and made by government order-in-council effective May 5, 1993. The Quebec courts have considered and applied *MacDonald Estate* through application of the *Code of ethics of advocates* as amended and their interpretation of the *Code* and other applicable law, c.f. *Castor Holdings Ltd, v. Richter & Associés Inc.*, [1995] R.J.Q. 1665 (C.A.), *Services environnementaux Laidlaw (Mercier) Ltée c. Procureur général du Québec*, [1995] R.J.Q. 2393 (C.A.) *Lumbermen's Underwriting Alliance v. Até-Sou-Ma Inc.*, [1999] R.J.Q. 1206 (C.A.) and *Côté v. Rancourt*, [2004] 3 S.C.R. 248.

The first issue addressed by the court was the degree of risk of misuse of confidential information that a client should have to accept and the court permit. At that time, the leading Commonwealth authority was *Rakusen v. Ellis, Munday & Clarke*¹³⁷ in which the English Court of Appeal established that a “probability of abuse” was the standard to be applied:¹³⁸

... the principle upon which it [the court] restrains a solicitor from acting against a former client is the prevention of abuse of the confidence reposed in the solicitor by his former client; accordingly, before an injunction can be obtained, the Court must be convinced of the existence of such confidence and of the probability of its being abused....

On the other hand, courts in the U.S. had by then generally adopted the stricter “possibility of real mischief” test.

The probability of abuse standard was rejected in *MacDonald Estate*¹³⁹ in favour of the possibility of mischief standard. As the majority reasons of Justice Sopinka state:

What then should be the correct approach? Is the “probability of mischief” standard sufficiently high to satisfy the public requirement that there be an appearance of justice? In my opinion, it is not. This is borne out by the judicial statements to which I have referred and to the desire of the legal profession for strict rules of professional conduct as its adoption of the Canadian Code of Professional Conduct demonstrates. The “probability of mischief” test is very much the same as the standard of proof in a civil case. We act on probabilities. This is the basis of *Rakusen*. I am, however, driven to the conclusion that the public, and indeed lawyers and judges, have found that standard wanting. In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in *Rakusen*, “that is a thing which you cannot prove” (p. 841). I would add “or disprove.” If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? ...

¹³⁷ [1912] 1 Ch. 831 (C.A.); Two solicitors were in partnership but conducted their businesses separately without knowledge of each other’s clients. *Rakusen* consulted one solicitor about a wrongful dismissal action against a corporation. *Rakusen* changed lawyers and sued the corporation. After the case went to arbitration, the corporation retained Clarke, the other partner in the firm. Neither partner knew of the other’s actions. The court declined to disqualify Clarke. English cases following *Rakusen* include *Re a Firm of Solicitors*, [1992] QB 959, [1992] 1 All ER 353 (CA); *David Lee & Co. (Lincoln) Ltd v. Coward Chance (A Firm)* [1991] Ch. 259, [1991] 1 All ER 668. The House of Lords has now moved away from that test: see *Bolkiah*, *supra* note 59. *Bolkiah* prompted the House of Lords to consider whether accounting firm KPMG could provide forensic accounting services to a Brunei agency investigating Prince Jefri when the prince had been a long-standing client of KPMG. The court held that in this case the ethical rules of conflict of interest were the same for forensic accountants as for lawyers, and that while screens could be effective to protect client confidences, KPMG had erected the screens too late.

¹³⁸ Cozens-Hardy, M.R. concluded at p. 835 that “as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.” In his concurring reasons, Fletcher Moulton L.J. stated [at p. 841]: “As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated.”

¹³⁹ *MacDonald Estate*, *supra* note 2 (per Sopinka J.).

Not long after *MacDonald Estate*, the House of Lords revisited this question in *Bolkiah v. KPMG*¹⁴⁰ and adopted the same possibility of mischief standard. Lord Millett said:

Many different tests have been proposed in the authorities. These include the avoidance of “an appreciable risk” or “an acceptable risk.” I regard such expressions as unhelpful: the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.

and

In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.

***MacDonald Estate v. Martin* [1990] 3 SCR 1235**

Having considered the standard to be applied, the Supreme Court of Canada in *MacDonald Estate* then considered a framework for the application of this standard. Essentially, two questions were addressed. First, how is the client to establish that the transferring lawyer has relevant confidential information without having to make the information available to the adverse party? Second, if relevant confidential information is found to exist, is it legally possible for a law firm to establish that there is no possibility of misuse of that information?

In answering the first question, circumstantial evidence (or a proxy) was used.¹⁴¹ In order to avoid requiring direct evidence of the existence of confidential information, it was decided that the court should consider whether the retainer in question is sufficiently related to the prior retainer that it should infer relevant confidential information. As the majority reasons explain:

In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. ... In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court’s degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden. (at pages 1260-61)

¹⁴⁰ *Bolkiah*, *supra* note 59.

¹⁴¹ A proxy is a fact from which one can properly infer the existence of another fact. A proxy fact is circumstantial evidence of the primary fact.

The majority concluded that the inference of relevant confidential information arising from the existence of the circumstantial evidence should be rebuttable. The minority disagreed on the basis that an “irrebuttable presumption is essential to preserve public confidence in the administration of justice.”

Lastly, the court considered what measures, if any, were required for a court to properly conclude that there was no risk of misuse having concluded that the transferring lawyer possessed relevant confidential information. The conclusion of the court on this issue has had substantial effect on legal practice as we will subsequently discuss.

Obviously, the transferring lawyer who possesses relevant confidential information cannot act without misusing that information. The risk of misuse, despite the best of intentions, is obvious. But what about others in the firm? On this point, the majority reasons were as follows:

There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the “tainted” lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession. It can be expected that the Canadian Bar Association, which took the lead in adopting a Code of Professional Conduct in 1974, will again take the lead to determine whether institutional devices are effective and develop standards for the use of institutional devices which will be uniform throughout Canada. Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession. In this regard, it must be borne in mind that the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court’s role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it. (pg. 1262)

Three points from this extract of the majority reasons warrant emphasis. The first is that the analysis proceeds from the logical inference that lawyers who work together share confidences. This is, to be sure, a sensible logical inference where lawyers actually do work together. The second is that public confidence in the integrity of the legal profession is engaged in this analysis. Protective measures are to be assessed with public confidence in mind. The third is the limited supervisory role of the courts in connection only with legal proceedings and the corresponding roles for the law societies.

The Task Force is particularly guided by the second and third points. Public confidence in the integrity of the legal profession is fundamental in support of the administration of justice. The legal profession, as a self-regulating profession, has a crucial role to play in respect of these aspects of legal ethics, and the respective roles of the courts and the profession should both be honoured.

Before canvassing the response of the profession to the challenge effectively made by the Supreme Court in *MacDonald Estate*, we conclude our review of this case by highlighting the values which the court concluded underlay proper analysis of the duty of confidentiality in the context of the transferring lawyer.

In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. (pg. 1243)

As we will later discuss, similar issues of confidentiality arise in the context of the former client even where there is no transferring lawyer involved. In the former client context, maintenance of the high standards of the legal profession and the integrity of our system of justice, and not depriving a litigant of the choice of counsel without good cause are values that are equally applicable.

Response to *MacDonald Estate*: The 1993 CBA Task Force

MacDonald Estate encouraged the profession, through the CBA, to determine whether institutional devices are effective and to develop standards for the use of uniform institutional devices throughout Canada.

Shortly after the release of *MacDonald Estate*, the CBA responded by establishing¹⁴² a task force (the “1993 CBA Task Force”). The 1993 CBA Task Force set out its mandate as follows:

The Task Force will restrict its inquiry to whether institutional devices like “Chinese walls” and “cones of silence” are effective in reducing the risk of confidential information possessed by the moving lawyer being used to the prejudice of the former client and, if so, what uniform standards for the use of these devices should apply.

...

The Task Force intends its conclusions to apply equally to litigious and non-litigious matters. With respect to non-litigious matters, it is important to bear in mind that this Report’s conclusions apply only when a lawyer’s transfer from one firm to another is the source of the conflict.¹⁴³

¹⁴² The 1993 CBA Task Force was established in January 1991 and reported in 1993.

¹⁴³ *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Ottawa: Canadian Bar Association 1993) at pp. 16 & 17 [referred to as the “1993 CBA Report”]. Note that the latter restriction in the excerpt has apparently been lost.

The 1993 CBA Task Force concluded that properly implemented institutional screens would be effective and delivered a final report establishing guidelines on how firms should manage conflicts arising from transfers between law firms (“CBA Guidelines”). The CBA Guidelines address what constitutes “reasonable measures” to protect confidential information, which have ever since informed decisions relating to the hiring of lawyers from another firm. The CBA Guidelines have been incorporated with minor modifications into the various provincial and territorial rules.

It should be understood that the CBA Guidelines were developed to address the issue of transferring lawyers and client confidentiality but not in the context of former clients or otherwise. The CBA Guidelines did not attempt to establish a fixed set of measures to be considered reasonable or appropriate in every case. In each case, a firm must decide what particular measures are appropriate in the circumstances of the particular case and in the context of the particular firm to satisfy the *MacDonald Estate* principles.

Issues emerging since *MacDonald Estate*

In the years since *MacDonald Estate* and the work of the 1993 CBA Task Force, the courts have decided more than 500 cases applying the *MacDonald Estate* principles and the CBA Guidelines. The courts have recognized that screens¹⁴⁴ constructed with due sensitivity to these guidelines can be effective in protecting client confidentiality and negating presumptions of information sharing within the firm.¹⁴⁵ The range of fact situations covered in these cases do not make for easy summary. However, certain questions have emerged:

- To what extent should lawyers sharing space be considered as a single firm for conflicts purposes?
- How should non-lawyer transferring staff be considered under the law and the guidelines?
- How should any delay in the formal erection of screens be treated?
- How have the recommended screening measures worked?
- Can screens be used to protect the confidential information of former clients?

Court decisions following *MacDonald Estate*

In *MacDonald Estate*, the Supreme Court noted the supervisory role of the court and that its relevant jurisdiction extended only in connection with legal proceedings. The Supreme Court also emphasized the role of the governing bodies of the profession in respect of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practise of law.

¹⁴⁴ The term ‘confidentiality screen’ refers to the institutional measures a law firm puts in place to ensure that confidential information is not misused. The measures chosen in a specific situation take into account the guidelines as reflected in the applicable code of professional conduct. Other terms such as ‘screen’, ‘ethical screen’, or ‘ethical wall’ are synonyms for ‘confidentiality screen’.

¹⁴⁵ Screens can be effective. See cases like *Bramalea Inc. v. KPMG* (1998) 22 CPC (4th) 353; *Davies Ward & Beck v. Baker and McKenzie* (1998) 40 O.R. (3d) 257 (CA).

The courts, in their decisions after *MacDonald Estate* and the 1993 CBA Task Force Report, have reflected and respected the different roles of the courts and the governing bodies.

The assessment of protective measures

The decision of the New Brunswick Court of Appeal in *Bank of Montreal v. Dresler*¹⁴⁶ illustrates the approach of the courts in the assessment of protective measures. The Court indicated that the following factors were of particular importance:

- the timing of the erection of the screen;
- the size of the firm which has been challenged;
- the number of disqualified lawyers; and
- the number of implemented guidelines.

The Court went on to explain that in cases where an effective screen has not been erected or it remains questionable whether there has been sufficient compliance with the rules and guidelines, a court is required to continue with its analysis. The court will also consider the impact of a disqualification order on the challenged firm's current client. "Justice must be done and be seen to be done, not only from the perspective of the former client, but also from that of the opposing party."¹⁴⁷ The additional considerations include:

- the availability of replacement counsel;
- the complexity and advancement of the case; and
- whether disqualification is being sought as a tactical weapon, which may include consideration of whether the former client has brought a timely motion for disqualification.¹⁴⁸

Space sharing arrangements and confidentiality

In *MacDonald Estate*, a fundamental element of the analysis was the "strong inference that lawyers who work together share confidences." This inference may or may not logically apply where lawyers work as sole practitioners, but within office space that affords them the economies of shared facilities.¹⁴⁹

¹⁴⁶ *Bank of Montreal v. Dresler*, (2002), 224 D.L.R. (4th) 337, [2002] N.B.J. No. 324, 660 A.P.R. 37, 253 N.B.R. (2d) 37, 25 C.P.C. (5th) 1, 2002 NBCA 69 (N.B. C.A.) reversing (2002), 16 C.P.C. (5th) 382, 2002 NBQB 28, 638 A.P.R. 143, 246 N.B.R. (2d) 143 (N.B. Q.B.) [*Bank of Montreal*].

¹⁴⁷ *Ibid.* at para. 86.

¹⁴⁸ *Ibid.* at paras. 86-95.

¹⁴⁹ While it is obviously relevant whether lawyers sharing space actually work together or are genuinely carrying on entirely separate practices, the extent to which facilities and staff are shared is relevant as well. Where facilities and staff are shared, there may be sufficient risk of misuse of confidential information that the "possibility of mischief" standard is engaged.

From a conflicts perspective, Canadian courts and governing bodies have tended to approach such arrangements as loose firms, with a presumption of shared knowledge. In fact, in the Supreme Court's second major conflicts case, *Neil*,¹⁵⁰ the lawyer involved was **deemed** to be in association with another firm, because of the operation of the *Rules of Professional Conduct* of the Law Society of Alberta.

The real issue is whether the shared arrangements give rise to a real possibility that the confidentiality of client information is at risk. If lawyers share resources as though they are members of a single firm, then proper conflict checking systems are likely required as much as if those sharing space were a conventional partnership. In order to avoid the consequences of the presumption of shared information and the resulting finding of a conflict of interest, lawyers who practise in space-sharing arrangements will have to put in place formal mechanisms to protect client confidential information.¹⁵¹

Some law societies have suggested that it is appropriate for clients to be notified of the degree of integration, and the fact that their information may be accessible by other individuals in the office. In one Ontario case, *BET-Mur Investments Limited v. Spring et al.*,¹⁵² the Court held that if the letterhead and door signage suggest that the lawyers may be partners, the lawyers bear the onus of conveying to the public that they are not partners. The Task Force believes that lawyers who practise in space-sharing arrangements should not be regarded as constituting a firm for conflicts purposes if their arrangements are such that client confidentiality is fully protected.

Moving from defence to prosecution

Soon after *MacDonald Estate*, the “strong inference that lawyers who work together share confidences” was considered in the case of a migrating defence lawyer. In *R. v. Morales*,¹⁵³ the former counsel for an accused in criminal proceedings had joined the office of the Procureur général du Québec as a prosecutor. The accused sought to disqualify two other prosecutors from the same office from acting in the criminal proceedings.

Justice Doyon concluded that the inference in *MacDonald Estate* should not apply for several reasons; (i) the role of Crown counsel is different than the role of private lawyers in that a prosecutor's proper goal is not to win the case; (ii) prosecutors do not practise in partnership; and (iii) the former defence counsel was not in the same team or section as the actual prosecutors. However, Justice Doyon was clear that the requirement to protect client confidential information was no less important than in *MacDonald Estate* and that the differing context resulted in a different result.

¹⁵⁰ *Neil*, *supra* note 4 at para. 5.

¹⁵¹ A number of factors are relevant in determining whether lawyers in a space sharing arrangement will be considered to be effectively a single firm for conflicts purposes, including the existence of: shared secretaries or other employees; shared accounting and office systems; shared technology; shared letterhead, signage and business cards; common marketing or advertising, including Internet websites; common reception area, including the behaviour of reception staff in answering the telephone and greeting clients; shared peripheral devices, such as copiers, scanners, printers and fax machines; the degree of physical integration of the lawyers' offices.

¹⁵² (1994), 20 O.R. 417 (Gen. Div.) affirmed (1999), 41 O.R. (3d) 800 (Ont. C.A.).

¹⁵³ [1993] R.J.Q. 2940.

The reasoning that the inference has limited force where prosecutors do not actually work together, do not discuss their cases, and are not in partnership together could apply to some private space-sharing arrangements. The same logic applies to lawyers who simply share space but do not otherwise work together.

The cases since *Morales*¹⁵⁴ continue to find that a prosecutor who has previously acted for an accused in a related matter may not subsequently prosecute the former client. Given the nature of criminal proceedings, matters may be related merely by the fact that the character and history of the accused may be relevant to both proceedings.

Not all subsequent cases have accepted the analytic relevance of the differing roles of prosecutors and other lawyers. However, the cases have permitted other prosecutors to act on the assurance that no confidential information has been or will be communicated by the migrating prosecutor. In this respect, the inference that lawyers working together will share confidences absent institutional protective measures is applied differently to prosecutors' offices than elsewhere. The inference appears to be overcome by the direct evidence of the migrating lawyer. This presumably reflects the unique role of lawyers carrying out the attorney general's responsibilities,¹⁵⁵ the nature of the relationship between prosecutors, and the organization of prosecutors' offices.

Law firm size and confidential information

Law firm size can be important in two respects. When a firm is very large with a number of offices and a number of practice areas, many of the lawyers in the firm do not in fact work together. Accordingly, the inference that those lawyers share information has little force. Although this reality of the large firm does not argue against the application of protective measures to preserve client confidences, it may be relevant to the selection of the appropriate measures and to the question of disqualification in the face of an allegation of conflict.

On the other hand, there has been discussion in the cases as to whether protective measures can be seen as genuinely effective in small firms. The 1993 CBA Task Force rejected the idea that a firm must have at least 30 lawyers for a screen to be effective, while the Solicitors Regulation Authority for England and Wales has observed that it is unlikely that any safeguards could ever be considered adequate where a firm has only one principal and no other qualified staff.

In *Robertson v. Slater Vecchio*,¹⁵⁶ the Supreme Court of British Columbia recently considered the issue of whether risk of disclosure by inadvertence is unavoidable in a small firm like Slater Vecchio (a nine-lawyer firm). The court relied heavily on *Bank of Montreal v. Dresler*¹⁵⁷ which involved a 20-lawyer firm citing the following statements by the New Brunswick Court of Appeal:

¹⁵⁴ *R. v. Lindskog*, 1997 CanLII 11318 (Sask. Q.B.), *R. v. Stokes* (1999), 176 N.S.R. (2d) 290 (NS S.C.), *r. v. Standingwater*, 2007 SKQB 484.

¹⁵⁵ *R. v. Doucet*, [1994] 5 W.W.R. 305 (M.C.A.) affirmed on appeal [1995] 1 S.C.R. 758.

¹⁵⁶ *Robertson*, *supra* note 36.

¹⁵⁷ *Bank of Montreal*, *supra* note 146.

In my view, the main obstacle facing an Atlantic law firm intent on erecting an effective screen, lies in the requirement that the firm be of a sufficient size. Size is measured in terms of: (1) lawyer numbers; and (2) physical arrangements; and (3) the number of practice areas within a firm. I agree with the Task Force when it rejected the American position that a minimum of 30 lawyers is needed. A smaller number may suffice. Each case must be judged on its own facts. In certain instances, the answer will be obvious. Take the example of a lawyer acting for a plaintiff who, during the course of litigation, moves to a two-lawyer firm representing the defendant. Does anyone doubt that the new law firm will be disqualified from acting for the defendant? In these circumstances, how can a tainted firm rebut the inference that lawyers in the same firm share confidences? To allow the tainted firm to continue with its representation of the defendant would undermine public confidence in the integrity of the justice system. At the other end of the spectrum are the “mega” or “national” firms within the contemplation of Justice Sopinka when writing in *MacDonald Estate v. Martin*.

On the issue of firm size, the court must be satisfied that the transferring lawyer can be effectively screened from those working on the tainted file. In an ideal legal world, the screened lawyer would not have daily contact with those working on the tainted file. Thus, lawyers in the same firm, but who work in different cities, do not pose the same risk as those who practice within the same office space. In effect, the screened lawyer must be able to practice law independently of those representing the current client. If the screened lawyer continues to work on other files with those working on the conflict file, does it make any sense to perpetuate the belief that compliance with the Law Society’s rules and guidelines has the effect of sustaining public confidence in the integrity of the legal profession and the administration of justice? I think not.

Note that construction of Chinese walls is intended to prevent inadvertent disclosure of confidential information during working hours. The law says nothing of the possibility that disclosure might occur through informal contacts. There is no legal impediment to lawyers within the same firm socializing, participating in education programs or performing firm management responsibilities. If the law were otherwise, it would be futile to even consider adopting effective screening mechanisms. Law firm disqualification would be a virtual given and the minority opinion, authored by Justice Cory in *MacDonald Estate v. Martin*, would become the de facto law.

There are approximately twenty lawyers in McInnes Cooper’s Fredericton office. No one has suggested that it should be disqualified from acting for the defendant Freyn because of firm size. I agree. Nothing in the record leads me to question the viability of the screen erected by McInnes Cooper. Specifically, there is nothing to indicate that Ms. McDonald cannot and does not work independently of Mr. Windle and Mr. Young, the two lawyers acting for the defendant Freyn ...¹⁵⁸

While the court in *Robertson* acknowledged that it may be that the risk of harm is greater with smaller firms, it noted that there are other factors that can also readily influence the risk and, in some cases, compensate for a size disadvantage, such as the configuration of the workplace and closer supervision and training of staff. Also, the court noted the reality that contemporary inter-office communication is largely done by telephone and e-mail as compared with personal contact and that firm size is irrelevant in that respect. Lastly, the court stated that it should not be presumed that individuals in smaller firms are more casual about their professional responsibilities than their big firm colleagues.

In any event, I find that Slater Vecchio because of its good management of the office environment was not, for lack of size, any more susceptible to disclosure than other bigger firms.¹⁵⁹

Leave to appeal *Robertson* was granted. Counsel agreed that the application to restrain the law firm from acting arises in the somewhat specialized context of the personal injury bar where a lawyer seeks to “cross the street” by moving from a personal injury practice acting primarily for the defendant to a personal injury practice acting primarily for plaintiffs. The appellants also sought to argue that the mobility issue is of particular importance when the move is to a smaller firm where there is a greater risk of disclosure of confidential information, at least in circumstances where all conflict safeguards are not in place at the time of the move. The Court of Appeal granted leave on three grounds, including the alleged failure of the trial judge to properly take into account the risks of disclosure of confidential information in a small firm, particularly where all conflict safeguards were not in place at the relevant time.¹⁶⁰ The Court of Appeal decision will be important in determining whether small firms will be permitted to manage confidentiality through screens.

The Supreme Court has expressly recognized¹⁶¹ the problems faced in specialty areas of practice and in remote communities by the over-rigid application of the conflicts rules. Given the many different situations and settings in which lawyers practise, in large and small firms, in large and small centres, and in specialty areas and remote communities, the Task Force believes that a more flexible approach is required than originally contemplated in *MacDonald Estate* and by the 1993 CBA Task Force.

Mobility of law firm staff

When law clerks, legal assistants, translators and other support staff move from one law firm to another, should this constitute a conflict of interest which is capable of disqualifying a lawyer or the firm from representing a client? The topic was not addressed in *MacDonald Estate* or by the 1993 CBA Task Force. Subsequently, the courts have considered the issue of support staff, but with somewhat inconsistent answers. We believe that this is one area where greater clarity in the rules would be welcome.

There are a limited number of Canadian cases¹⁶² on this topic. The cases discussed below illustrate two alternative approaches. In *J-Star Industries Inc. v. Berg Equipment Co. (Canada) Ltd.*,¹⁶³ the Federal Court considered the case of a legal assistant moving from one firm to another. The legal assistant had taken dictation and typed correspondence and other relevant documents concerning a trademark matter. The new firm acted against the client of the former firm in an ongoing dispute involving the trademark.

¹⁵⁹ *Ibid.* at para. 55.

¹⁶⁰ [2007] B.C.J. No. 2359 at paras. 11-12 (C.A.).

¹⁶¹ *Strother*, *supra* note 3 at para. 55.

¹⁶² See for example, *R. v. Le*, [2001] A.J. No. 323 (Alta. Q.B.); *Gottschlich v. Gottschlich*, [2001] A.J. No. 696, [2001] 8 W.W.R. 667, 5 C.P.C. (5th) 407, 91 Alta. L.R. (3d) 346, 291 A.R. 173, (Q.B.); *A.K. Film Ltd Partnership v. Gallery Pictures Inc.*, [1996] O.J. No. 1741 (Ont. Gen. Div.).

¹⁶³ [1992] 3 F.C. 639, 45 C.P.R. (3d) 72, 57 F.T.R. 75 (T.D.) [referred to as *J-Star*].

In denying the disqualification motion, the court considered *MacDonald Estate* but stated:

... although there may be a strong inference that lawyers who work in the same firm share confidences, I do not believe that a similar inference can be drawn with respect to the exchanges between lawyers and their secretaries. In the case of “non-lawyer personnel,” it must be shown by the client that the person now employed by opposing counsel was involved in the preparation of the client’s case in such a way as to have become privy to confidential information while employed by the client’s counsel.

... There was no evidence to indicate that she had attended any meetings at which confidential information had been imparted by the appellant or during which any case strategy had been discussed. Furthermore, a review of the affidavit evidence containing copies of the correspondence and documents prepared by Dorothée Paquin in relation to the appellant’s file did not disclose any confidential information which, in the hands of the respondent, could possibly be used against the appellant’s interests.¹⁶⁴

The court concluded that a reasonable member of the public would not believe, in the circumstances of that case, that the confidential information was at risk. The court was also not convinced that public confidence in the administration of justice was at risk.¹⁶⁵

By contrast, the Saskatchewan Court of Queen’s Bench came to the opposite conclusion in *Ocelot Energy Inc. v. Jans*¹⁶⁶ regarding a transferring legal assistant. *J-Star* was considered but distinguished on its facts:

I do not necessarily agree with Denault J. that exchanges between lawyers and their secretaries would not involve discussions of confidential matters relating to clients. Furthermore, in many instances an experienced legal assistant has as much or more knowledge than the lawyer as to what is contained in a particular file.

I agree that a legal assistant would not formulate strategy or develop arguments. However, if a file contains confidential or sensitive correspondence, memorandums or other documents, the lawyer’s legal assistant would be expected to be quite familiar with that material.

In any event the decision of Denault J. in *J-Star Industries* is distinguishable from the application before me. In that case the legal assistant changed employment three days prior to the hearing. The evidential record for the opposition hearing had been finalized. The only matter remaining was the legal argument. In those circumstances any risk of communication of confidential information was so remote as to be almost non-existent.¹⁶⁷

In *Ocelot*, the new firm was a two-person law firm. The judge noted that opportunities for private discussions and sharing of confidences may be greater when the lawyer and legal assistant work in a two-person law firm.¹⁶⁸ Justice McLellan allowed the disqualification application and concluded:

¹⁶⁴ *Ibid.* at paras. 21 & 22.

¹⁶⁵ *Ibid.* at para. 23.

¹⁶⁶ [1998] 8 W.W.R. 708, 165 Sask. R. 252 [*Ocelot*].

¹⁶⁷ *Ibid.* at paras. 15-17.

¹⁶⁸ *Ibid.* at para. 21. It is ironic that this was the very situation in *Rakusen*, *supra* 137, in which the English Court of Appeal had accepted that the lawyers had no knowledge of the other’s affairs.

In my opinion a reasonably informed person would not be satisfied that no use of confidential information would occur in circumstances where a former member of the staff of a law firm who had full access to and had worked extensively on a client's file, was working directly for the lawyer representing the party opposed to the client in the litigation, and appeared to be working directly on the particular file for the new lawyer.¹⁶⁹

These two cases adopt different approaches, or reach different conclusions on the facts, in dealing with the migration of legal assistants. Essentially, the distinction is the extent to which it can properly be inferred that legal assistants share confidences with the lawyers with whom they work. The fact that the second case involved a two-person firm rather than a larger firm may be relevant to the applicability of the inference; it may be that legal assistants take on multiple tasks and play a greater role in smaller firms.

The need for rules on staff transfers

The transfer of legal assistants and other staff between law firms is so common that the rule should be clear and practical. It would be helpful for the governing bodies to codify how the rules apply to support staff, so that proper measures may be taken on transfer.

The starting point for a general rule should be whether or not an inference may be properly drawn that a staff member will share confidences with those involved in the adverse matter. We do not think that the inference has logical validity where the staff member does not actually work with the lawyers who are representing the adverse client. While in some situations it may be reasonable to infer that lawyers working together collaborate regarding client representation whether or not each is specifically involved, the same is not necessarily true for staff members.

The validity of the inference depends on the nature of the role and expertise of the staff member. Some staff members are directly and substantively involved in client matters and others are not. Articling students, law clerks, patent and trademark agents, planners and other professionals and paraprofessionals ("professional staff") often have ongoing substantial involvement in client matters. Legal assistants have ongoing involvement but their involvement is not necessarily substantive. Librarian researchers, translators, process servers, title searchers, electronic document specialists¹⁷⁰ and word processing operators ("specialist staff") undertake specific technical tasks in client matters without ongoing involvement. Other staff members are not really involved in client representation at all. For example, accounting and computer staff ("administrative staff") may have access to confidential information by virtue of their work but are not involved in client matters.

The Task Force considers that it is a reasonable inference that professional staff will share confidences with those with whom they work on client matters. Further, the Task Force considers that it is a reasonable inference that legal assistants will share confidences with the

¹⁶⁹ *Ocelot*, *supra* note 166 at para. 30.

¹⁷⁰ The growth of electronic discovery has required the development of staff specialties. Electronic document specialists assemble databases of electronic documents for review and production.

lawyer with whom they work but, given that legal assistants are usually assigned to particular lawyers, only with those lawyers. The Task Force does not believe that the inference logically applies to specialist and administrative staff.

As with lawyers, it should not be possible to disqualify a firm to which a member of support staff has moved, unless the staff member has relevant confidential information. The Task Force believes that professional staff should be governed by the same rules which apply to lawyers. Legal assistants should be governed by the same rules but only where they assist lawyers who are actually involved in the adverse matter. Specialist and administrative staff should not be governed by these rules but should be advised when employed of their obligation to observe their confidentiality obligations to clients of their former firms.

These categorizations should be applied substantively and not formalistically. If, for example, a specialist staff member has direct and substantive involvement in client matters then they should be subject to full protective measures despite their title or designation.

If the staff member does possess that actual knowledge, the firm must be able to establish through the timely introduction of appropriate screens that all reasonable steps have been taken to prevent the confidential information from being disclosed.

As non-lawyers are not personally subject to the rules of professional conduct, we also suggest that bodies such as the Association of Legal Administrators or Law Clerks Associations may wish to consider adopting ethical rules to reinforce the ethical obligations of their members.

Timing of screen implementation

Of all of the factors listed in the 1993 CBA Task Force Report, the critical factor has come to be the timing of the implementation of the screening measures. In all but the most unusual cases, failing to put up a screen at the right time has been fatal to the screen's effectiveness. Curiously, courts in Quebec and Alberta have been more tolerant of late screens than Ontario courts. The texts of the rules of the law societies have been inconsistent, for reasons which do not seem to reflect special conditions or circumstances. The approaches taken in different cases have been inconsistent. The Task Force is troubled by the mechanical approach in some cases that "timing" should be determinative. In our consultation paper we suggested that courts should be able to decide the alleged conflict on the basis of whether or not confidential information has in fact been misused or disclosed, regardless of the late implementation of the screen. An overwhelming response from those who responded to the consultation paper emphasized that timing of the erection of screens should not be determinative, so long as it can be proved that there has been no disclosure and that going forward there are adequate safeguards in place to prevent future disclosure.

Examination of the timing issue usefully starts with the *Bank of Montreal* decision.¹⁷¹ The New Brunswick Court of Appeal considered difficulties in determining whether a conflict exists and whether there should be exceptions to the timing requirement.¹⁷²

Like the [1993] Task Force I am sensitive to the problem of determining whether a conflict exists. Traditional search methods may not always readily reveal the existence of a conflict. Computer cross-referencing can be as fallible as one's memory. Hence, the exception to the timing requirement: see generally cases cited in *Saint John Shipbuilding* at para. 66 and, in particular, *Ford Motor Co. of Canada Ltd v. Osler, Hoskin & Harcourt* and *Canada Southern Petroleum v. Amoco Canada Petroleum Co.*¹⁷³

To be clear, the courts have been consistently sceptical of assurances that confidentiality has been properly protected, if there has been any delay in implementing barriers or erecting screens.¹⁷⁴ For example, Justice Robertson in *Bank of Montreal v. Dresler*¹⁷⁵ stated:

In all but the exceptional case, a failure to erect a screen at the time of this transfer will be fatal to screen's effectiveness.

The impact of delays in setting up a confidentiality screen

Yet some of the cases betray a somewhat rigid approach to this factor. The problems encountered can be demonstrated by a review of eight cases, all of which grappled with the *MacDonald Estate* decision and the applicable rules of professional conduct, but which reached very different results. In some of those cases, the delay in implementing reasonable measures was significant. For example, in *Poehler v. Langer*,¹⁷⁶ the measures were not implemented until approximately five months after the lawyer transferred to the new firm:

The omission on the part of the transferee firm to implement institutional mechanisms immediately upon learning of the potential for disclosure, no matter how inadvertent the disclosure might be, will most often result in disqualification, either on the basis of the test in *MacDonald Estate*, or on the basis of non-compliance with the Law Society Rules. The bar has been set high, but no higher than is justified by the need to ensure utmost confidence in the legal system.¹⁷⁷

In this case, the mere fact of the lapse of time after having learned of the potential for disclosure was enough to justify disqualification. But in other cases, the courts have effectively required firms to have taken action before they could have known that there was a problem to address.

¹⁷¹ *Bank of Montreal*, *supra* note 146.

¹⁷² *Ibid.* at para. 76.

¹⁷³ *Ibid.* at paras. 77-78.

¹⁷⁴ *Oxner and Keddy Estate v. National Life Insurance of Canada*, (2006), 244 N.S.R. (2d) 356 (S.C.); *Skye Properties Ltd v. Wu*, (2002), 58 O.R. (3d) 154 (Div. Ct.), [2003] O.J. No. 3481 at paras. 30-31 (Div. Ct.) *aff'd*, [2004] O.J. No. 3948 (C.A.); *Alcan Inc. v. Farris, Vaughan, Wills & Murphy* [2004] 9 W.W.R. 617, 32 B.C.L.R. (4th) 85; *Chippewas of Kettle & Stony Point v. (Canada (Attorney General))*, (1993) 17 C.P.C. (3d) 5, [1993] O.J. No. 1578 (Div. Ct.); *Feherguard Products Ltd v. Rocky's of B.C. Leisure Ltd*, [1993] 3 F.C. 619, 54 C.P.R. (3d) 545 (C.A.); *Ford Motor Co. of Canada, Ltd v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419, 27 O.R. (3d) 181 (Gen. Div.); *James v. Vogue Developments (Phase II) Inc.*, [2000] O.J. No. 4107 (S.C.J.); *Saint John Shipbuilding Ltd v. Bow Valley Husky (Bermuda) Ltd* (2002), 251 N.B.R. (2d) 102, [2002] N.B.J. No. 205 (C.A.) [referred to as *St. John Shipbuilding*].

¹⁷⁵ *Bank of Montreal*, *supra* note 146 at para. 76.

¹⁷⁶ [1999] B.C.J. No. 217 (S.C.) [*Poehler*].

¹⁷⁷ *Ibid.* at para. 45.

*Alcan Inc v. Farris, Vaughan, Wills & Murphy*¹⁷⁸ demonstrates this concern. A lawyer, who had represented Alcan at his previous firm, joined Farris, Vaughan, Wills & Murphy. A conflicts check was done at the time and no conflict with Alcan was identified as the new firm had no related files. About 17 months later, the firm took on a new retainer in which Alcan was an adverse party. Counsel for Alcan advised the firm that the lawyer had previously represented Alcan and there was therefore a conflict of interest. The Court analyzed the issue as follows:

Essentially, Farris & Co. asks the question, “What more could be done by the firm?”, paraphrasing Newbury J.’s remarks in *Choukalos*.¹⁷⁹ The obvious answer is that Farris & Co. could have taken measures, preferably before but at the latest, at the time it accepted Kitimat’s retainer, to alert the members of its firm that the firm intended to act or was acting for Kitimat against Alcan. That conflicts check would presumably have resulted in Mr. Gora revealing the fact that he had acted for Alcan while a member of Lawson Lundell. I have no doubt that Farris & Co. would then have put in place the various measures that were eventually implemented on February 16, 2004, but would have done so in August 2002.

Having failed to do so, I am left with nothing more than the affidavits of the lawyers at Farris & Co., who have sworn that they have not conveyed or accepted confidential information about Alcan. However, as I read the cases provided to me, particularly *MacDonald Estate, Manville*, and *Saint John Shipbuilding*, that evidence standing alone is not sufficient to rebut the presumption that Mr. Gora shared confidential information.¹⁸⁰

In *Alcan*, the court noted that under British Columbia’s *Professional Conduct Handbook*, the use of screens was permitted only when a lawyer transfers firms. The *British Columbia Professional Conduct Handbook*¹⁸¹ does not address the use of screens in circumstances where a law firm seeks to act against a current member’s former client.

In March 2004, the Law Society of British Columbia announced that the Benchers were considering changes to Chapter 6 of the Professional Conduct Handbook to permit lawyers to act against former clients in certain circumstances with appropriate safeguards in place. In the March-April 2004 Benchers’ Bulletin, the Law Society announced as follows:

The question has since arisen: *should similar rules be adopted to cover situations other than those in which lawyers are transferring firms?* Several courts have recently considered the scope of imputed conflicts. The law society in Ontario now allows law firms to act against former clients, if there is client consent or if the firm can meet certain standards (similar to those set out in Chapter 6, Rule 7.4 of B.C.’s Professional Conduct Handbook).

¹⁷⁸ [2004] 9 W.W.R. 617, 32 B.C.L.R. (4th) 85, [2004] B.C.J. No. 1199 (S.C.) [*Alcan*].

¹⁷⁹ *Choukalos Woodburn McKenzie Maranda Ltd v. Smith, Lyons, Torrance, Stevenson & Mayer*, [1994] B.C.J. No. 1660, 97 B.C.L.R. (2d) 122, [1995] 1 W.W.R. 3 (B.C.S.C.).

¹⁸⁰ *Alcan*, *supra* note 178 at paras. 60 and 61.

¹⁸¹ It is interesting that the minutes of the meeting of the Benchers of the Law Society of British Columbia of December 12, 2003 contain the following item. Despite this motion, the rule has not actually been amended although we understand that some firms in B.C. are acting on this motion:

I. It was **moved** (Zacks/Sullivan) to approve in principle amending Chapter 6 of the Professional Conduct Handbook to permit clients to give informed consent to the use of screens to enable a law firm acting for the client to meet the requirements of Rule 6.3(b), where the firm is not otherwise able to meet those requirements, and to permit lawyers to meet the requirements of Rule 7(b) through the use of screens, provided they can meet requirements similar to those set out in Rule 7.4.

II. The motion was **carried**.

Thus, it appears that the Law Society of British Columbia's present position is that, in this province, ethical screens are not an appropriate response to a conflict arising, as here, where the firm seeks to represent a party against the former client of one of its members.

Even assuming that ethical screens are an appropriate response to a conflict, I am of the view that such ethical screens can only speak to the future and cannot correct a significant gap of 17 months. If the creation of an ethical screen is to rebut the strong inference that lawyers who work together share confidences, the law firm must implement the screen in a timely fashion. *Alcan* submits, and I agree, that the 17-month delay in this case cannot be considered timely implementation.¹⁸²

Conflict checks and subsequent retainers

Since *MacDonald Estate* and the 1993 CBA Task Force, law firms have established conflicts clearance procedures for transferring lawyers which examine conflicts existing at the time of transfer. These procedures, obviously, do not address subsequent retainers.¹⁸³ *Alcan* effectively indicates that all lawyers in a firm must be canvassed for potential conflicts each time a new file is opened, an action which occurs dozens of times a day in large firms. While new matter lists are commonly circulated by larger firms, we think it unrealistic to believe that new matter lists effectively deal with the issue of transferring lawyers and subsequent retainers.

The decision in *Alcan* is also of concern because of the apparent conclusion that the transferring lawyer rule in British Columbia applies only to client retainers in existence at the time of transfer but not to subsequent retainers.¹⁸⁴ Further, the *Alcan* decision does not distinguish between affidavits regarding existing facts and current intentions.¹⁸⁵ This is an issue in which technological change since 1990 is significant. Affidavits by lawyers as to existing facts can, where the requisite systems exist, be corroborated by evidence as to access to electronic documents and relevant e-mails.

In contrast to Ontario, the Alberta courts have concluded that where there is a delay in implementing a screen, the particular circumstances of the case must be considered. Quebec courts are also apparently flexible in examining specific circumstances where a delay exists.¹⁸⁶

¹⁸² *Alcan*, *supra* note 178 at para. 66-68.

¹⁸³ It will be rare that the adverse retainer does not exist at the time of transfer as, ordinarily, the adverse party will already be represented. It was an unfortunate and unusual coincidence in *Alcan* that the law firm to which the lawyer transferred subsequently was subsequently retained.

¹⁸⁴ It is true that a client is likely less prejudiced where a firm declines a new retainer because the transferring lawyer has been hired than where an existing retainer is terminated because the transferring lawyer has joined the firm. However, in each case a client's choice of counsel is compromised. Whether a retainer subsequent to transfer should be examined within the transferring lawyer analysis or within the former client analysis is arguable, as the subsequent retainer scenario is somewhere in between the other two scenarios. A new retainer can be more easily rejected than an existing retainer can be terminated. Possession of relevant confidential information is likely more limited where the adverse party is the former client of the transferring lawyer than a former client of the law firm.

¹⁸⁵ In *MacDonald Estate*, *supra* note 2, the Court observed that sworn undertakings and statements amount to no more than a request that the court trust the lawyer in question. This is quite different than sworn testimony by an officer of the court as to whether confidences have **previously** been maintained. The Court stated:

A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me."

¹⁸⁶ See for example, *Services environnementaux Laidlaw (Mercier) Ltée. v. Procureur général du Québec* [1995] R.J.Q. 2393, J-E 95-1669 (C.A.) *Loiselle v. Fortier*, [1995] D.D.O.P. 177 (T.P.) D.D.E. 95D-41 (T.P.), requête en évocation rejetée, C.S., 1995-08-30, 200-05-000914-957; permission d'en appeler C.A. no 200-09-000509-957, le 26-10-1995, appel qui a été déserté, C.A. no 200-09-000611-951, le 16-12-1996; *Alstom Canada Inc. v. Ace Ina Insurance Co.*, 2002 IJCan 5694; R.E.J.B. 2002-33473; J.E. 2002-1720 (C.S.); *Boissonneault v. Lessard*, R.E.J.B. 1998-05872; J.E. 98-981 (C.A.).

In the Alberta case *Dreco Energy Services Ltd v. Wenzel Downhole Tools Ltd*,¹⁸⁷ the defendant applied to have counsel for the plaintiffs disqualified based on a law firm merger which took place on November 1, 2005. Due to miscommunication and the hospitalization and subsequent absence of the lawyer involved, the conflict was not identified until December 2 despite electronic records being transferred to the merged firm's computer system on November 18. On December 7, screens were established and by December 13, the merging lawyers signed affidavits and undertakings.

The Alberta Court of Queen's Bench drew the inference that confidential information was imparted to one of the merging firms. The more difficult question was whether there was a risk that any such information was or would be misused. Counsel for the former client argued that any delay in implementing a screen precludes a firm from continuing to act.

The court held that the late erection of the screen in this case was adequate to prevent prospective disclosure of confidential information. The court went on to consider the second question, namely whether a reasonably informed person would be satisfied that no confidential information had been communicated to other counsel or used during the time period in question, so as to undermine the efficacy of the subsequent screen. Clear and convincing evidence would be required to discharge the onus. The court held that in the particular facts of that case, a reasonably informed person would be satisfied that there was no risk that any confidential information had or would be misused. In particular, in addition to the undertakings and affidavits, the court stated that the following evidence was significant:

- The impugned lawyer had no involvement in the other matters.
- Two different offices were involved.
- The files were locked in a separate office, not readily accessible.
- Immediate steps were taken to put protective measures including a screening mechanism into place as soon as the possible conflict was identified.

The relevant electronic documents were not stored in the merged firm's normal document management system, so, they were not generally available to lawyers or staff in the firm. Evidence showed that no one attempted to access or accessed this electronic information before the protective screen was implemented.¹⁸⁸

The court in *Dreco* distinguished the decisions in *Ford Motor* and *Skye Properties Ltd v. Wu*,¹⁸⁹ in part, on the grounds that the *Ontario Rule*, unlike the *Alberta Rule*, specifically required that security measures be put into place before a lawyer changes firms.¹⁹⁰

¹⁸⁷ [2006] ABQB 718 (CanLII) at para. 40 [*Dreco*].

¹⁸⁸ *Ibid.* at para 42.

¹⁸⁹ (2001), 57 O.R. (3d) 46; aff'd, [2003] O.J. No. 3481; aff'd, [2004] O.J. No. 3948 (C.A.) [*Skye Properties*].

¹⁹⁰ *Dreco*, *supra* note 187 at paras. 38 & 39.

A similar approach can be seen in some of the British Columbia cases, where the courts have recognized that failing to meet the standard perfectly may not preclude achieving the goal of client protection. In *Robertson*,¹⁹¹ a lawyer joined Slater Vecchio, counsel for the plaintiffs in certain litigation, on November 1, 2006. The lawyer was previously an associate in the firm which acted as counsel for defendants. The lawyer was actively involved in the defence of the lawsuits.

The nine-lawyer Slater Vecchio firm largely implemented its security measures by November 1 when the lawyer joined the firm, but these measures were not completed until November 19, 2006. The court held that disqualification was not required:

... the courts must also consider the plaintiff's basic right to counsel, and whether the consequences of disclosure, the mischief, is actual and not speculative. If there is no prejudice, no mischief, the courts may deny injunctive relief. The court must analyze all relevant factors.¹⁹²

The chambers judge found that the law firm had substantially – but not completely – complied with the Law Society's guidelines and concluded:

I have weighed the facts in light of the strict test expressed by Sopinka J. in *MacDonald Estate*. A firewall was necessary. Ideally it should have been completed by the time Mr. Gordon arrived for work at Slater Vecchio on November 1, 2006. In my view, however, although there was not complete conformity to the guidelines laid down by the Law Society, there was compliance in spirit and substantial compliance by November 1, 2006.

In my opinion, the knowledgeable and reasonable client, witnessing the effective good faith effort by Slater Vecchio to protect against disclosure, would conclude that no unauthorized disclosure of confidential information occurred or was likely to occur in respect of Mr. Gordon's transfer to Slater Vecchio.¹⁹³

Sufficient evidence of non-disclosure

It would be best, of course, that delays not occur and that protective measures always be established before a transferring lawyer joins a firm. However, the Task Force considers it inappropriate to necessarily require a client to seek new counsel where the Court is provided with sufficient evidence to properly conclude that there has been no disclosure of confidential information. Sometimes delays occur for reasons that are unlikely to have had any impact on disclosure. For example, a lawyer may be out of the office for a few weeks on a lengthy out-of-town trial.

Where a lawyer has simply not been in the office, the inference that lawyers who work together share confidences has little force. The same may be true for other practical situations which inherently provide assurance that no information has been shared in the interim. On proper affidavit evidence, there is no obvious reason to disqualify such a lawyer for late establishment of an ethical wall.

¹⁹¹ *Robertson*, *supra* note 36.

¹⁹² *Ibid.* at para. 44.

¹⁹³ *Ibid.* at paras. 61 & 62.

Considering cases and examples such as these led the Task Force to the position it articulated in its consultation paper, that timing should not necessarily be critical if it can be proved that no disclosure of confidential information has in fact occurred. Many respondents agreed with the Task Force preliminary view. For them, the critical factor is whether or not confidential information was disclosed, not the timing of the screen.

Although some respondents felt that timing is important and that delay gives rise to suspicions, the Task Force believes that the public is not well served by a rigid rule that can have serious negative results for clients when there is clear evidence of no disclosure or sharing of confidential information.

We believe that a strict rule that delay will result in disqualification creates unnecessary prejudice. We accordingly recommend that the Rules should be amended to provide that delay of the erection of screens should not necessarily be fatal if it can be proved that no disclosure of confidential information has in fact occurred.

Merging law firms

Mergers have given rise to significant problems. In *Saint John Shipbuilding Ltd v. Bow Valley Husky (Bermuda) Ltd*¹⁹⁴ the court considered a law firm merger rather than a lawyer transfer. In that case, the merged law firm simultaneously represented both sides of a dispute and failed to implement any measures until 21 months after the merger:

There is considerable judicial authority for the view that where a conflict of interest will arise consequent upon a lawyer joining a law firm or, as here, following a merger, screening mechanisms, to be effective, must be in place before the differently constituted law firm becomes a reality. Rarely will a departure from that general rule be warranted. The burden of establishing circumstances justifying a departure from the general rule rests on the party seeking relief from its application.

In the case at bar, no screening measures were in place prior to January 1, 2000 and none were implemented until September 18, 2001. Had an effective pre-merger search been conducted, the conflict of interest at the root of Saint John Shipbuilding's motion would, in all likelihood, have come to the fore. Gowlings would have had to terminate its retainer by Saint John Shipbuilding and put in place prior to the merger the screening mechanisms, if it was to have any chance of successfully resisting any disqualification application by Saint John Shipbuilding. Undoubtedly, there will be cases where the court will quite properly be justified in overlooking the impugned law firm's omission to raise appropriate screens prior to the conflict-of-interest-generating merger. The present case does not fall within that exceptional category.¹⁹⁵

Courts consistently hold that screening mechanisms must be in place when law firms agree to merge. Unfortunately, this poses many practical problems for merging law firms.

¹⁹⁴ *St. John Shipbuilding*, *supra* at note 174.

¹⁹⁵ *Ibid.* at paras. 66-68.

A merger is a complex set of business, professional and technological arrangements which may take months to complete. At the time of agreement, the merging firms will have separate offices, facilities and systems. The ability to establish protective measures is limited. While some conflicts may be apparent before merger, the ability of the merging firms to determine all conflicts prior to merger is limited for practical and ethical reasons. Once a merger agreement is entered into, significant work is required to search conflicts in both conflicts systems. The ability to establish protective measures is quite different at the time of agreement than it will be once offices, facilities, and systems are merged. At the time of the merger agreement, lawyers are not yet working together and the inference that lawyers of the merged firm will share confidences does not yet have logical vigour.

The Task Force believes that it is appropriate to analyze the merging firm scenario by examining when there was a genuine risk of breach of client confidentiality. This might be when office premises are combined, when physical file systems are integrated or when computer networks are combined. Up to that point, there may have been an agreement to merge, but lawyers have not yet worked together and client confidences were not yet at risk.

One recent Ontario case illustrates that conflicts must be on the agenda in the consideration of the risks and benefits of the merger. In *James v. Vogue Developments (Phase II) Inc.*,¹⁹⁶ measures were put in place less than three weeks after the effective merger. The lawyers of the merging firms assumed settlement of an otherwise potential conflict but the settlement unexpectedly failed after the merger:

What these cases establish is that a firm to which lawyers are transferring must put in place a system of identifying conflicts and segregating confidential information before the new lawyers join the firm. However reasonable the steps taken may have ultimately been, such a system was not in place in advance of the Farano, Green files arriving at the offices of Gardiner, Roberts. Although the conflict in this particular file was well known to both counsel involved, safeguards were only put in place after the settlement broke down. I hasten to add that there is nothing in the evidence which suggests any impropriety, lack of good faith or even lack of judgment on the part of the lawyers involved. The fact is however, that the minimum requirements of the *MacDonald Estate* test have not been met.¹⁹⁷

Firms need to be careful to address possible conflicts at the time of merger negotiations, and to have plans in place to protect client information. At the same time, courts should be more receptive to evidence regarding the point at which confidential information is actually at risk.

Comments on the CBA Guidelines on screening measures

In this section, we will highlight some specific issues regarding the CBA Guidelines¹⁹⁸ which have arisen during our consultations.

¹⁹⁶ *James*, *supra* note 174.

¹⁹⁷ *Ibid.* at para. 13.

¹⁹⁸ See page 43 of the CBA's *Code of Professional Conduct*.

Announcements about the establishment of a screen

The first issue is the distribution of screen memoranda. Guideline 7 provides that:

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.

Guideline 7 has generally been taken to mean that a screen policy should be circulated to all firm staff describing context, the protective measures, and containing the admonition.

While the CBA Guidelines dealt with transferring lawyers, screens are now commonly used in other situations as well. Outside of British Columbia,¹⁹⁹ screens are often used where a firm acts against a current client. Where consent is sought and obtained, it is often agreed that a screen will be established in order to satisfy the client that no confidential information will inadvertently be misused. Screens are often used where a firm acts against a former client. Finally, some firms use screens to protect particularly sensitive matters including, for example, highly confidential information regarding public issuers.

One major firm advised that: “We do not distribute our ethical wall memoranda on a firm-wide basis. Our view is that it is not appropriate to extend the knowledge of the wall beyond those who are working on one or other matter and who obviously need to know.” Moreover, this approach limits the obligations to those who have had the access to the confidential information which needs to be protected. While it may in theory be helpful to circulate a bulletin reminding firm members of their ethical obligations, such a reminder loses its impact when repeated dozens or even hundreds of times, or sent out to offices which have no connection whatsoever to the alleged conflict.

The Task Force agrees that the distribution of specific screen information should be limited to those involved in the screen. There is little advantage in circulating a screen to lawyers and staff who realistically have nothing to do with the lawyers or matters dealt with in a screen and may result in the dissemination of information which should not be disseminated.

The use of affidavits

Guideline 8²⁰⁰ provides that:

Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.

¹⁹⁹ Rule 6.3 of the B.C. Handbook permits an adverse retainer against a current client with consent but only where “the matters are substantially unrelated and the lawyer does not possess confidential information arising from the representation of one client that might reasonably affect the other representation.”

²⁰⁰ *Supra* note 198.

The Task Force does not believe, especially with the broader use of screens, that the use of affidavits should be mandatory within the guidelines.²⁰¹ As noted above regarding *MacDonald Estate*, affidavits as to future events are no more than sworn statements of current intention. The Task Force does not believe that any genuine purpose is served by requiring an affidavit. The Task Force suggests a review of Guideline 8 may be appropriate to consider whether affidavits should be required in all circumstances in which a screen has been put in place.

Where there is delay in the establishment of a screen, the situation is different and affidavits can provide valuable evidence as to whether there has in fact been compliance up to the date of the affidavit. In the case of the transferring lawyer, an affidavit of the transferring lawyer may be useful to confirm that there has been no improper disclosure during the hiring process.

The location of staff in the office

Guideline 10²⁰² provides that:

the screened member's office or work station and that of the member's secretary should be located away from the offices and work stations of lawyers and support staff working on the matter.

The Task Force notes that, in some practices and offices, this may simply not work, especially where a lawyer is part of a team working together on a large number of mandates, with the only conflict arising from marginal involvement on a single file. We do not believe that protecting client confidentiality in these circumstances requires total isolation. A degree of pragmatic sensitivity would be helpful in the application of Guideline 10.

Confidentiality and the disclosure of client information for screening purposes

Furthermore, the guidelines do not deal with establishment, maintenance and supervision of screens. Guidance would be helpful in a number of situations, for example, in the case of transferring lawyers. In order to clear conflicts, it is necessary that the transferring lawyer identify potential conflicts to the new firm so that a proper conflicts search can be made. However, there is a question as to whether the transferring lawyer, or their former firm, can properly disclose the identity of the former clients in light of the rules governing client confidentiality. The Task Force recommends that there be clarification permitting such disclosure for the purpose of conflicts clearance.

²⁰¹ In the case of a transferring lawyer, it is perhaps easier to identify the “appropriate lawyers.” Where screens are used in the case of adverse mandates against current or former clients or for securities law or other purposes, the number of potentially appropriate lawyers increases dramatically with the utility of, and compliance with, mandatory affidavits being increasingly doubtful.

²⁰² *Supra* note 198.

Changes in technology

We complete this section by noting that the ability to assess and ensure compliance with screens and other protective measures has been dramatically enhanced by technological advances since *MacDonald Estate*. Most communication and documentation is now created, accessed, and retained electronically, making it easier to monitor and restrict.

Modern document management systems can provide audit trails which record access to and editing and printing of electronic documents. Modern e-mail systems can be searched to examine electronic communication to and from particular individuals.

Sophisticated confidentiality screen software can now restrict access to electronic documents to those who are permitted access pursuant to established confidentiality screens. Confidentiality screen software can be linked with time-entry software to ensure that only those who are authorized to participate in a matter can docket time to the matter.

With the advent of these computerized monitoring and security systems comes much more assurance that client confidentiality has been protected and that information has not been improperly accessed. The list of factors which can be considered in assessing the adequacy of screens should be expressly expanded to permit the evidence of those responsible for the monitoring and security of law firm information technology, systems, and networks that no breach of security or unauthorized access has in fact occurred.

The use of screens with respect to former client matters

While the rules establishing screens were first articulated to address the problems posed by transferring lawyers, courts have considered that they may constitute appropriate safeguards in other situations where there is a need to ensure the proper protection of client confidences. *Ford Motor Co. of Canada, Ltd v. Osler, Hoskin & Harcourt*²⁰³ was such a case.

Justice Winkler, as he then was, applied the transferring lawyer guidelines to a former client situation and concluded that, had a screen been established in a timely fashion, a screen would have been acceptable. Justice Winkler wrote on this issue:

Hence, it is submitted that Osler, Hoskin can seek no comfort in the fact that they took guidance from and sought to comply with the Canadian Bar Association guidelines. I disagree with this line of argument. In the first place it ignores, in my view, the words of Sopinka J. in *MacDonald Estate v. Martin* where at p. 1261, in elaborating on the second question, he states: “a lawyer who has relevant confidential information cannot act against his client or former client.” Then later: “The answer is less clear with respect to the partners or associates in the firm.” Although his Lordship goes on to address this distinction to a transferring lawyer, it seems to me that the analysis is equally apposite to the singular situation of lawyer acting against a former client or a law firm acting against a former client where different lawyers will have carriage of the relevant matters for and against the client. Also, while

²⁰³ *Ford Motor, supra* note 174.

it would have been preferable had the Canadian Bar Association and Law Society of Upper Canada pitched the guidelines and Rule 29 more broadly to encompass squarely on their face the internal situation of acting against a former client, the issues and applicable principles are the same.

This reasoning has been cited with approval in other cases involving former clients²⁰⁴ and in cases involving prospective clients.²⁰⁵

This reasoning led the Law Society of Upper Canada to amend its *Rules of Professional Conduct* to recognize that screens, properly constructed, might be appropriate in other circumstances, such as taking precautions to ensure that a lawyer has not had access to the confidential information of a former client. The accompanying commentary notes that it extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms to the situation of a law firm acting against a former client.

The Task Force supports use of screens in former and prospective client cases in the circumstances contemplated by the Ontario rule. The Task Force particularly supports the view that properly informed clients should be able to consent to the use of screens where confidential relevant information is possessed. Accordingly we suggest that a rule similar to Ontario’s Rule 2.04 (5) might usefully be added to the CBA Code of Professional Conduct to clarify that screens constructed in this way are suffice to protect client interests.

The presumption that disclosure has occurred

In its consultation paper, the Task Force asked the profession about the wisdom or utility of a presumption that confidential client information will inevitably be shared by lawyers within a law firm, under circumstances where it can be proven that it was not. We suggested that courts hearing disqualification motions should determine the issue based on whether confidential information was *in fact* disclosed or misused. We also suggested that the rules expressly recognize that screens are appropriate and effective to protect client confidentiality, in contexts other than for transferring lawyers. We asked for comments on the presumption that confidential information has been shared, suggesting instead that a disqualification should not be based on a presumption and on the timing of screen placement but rather on whether confidential information has been, or could be, misused or disclosed.

In general, the members of the profession who commented on the proposals offered strong support for the Task Force approach. Some respondents noted that the current irrebutable presumption was “absurd”, “unfair” and “lacking in natural justice.” Some wrote that the reality for many lawyers today is that they work in a large firm and may not even have met or ever talked to other lawyers in the firm, let alone shared client information with them.

²⁰⁴ *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, 10 B.L.R. (3d) 104, 141 O.A.C. 380 (C.A.).

²⁰⁵ *Ainsworth Electric Co. v. Alcatel Canada Wire Inc.*, 1998 CanLII 14845 (ON S.C.) [*Ainsworth*]. This case is discussed at greater length in the “Clients, near-clients and non-clients” chapter.

While there was support for the Task Force view that the presumption of disclosure should be rebuttable, some respondents identified a few situations in which the presumption could not be rebutted. These included situations in which the lawyers worked in close proximity, where there was a possibility of harm, and where highly confidential information was involved.

Our consultations also showed us that the profession is keenly aware of the public interest. Whatever changes are adopted must be done in a balanced fashion which protects the public and avoids unnecessary theoretical problems. The present state of the law may impose standards which serve to protect the public or protect the administration of justice in certain instances but it also deprives clients of the right to retain counsel of their choice in other instances.

Tactical use of disqualification

Concerns have been expressed regarding the proliferation and misuse of disqualification applications for tactical reasons. The courts have also expressed concern about the potential abuse of disqualification motions for purely tactical purposes.²⁰⁶ Justice Binnie highlighted this issue in *Strother*.²⁰⁷

Sometimes the claim of conflict is asserted for purely tactical reasons, an objectionable practice criticized in *Neil* at paras. 14-15.²⁰⁸ and a factor to be taken into account by a court in determining what relief if any is to be accorded.²⁰⁹

The use of conflict of interest allegations as a tactic to gain advantage in litigation or in a commercial transaction must be strongly discouraged, particularly when it can be proven that there has been no disclosure or misuses of the client's confidential information.

While the values identified by Justice Sopinka in *MacDonald Estate* are vitally important, a number of judges have observed that the proliferation of disqualification applications since *MacDonald Estate* has not increased public confidence in the justice system, but instead has spawned a complex set of rules which are capable of being abused. Justice Rice of the British Columbia Supreme Court expressed this concern in *Robertson v. Slater Vecchio*:

I return to the first value, the concern to maintain the high standards of the legal profession in the integrity of our system of justice. There are many references in the judgments in *MacDonald Estate v. Martin* to that very broadly stated value, which is treated as being at risk only from conflict of interest by lawyers. I do not discount the seriousness of that risk but I suggest with respect that, if the rules for disqualification invite applications of this kind wherever the ingenuity of the legal mind can conjure up a possibility of an appearance of impropriety, the result will be to damage the profession's reputation and the integrity of the system by adding to the already intolerable length and cost of litigation.

²⁰⁶ See *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821; *Skye Properties*, *supra* note 189; *Canadian Pacific Railway Company v. Aikins, MacAulay and Thorvaldson* (1998), 157 D.L.R. (4th) 473, [1998] 6 W.W.R. 351, (1998), 123 Man. R. (2d) 281 (C.A.); *Moffat v. Wetstein* (1996), 135 D.L.R. (4th) 298 (Ont. Ct. (Gen.Div.)) per Granger J.; and *Manville Canada Inc. v. Ladner Downs*, *supra* note 36, at p. 224, and *Rayner v. Enright* (1993), 20 C.P.C. (3d) 269 (Sask. Q. B.), per Kyle J., at p. 271.

²⁰⁷ *Strother*, *supra* note 3 at para 36.

²⁰⁸ *Neil*, *supra* note 4: "In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection."

²⁰⁹ *Citing De Beers Canada Inc. v. Shore Gold Inc.*, [2006] 8 W.W.R. 124, (2006), 278 Sask. R. 171; *Dobbin v. Acrohelipro Global Services Inc.* (2005), 246 Nfld. & P.E.I.R. 177, 2005 NLCA 22.

Until very recently, applications to remove lawyers were so rare an event that, at least in this jurisdiction, few judges or lawyers seemed to be more than vaguely aware that such a remedy existed. Nor, so far as I am aware, was there any general feeling of discontent on the part of the public arising from the possibility of conflict. But there was and is a rising tide of discontent with the length, complexity and cost of proceedings. Since *MacDonald Estate v. Martin*, the application to disqualify has become a growth area as it began to do 20 or so years ago in the United States where it seems to have reached the stage of being a common feature of major litigation. No doubt, some of those applications are brought to prevent a risk of real mischief. But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation. If that becomes a regular feature of our litigation it would not likely do much to improve the profession's standards in an area in which there seem to have been few serious problems. But it could do much to further reduce the court's ability to get to judgment in a timely way.²¹⁰

The Task Force recommends that the rules and their application by the courts be used to provide real protection for client interests and, at the same time, discourage, in the strongest terms, the use of allegations of conflict for tactical purposes. The Task Force is concerned that an overly rigid rules-based approach has not served the public interest to the extent that a more principled approach would.

RECOMMENDATIONS

That the CBA Code of Professional Conduct be amended to:

9. provide that a delay in the erection of a confidentiality screen need not require a law firm to cease acting if it can be shown that no disclosure of confidential information occurred;
10. adopt the Law Society of Upper Canada Rule 2.04 (5) which says:
Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if
 - (a) the former client consents to the lawyer's partner or associate acting, or
 - (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
 - (i) the adequacy 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,
 - (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.

²¹⁰ *Manville Canada Inc. v. Ladner Downs*, *supra* note 36 at paras. 53-54. See also *Credit Union Central of Ontario Limited v. Heritage Property Holdings*, *supra* note 206; *Skye Properties*, *supra* note 189; and *Canadian Pacific Railway Company v. Aikins*, *supra* note 23 at para 19. See also *Moffat v. Wetstein*, *supra* note 206, per Granger J., and *Rayner v. Enright*, *supra* note 206 at p. 271.

11. include commentary to clarify the procedures that should be followed when professional, specialist and administrative staff transfer from one law firm to another.

Notes

Nothing in this recommendation is intended to exclude liability should confidential information actually be misused or inappropriately disclosed.

Note that the use of confidentiality screens may be appropriate with respect to cases involving former clients.

A strict rule that a delay in establishing a confidentiality screen will result in disqualification creates unnecessary prejudice. Factors that can be used to prove that no disclosure took place may include information from a firm's technology systems and networks that show that no breach of security or unauthorized access occurred.

The distribution of information about a firm's decision to establish a confidentiality screen may be limited, where appropriate, to those who need to know, without compromising the effectiveness of the screen. Wide circulation of screen information may have the unintended effect of increasing the risk of an inadvertent disclosure.

Lawyers who have independent practices but share space with other lawyers should not automatically be assumed to also be sharing information about their clients. Having systems in place to protect client confidentially completely should be considered sufficient.

Professional staff includes articling students, law clerks, and paralegals, patent and trademark agents, planners, and other professionals and paraprofessionals.

Specialist staff includes librarian researchers, translators, process servers, title searchers, electronic document specialists, and word processing operators.

Administrative staff includes accounting and computer staff.

The use of a disqualification motion as a tactical or dilatory action does not contribute to respect for the justice system and is discouraged.

That the guidelines on conflicts from transfer between law firms in the CBA Code of Professional Conduct be amended to:

12. recognize that in the case of a merger of law firms the risk of a breach of client confidentiality does not occur by reason only of entering into a merger agreement and that any necessary screens should therefore be required only when the lawyers in the merged firm start working together or otherwise sharing client information.

Notes

Law firm mergers are complex business, professional, and technical arrangements that may take many months to complete. At the time of a merger agreement, the firms will have separate offices, facilities, and systems. Conflicts may only be detectable when work begins to merge these various elements. This is the critical moment for identifying a conflict and ensuring screens are in place, if necessary.

To complement its Report and recommendations, the Task Force has prepared a Conflicts of Interest Toolkit which includes model letters and checklists. The Toolkit can be found at pages 183 to 259. The following items are of particular relevance to this chapter:

| | |
|---|----------|
| Hints on the construction of screens | Page 237 |
| Model confidentiality screen memorandum to team members | Page 239 |
| Potential conflict arising from former mandate | Page 243 |
| Checklist for interviewing transferring lawyer | Page 250 |
| Model lateral hire memorandum | Page 251 |

CHAPTER 4

Clients, Near-clients, Non-clients

The analysis in *Neil* opens with the stirring words of Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline:

“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty. ...”²¹¹

As the Court in *Neil* observed, these words are far removed in time and place from the legal world in which lawyers today carry on their practices, but the defining principle endures because the principle of duty to client:

“... is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained.”²¹²

As important as the duty owed, is the determination of the identity of persons to whom the duty is owed.²¹³ Clarity is required in the determination of the client so that the full rigour of lawyer-client duties is not weakened by misapplication of those duties in favour of non-clients.

Clarity of terminology is important for the same reason. The term “client” is sometimes used to refer to non-clients. For example, prospective clients are sometimes referred to as clients for the purpose of protecting confidentiality. Similarly, persons associated with clients may be owed limited duties but this does not mean that they are owed all of the duties that are owed to clients.

Previous chapters have explored the nature of a lawyer’s duties. This chapter considers the question “Who is the person to whom these fundamental duties are owed?”²¹⁴ After a review of the case law on the topic, the chapter concludes with recommendations for amendments to the CBA Code of Professional Conduct that would provide more guidance on who is the client.

²¹¹ (*Trial of Queen Caroline* (1821), by J. Nightingale, vol. II The Defence, Part 1, at p. 8) as cited in *R. v. Neil*, *supra* note 4, at para. 12.

²¹² *Neil*, *ibid.*

²¹³ Allan C. Hutchinson, *Who are “Clients”? (And Why It Matters)* (2005), 84:3 Can. Bar Rev. 411 at p. 424 and 425.

²¹⁴ This is not to say that no duties are owed by lawyers to non-clients. Lawyers do, in some circumstances, for example, owe duties of confidentiality to non-clients, but it would be illogical and counter-productive to grant what Professor Hutchinson in his article in footnote 3 referred to as the “whole collection of commitment and values” with which the law protects clients to non-clients.

Prospective clients

Initial contacts

A lawyer's duty of confidentiality may arise as soon as a prospective client contacts the lawyer, whether or not a lawyer-client relationship is ever established. Often, a prospective client may want to assess the expertise, experience and attributes of a lawyer before deciding to retain the lawyer. And before agreeing to take on a retainer, lawyers need to assess the nature of the work by asking: Am I competent to act on this matter? Am I interested in acting? Am I able to act or do I have a conflicting interest?

During this process, a prospective client may disclose confidential information and, as a result, the lawyer may take on a duty of confidentiality, even if the person never becomes a client and no duty of performance or duty of loyalty is ever assumed.

Requests for proposals

In recent years, some prospective clients have begun asking several lawyers or law firms to compete for their work. A "beauty contest" asks for bids to handle a specific retainer and a request for proposal (RFP) process asks for proposals to handle a range of the client's legal service needs. In either situation, the lawyers or law firms will come to a meeting or submit a proposal describing how they will handle the work, which lawyers will do it, and how they will bill for it. As a result of the process, one submission will be successful, and the other bidders run the risk of having developed a conflict, because they may have learned confidential information about the client during the client's search process.

The impact of the "beauty contest" process on the unsuccessful bidders was considered in *Ainsworth Electric Co. v. Alcatel Canada Wire Inc.*²¹⁵ In that case, Alcatel sought to disqualify Ainsworth's lawyers, Goodman Phillips & Vineberg. Alcatel had asked for proposals for work involving a dispute with Ainsworth and Goodman was one of several firms that had submitted a proposal. In assessing the obligations that an unsuccessful bidder owes to a company that did not end up becoming the firm's client, Master Sandler wrote:

In my view, there was a "solicitor-client" relationship between Alcatel and the Goodman firm as that phrase is understood in law, even though Alcatel was just "shopping" and had not actually or formally retained the Goodman firm in this case. Goodman clearly owed Alcatel a duty of confidentiality.²¹⁶

²¹⁵ *Ainsworth*, *supra* note 205.

²¹⁶ *Ibid.* at para. 39.

However, Master Sandler went on to conclude that:

I find that the presumption that there is a real risk to Alcatel that any confidential information that was imparted to Zarnett and Crofoot [*lawyers with Goodman*] will be used by them to the actual prejudice of Alcatel has been rebutted in this case. And I think it relevant that Zarnett and Crofoot have, in fact, no actual recollection of the two meetings with Alcatel in October of 1995.

But much more important are the steps that have been taken by Mr. Wise [*a lawyer with Goodman*] to put in place a screen. He moved as quickly as possible. The screen is sufficient in the circumstances of this case. Removal is an extraordinary and drastic remedy and I am to have regard to the reality, rather than focusing only on appearances and perceptions. There is not a risk of real mischief in this case. Alcatel's concerns are legitimate and should be taken seriously, but, on balance, I find no real risk to Alcatel that it would be prejudiced if Mr. Wise, now at the Goodman firm, continues to act, so long as the screen is in place and is adhered to. I accept the statements under oath of Mr. Wise, Mr. Zarnett and Mr. Crofoot that all elements of the screen will be adhered to. I therefore dismiss the motions.²¹⁷

Three points can be made regarding this case. First, Goodman and Alcatel apparently did not address at the outset whether Alcatel would disclose confidential information in the course of the RFP process, nor whether Goodman would be free to act in this matter adverse to Alcatel if not retained by Alcatel. The lawyers involved deposed that they did not recall that any confidential information had been disclosed during the meetings that had been held. It is clear that preparation of a document expressly stating the basis upon which the law firm was prepared to participate in the RFP process would have made the result of this motion much more predictable.

The second point is that a timely confidentiality screen made the difference in the result. While this case involved a transferring lawyer and participation in an RFP process, the value of immediate protective measures is emphasized by this case.

The third point is that it is unnecessarily confusing to describe a prospective client as a client. While it is true that lawyer-client privilege and a duty of confidence will protect preliminary discussions with a prospective client, a prospective client is not owed any duty of performance nor a duty of loyalty until the client has decided to retain the lawyer and the lawyer accepts the retainer.

The CBA Code of Professional Conduct²¹⁸ addresses the prospective client issue as follows:

Requests for Proposals and Other Enquiries

- 17 Prospective clients often interview or seek proposals from several firms about potential retainers. During the course of such a process, a prospective client may provide confidential information about the potential retainer. As a result, there is a risk that it will be suggested that a lawyer who unsuccessfully participates in such a process should be disqualified from acting for another party to the matter. Discussing a potential retainer with a prospective client or participating

²¹⁷ *Ibid.* at para. 41-42.

²¹⁸ Comment section 17 of Chapter V.

in a request for proposals process does not itself preclude a lawyer from acting in the matter for another party. Where the prospective client wishes to disclose confidential information as part of such a process, the lawyer and the prospective client should expressly agree whether the disclosure will prevent the lawyer from acting for another party in the matter if the lawyer is not retained by the prospective client. If the prospective client and the lawyer are unable to agree, the lawyer should insist that the prospective client not disclose confidential information unless and until the lawyer is retained.

The emphasis in both the *Ainsworth* case and in the CBA Code regarding prospective clients is the duty of confidentiality. It would be wrong to conclude that because a duty of confidentiality is owed to a prospective client, the full range of lawyer-client duties is therefore also owed. When a client has decided not to retain the lawyer, no duty of performance arises and no ongoing lawyer-client relationship is established which would result in a duty of loyalty.

From a lawyer's perspective, there are at least two quite different situations where unintended client relationships may arise or be thought to arise. In one situation, the lawyer must guard against an unintended client mistaking contact with the start of a lawyer-client relationship. In the other situation, an unintended client may approach a lawyer who understands that the client is looking to retain that lawyer, but the lawyer is not prepared to accept the retainer.

The work of government lawyers provides a useful example of the first scenario. Their client is the government,²¹⁹ but through their work many government lawyers routinely have contact with members of the public. These encounters do not create a lawyer-client relationship, but a member of the public dealing with a government lawyer might occasionally and erroneously conclude that a relationship exists. Aware of this possibility, government lawyers are accustomed to reminding members of the public that any assistance they render is not provided within the context of a lawyer-client relationship and that independent legal advice is necessary.

The risk of unintended lawyer-client relationships is also a concern for in-house counsel. In light of the multiplicity of requests for advice made to in-house counsel from a wide-ranging corporate constituency, there is significant potential for lines to be blurred in the minds of those who seek counsel's advice. It is important for in-house counsel to identify their client in order to protect that client's interests and deal appropriately with potential conflicts of interest and questions of confidentiality.

The second scenario – the person who is looking for a lawyer – is more likely to happen in private practice. Lawyers, or their staff, are sometimes approached by prospective clients looking for counsel without the lawyer being willing or able to act.

As the Ontario Securities Commission emphasized in the *Credit Suisse*²²⁰ case, regard must be had to all of the circumstances in determining whether a lawyer-client relationship has arisen absent a formal retainer:

²¹⁹ There may be some debate about who, within government, is a government lawyer's client, but there is general agreement that members of the public are not.

²²⁰ *Supra* note 65.

[98] ...a solicitor-client relationship is often established without legal formality and in the absence of an express retainer or remuneration. This commentary is an important statement of public policy from the body which regulates the legal profession in Ontario. It reinforces our determination that it would be inappropriate, in the circumstances of this case, to take too rigid and mechanical an approach as to whether RS became a client and as to whether Stikeman Elliott owes duties to RS notwithstanding the absence of a formal retainer between them.

Determining whether a prospective client has become an actual client is sometimes a challenge. Interaction with the lawyer or employees of the lawyer may, of course, provide evidence that a lawyer-client relationship was established or is continuing.

Telephone calls

There have been a number of cases where a party has argued that brief telephone conversations or other discussions between a lawyer and that party were sufficient to establish the lawyer-client relationship. In *Trizec Properties Ltd v. Husky Oil Ltd*,²²¹ at issue was a 30-minute conversation (evidenced by telephone records) which had been held 13 years earlier, combined with the lawyer's notes of the call. Together these were sufficient to prove that the discussion had been of such a general nature that no client relationship had been created. In *Holizki v. Reeves*,²²² no lawyer-client relationship was created by the purported client's 14-minute call to a lawyer giving him the background of her case since the records indicated this had not been followed (as she claimed) by a subsequent 30-minute conversation on the case.

The value of a written record

A lawyer's failure to keep records and remember what actually transpired may make it difficult to prove that no lawyer-client relationship was established. *Vance v. Polland*²²³ was a motion to remove counsel for the defendant on the grounds that the lawyer had previously been consulted by one of the plaintiffs. There was apparently a brief conversation between the plaintiff and the lawyer in question in which no confidential information had been transmitted, followed by the plaintiff e-mailing a 12-page document to the lawyer. Although the lawyer denied that he had asked for or ever received the document, there appears to have been some evidence that it did reach his firm and was housed on its server. There was therefore a risk that the confidential information in the document could be accidentally or unintentionally misused, and no reliance could be placed on the lawyer's assurance that it would not. The lawyer was removed as solicitor of record.

In a similar case from England, *Davies v. Davies*,²²⁴ a wife consulted Mr. Tooth, a well-known family solicitor (who later could not remember the conversation) in 1991 about her legal marital problems and she told him about her husband's behaviour and that there was a

²²¹ 15 C.P.C. (4th) 346 (Alta C.A.), aff'd (1996), 4 C.P.C. (4th) 83 (Alta Q.B.).

²²² (1997), 10 C.P.C. (4th) 63 (Sask. Q.B.).

²²³ (2005), 136 A.C.W.S. (3d) 597 (N.B.Q.B.).

²²⁴ [2000] 1 F.L.R. 39 (C.A.).

pre-nuptial financial agreement. When the wife later sued for divorce in 1997, she hired another solicitor and her husband hired Mr. Tooth. The lower court and the Court of Appeal were both in agreement that Mr. Tooth had received sufficient confidential information from the first consultation to warrant his disqualification. The court seems to have been particularly concerned about the fact that two of the matters that the wife had discussed with Mr. Tooth, the husband's behaviour and the pre-nuptial agreement, were both at issue in the divorce proceedings.

Conversations with staff

When dealing with prospective clients, care must be taken to avoid any confidential information being transmitted to staff of the law firm or organization. It may not be necessary for a lawyer to receive the confidential information in order for there to be a perceived conflict of interest and even, in the view of certain judges, the establishment of a lawyer-client relationship. In *Dalgleish v. Dalgleish*,²²⁵ at the start of divorce proceedings, the wife had three brief conversations, two with the secretary and one with the clerk of a lawyer she was thinking of retaining. She did not retain that lawyer, but the husband did. The lawyer maintained that he had never received any confidential information about the file from his assistant, which was accepted. The judge went on to say, however, that the test in removal cases is not whether confidential information was or was not in fact disclosed, but whether it was *likely* to have been disclosed. In his view:

There is no question in my mind that the working relationship of a legal secretary and her employer is such that, a prospective client speaking to a secretary in the context of considering whether or not to retain the lawyer, would not differentiate much between them. This is so, as far as the information trail is concerned. The prospective client would, under ordinary circumstances, expect the secretary to convey all of the information to her employer.²²⁶

In the judge's view, a lawyer-client relationship was created as confidential information was imparted to the assistant and the clerk in the three calls which was likely to have involved matters beyond those of a merely administrative nature. The lawyer was therefore disqualified.²²⁷

Duties owing to prospective clients

These cases illustrate that sometimes there may be difficulty distinguishing between prospective and actual clients and that there therefore can be a lack of clarity regarding the different obligations owed to each. The Task Force believes that it is not appropriate to classify the lawyer-prospective client relationship as a lawyer-client relationship – with all the duties that entails – when, for whatever reason, the lawyer is never retained. The more suitable analysis, in such cases, is that, even though no lawyer-client relationship is established,

²²⁵ [2001] O.J. No. 2187 (S.C.J.).

²²⁶ *Ibid.* at para. 31.

²²⁷ See also *Gottschlich v. Gottschlich*, [2000] A.J. No. 696 (Q.B.); *Ocelot*, *supra* note 166; *Chern v. Chern*, 2006 ABCA 16 (solicitor disqualified because assistant likely to have been in possession of confidential information of the other side).

the lawyer is under an obligation of confidentiality. To be clear, lawyer-client privilege may attach to prospective client communications without it being necessary for the court to conclude that the lawyer had been retained to act for the client.

The approach of the *Alberta Code of Professional Conduct* is instructive:

C.3.4 Prospective client: A prospective client is a person who discloses confidential information to a lawyer for the purpose of retaining the lawyer. A lawyer must maintain the confidentiality of information received from a prospective client. ... If the lawyer declines the representation, the information disclosed by the prospective client, including the fact that the client approached the firm, must not be disclosed to those who may act against the prospective client, notwithstanding Chapter 9, Commentary G.1 [General duties to clients respecting information]. The firm may act or continue to act contrary to the interests of the prospective client in relation to the proposed retainer if the lawyer takes adequate steps to ensure that:

- (a) the confidential information is not disclosed to other firm members representing clients adverse to the prospective client, and
- (b) firm members who have the confidential information will not be involved in any retainer that is related to the matter for which the prospective client sought to retain the firm.

The adequacy of the measures taken to prevent disclosure of the information will depend on the circumstances of the case, and may include destroying, sealing or returning to the prospective client notes and correspondence and deleting or password protecting computer files on which any such information may be recorded.

The Alberta approach appropriately ensures that the confidential information of a prospective client is protected, while recognizing that duties of performance and loyalty have not been assumed or imposed by law.

Other situations which may result in an unexpected lawyer-client relationship

When staff in a law firm perform administrative tasks with no or minimal lawyer participation, there may never be a lawyer-client relationship established. However, in *First Property Holdings Inc. v. Beatty*,²²⁸ Justice Wilson found that there was an ongoing lawyer-client relationship. For several years the law firm had submitted required filings to the Ontario Securities Commission on behalf of Iatra Life Sciences Corporation (“IATRA”). IATRA sent the necessary financial information to the firm and a law clerk input the data into a specialized computer program. The lawyer-client relationship was held to exist because: (i) the vice-president of IATRA was the contact person on the file, not its counsel, who practised at another firm; (ii) the work was classified by the firm as corporate/commercial rather than agency, and IATRA’s securities were added to the firm’s restricted list; and (iii) the law clerk’s investigation and correction of compliance problems with respect to filings was not the mere performance of routine,

²²⁸ [2003] O.J. No. 2943 (S.C.J.) [*First Property*].

non-analytical tasks. The fact that the paralegal's work was "uncomfortably close" to certain allegations in the action caused heightened concern, as did the fact that the lawyer in the action had asked to see certain filings that the paralegal was responsible for, on the eve of the shareholder suit. Not finding a lawyer-client relationship in such a case would represent:

a dangerous slippery slope of distinguishing between obligations owed to different categories of existing clients and embarking on a detailed analysis of the exact nature of the work performed.²²⁹

The lawyer's request to see the filings appears to have been crucial to the judge. Had it not occurred, and had the law firm established different procedures for the management of the retainer, Justice Wilson might not have found a problem (at para. 44). The judge concluded that there could be no doubt that IATRA was a current client and had been a client for four years at the time the shareholder claim was issued.

Given the fact situation in the case, *First Property* leaves open the possibility that mere mechanical or administrative work may not attract the same duties as legal advice. This is logical given that it is the nature and importance of the lawyer-client relationship which attracts fiduciary duties and that a relationship will be quite different when the work is merely administrative. While Justice Wilson is reluctant to parse the nature of the work performed, there are situations²³⁰ where the work done does not require or warrant the creation of a fiduciary relationship and no fiduciary duty ought to be imposed.

The same distinction between merely administrative work and legal work can arise where one lawyer acts as a limited agent for another lawyer. In *Smith v. Salvation Army in Canada*²³¹, the court held that receiving and copying documents, meeting clients to swear affidavits, and filing and serving motion materials was insufficient to create a lawyer-client relationship with the plaintiffs in the action.

The importance of clarifying expectations

Fee payment

Payment of a lawyer's legal fees should not, without more, be considered to establish a lawyer-client relationship.²³² This situation can occur, for example, for lawyers writing a will for an elderly person whose son or daughter is paying the fees. In this situation, it is important for the lawyer to clarify that simply paying the fees, without an authorization from the client to act on the client's behalf, does not entitle the payor to give instructions to the lawyer, make the payor a client, or mean that the lawyer owes the payor a duty of loyalty.

²²⁹ *Ibid.* at para. 14.

²³⁰ For example, being an agent for service or being a registered office.

²³¹ (2000), 50 C.P.C. (4th) 331 (Ont. S.C.J.).

²³² *Banai Management Inc. v. Baghai Development Inc.*, [2004] O.J. No. 261 (S.C.J., Master).

The *Alberta Code*²³³ expressly deals with the issue of payment of lawyer’s fees in some detail and recommends that a lawyer make it clear to the parties involved who the lawyer considers to be the client:

C.9.2 Accepting payment from a third party. A lawyer may be paid by one person, such as an insurance company or union, while being retained to act for another person, such as an insured individual or union member, who has standing to provide instructions directly to the lawyer. In this situation, the lawyer must clarify through discussions with both parties at the outset of the representation whether the lawyer will be acting for both parties, or only for the person.

...

In some circumstances, the person responsible for payment may agree that the other person will be considered the sole client of the lawyer in that matter if (for example) the first party is paying the other’s legal fees through courtesy or philanthropy or pursuant to a prepaid legal services plan. In this event, the lawyer should be satisfied that the financially responsible party understands the significance of the characterization of the other party as the sole client and, in particular, that the financially responsible party will have no right to request or receive confidential information regarding the matter.

Business relationships

Lawyers may do business with third parties who never become clients. It is important that lawyers clearly separate their lawyer-client relationships from their business relationships. The CBA Code of Professional Conduct provides the following guidance:

6. The question of whether a person is to be considered a client of the lawyer when such person is lending money to the lawyer, or buying, selling, making a loan to or investment in, or assuming an obligation in respect of a business, security or property in which the lawyer or an associate of the lawyer has an interest, or in respect of any other transaction, is to be determined having regard to all the circumstances. A person who is not otherwise a client may be deemed to be a client for purposes of this Rule if such person might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the transaction. In those circumstances the lawyer must consider such person to be a client and will be bound by the same fiduciary obligations that attach to a lawyer in dealings with a client. The onus shall be on the lawyer to establish that such a person was not in fact looking to the lawyer for guidance and advice.

When involved in any personal business situations, it is important for the lawyer to make the other parties aware of the lawyer’s intention to not act as a lawyer in the situation and for the lawyer to document this, especially when the nature of the relationship is not clear from the facts. Nevertheless, despite the absence of a lawyer-client relationship, a duty of confidentiality may exist whenever a person confides information to a lawyer or the firm “by reason of their profession” and expects such information to be kept confidential.²³⁴

²³³ Alberta Code, Commentary to Rule 9.2.

²³⁴ Simon Chester, ‘The Conflict Revolution – *Martin v. Gray* and Fifteen Years of Change’, paper prepared for Heenan Blaikie LLP.

An ambiguous situation may result in a holding that a lawyer-client relationship exists, so lawyers who do not act to eliminate the ambiguity bear the resulting risk of unexpected duties of performance, loyalty and confidentiality. Proper documentation is of great value to avoid this unfortunate result.

Engagement letters: evidence of a lawyer-client relationship

The presence of an engagement letter will provide *prima facie* proof that there is a lawyer-client relationship but the absence of an engagement letter does not prove the reverse.²³⁵ Lawyers need to take care to ensure that casual communications or their personal business dealings with third parties do not create unintended client relationships and bring with them lawyer-client obligations.²³⁶

Writing up the retainer is a sound practice. Where lawyers are in discussions with prospective clients, the basis upon which the lawyer and prospective clients are prepared to deal with each other may be usefully documented. Where a lawyer understands that he or she has not been retained, a “non-retainer” letter is valuable to confirm that the lawyer will not be performing any services for the prospective client and, therefore, will not owe a related duty of loyalty. Where a retainer is completed, there may be value in so confirming in order that it be clear that the duties of performance and loyalty owed to a current client are spent.

Proper documentation, prepared at the appropriate time, would have gone a long way to avoiding the problems that led to the court cases discussed below.

Potential obligations: multiple clients

Incorporated entities

When a corporate representative retains a lawyer, a few basic questions need to be answered at the outset. Will the lawyer be representing the individual? Or will the lawyer act for the legal entity that the individual represents? If the client is the legal entity, will the lawyer also represent the affiliates of the legal entity or other entities in its group?

For government and in-house lawyers, it is already established that their client is the entity and not the individual from whom they take instructions. For lawyers in private practice, this determination requires greater attention.

Sometimes, at the first meeting, it will be clear whether the individual with whom the lawyer is meeting is acting as a representative of a legal entity or in a personal capacity. Ideally, this will be documented in a written engagement letter. However, relationships evolve over the years

²³⁵ The Commentary to Rule 1.02 of the *Rules of Professional Conduct* of the Law Society of Upper Canada (“*Ontario Code*”) states that “A solicitor and client relationship is often established without formality. For example, an express retainer or remuneration is not required for a solicitor and client relationship to arise.”

²³⁶ *Hutchinson*, *supra* note 213 at p. 418.

and what was clear at the outset may be blurred if the lawyer begins to do the individual's personal legal work or if the individual seeks to consult the lawyer about issues where the individual's interests are different from those of the legal entity. It is therefore important for the lawyer to identify the client at the outset and to continue to review and evaluate the situation.

Many of the codes of professional conduct address this issue. The CBA Code of Professional Conduct warns lawyers to ensure that representatives of an organization realize that it is the organization which is being represented (if that is the case) and not the individual representatives:

16. A lawyer who is employed or retained by an organization represents that organization through its duly authorized constituents. In dealing with the organization's directors, officers, employees, members, shareholders or other constituents, the lawyer must make clear that it is the organization that is the client whenever it becomes apparent that the organization's interests are adverse to those of a constituent with whom the lawyer is dealing. ...²³⁷

In *Hem Mines Ltd N.P.L. v. Omax Resources Ltd*,²³⁸ Justice Melnick considered a claim that company lawyers had also acted for a corporate officer personally. Justice Melnick started his analysis with the proposition that:

Ultimately, this is an exercise that is necessarily dependant on a careful analysis of the facts.

In *Gainers Inc. v. Pocklington*²³⁹ the Alberta Court of Appeal declined to disqualify a law firm from acting for its long-standing corporate client in an action against Pocklington, the company's former principal, who was alleged to have diverted corporate assets.

The Court stated that one must look to all of the relevant circumstances to determine who is the client and determine the "reasonable expectations" of the parties:

... At one extreme, courts should look at more than just whose name was on the law firm's file cover or ledger as "client." But at the other extreme, courts should not ignore the existence of companies, and pretend that they are all unincorporated associations of their shareholders, officers and directors. ... Most companies are not a mechanism for doing business by an individual; still less was Gainers Inc. Still less should courts pretend that the spokesperson for a company is the "real client" when a law firm represents the company in litigation. One must examine all the relevant facts, including the reasonable expectations of those involved.

...

One cannot assume that a company and its indirect owners are the same person and that acting for one is acting for the other. To do so is likely to create a conflict and to violate the Code, not to avoid conflicts or violations.

²³⁷ CBA *Code of Professional Conduct*, Ch. 5, Commentary. See also, for example, Commentary to s. 2.02 (1.1) of the Ontario Code.

²³⁸ (2003), 38 B.L.R. (3d) 146 (B.C.S.C.).

²³⁹ (1995), 29 Alta L.R. (3d) 323 (C.A.), 125 D.L.R. (4th) 50, 20 B.L.R. (20) 288.

The Court concluded that it was not reasonable for Pocklington to assume that information disclosed to the firm would be kept confidential from the company or that a lawyer-client relationship had been established with him personally.

There are a number of cases in the litigation context where lawyers have been disqualified from acting for both a legal entity and individuals involved in the entity. Clearly, a conflict may exist between a corporate defendant and its majority shareholders (who may also be directors of the corporate defendant) in an oppression action by minority shareholders, as the interests of the corporation and its majority shareholders are not or may not necessarily be the same.²⁴⁰ Similar concerns may arise in respect of derivative actions as the interests of plaintiff shareholders will usually be quite different from that of the directors or officers whose conduct is the subject of the action.²⁴¹

Affiliates and other entities

Once it is established that, in a particular situation, the client is the legal entity, the issue then becomes whether other entities in that entity's group are also the lawyer's clients. While the focus of the following analysis is in the corporate context, the analysis is not fundamentally different where human, rather than corporate, families are involved.

The Task Force believes that the client is the person who, or entity whose representative, consulted the lawyer. For example, the fact that a corporation consults a lawyer does not necessarily imply that subsidiaries or affiliates of that corporation (or their shareholders, individual directors, officers or employees) are also clients.²⁴² This simple approach provides a useful starting point, respecting the traditional principle of separate legal personality in *Salomon v. Salomon*.²⁴³

The ABA Standing Committee on Ethics and Professional Responsibility has opined that “the fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well.”²⁴⁴

²⁴⁰ See *King v. Arnett*, 2006 ABQB 639; *Normerica Inc. v. 1406716 Ontario Inc.* (2002), 58 O.R. (3d) 464 (S.C.J.); *TransCanada Pipelines Ltd v. Nova Scotia (Attorney General)* (2000), 188 N.S.R. (2d) 14 (S.C.); *Friesen v. Gimli & District Métis Association Inc.* (1997), 120 Man. R. (2d) 226 (Q.B.); *Gaylor v. Galiano Trading Co.* (1996), 29 B.L.R. (2d) 162 (B.C.S.C.); *Mottershead v. Burdwood Bay Settlement Co.*, [1991] B.C.J. No. 2554 (S.C.); *R.B.L. Management Inc. v. Royal Island Development Inc.*, 2007 BCSC 674.

²⁴¹ See also *Hutchinson*, *supra* note 213, at 427.

²⁴² It would be as if every time an individual consulted a lawyer, the status of client was automatically extended to other family members, which is not the case.

²⁴³ [1897] A.C. 22 (H.L.).

²⁴⁴ See ABA Formal Opinion 95-390: Conflicts of Interest in the Corporate Family Context (25 January 1995); Charles W. Wolfram, 'Legal Ethics: Corporate-Family Conflicts' (1999), 2 J. *Inst. Stud. Leg. Ethics* 295; *Apex Oil Co. v. Wickland Oil Co.*, US Dist. Lexis 6398 (E.D. Calif., 1995); *R.H. Donnelly Corp. v. Sprint Publishing and Advertising*, US Dist. Lexis 2363 (N.D. Ill., 1995); *Brooklyn Navy Yard Cogeneration Partners LP v. Superior Ct (Parsons Corp.)*, 60 Cal. App. 4th 248 (Cal. Ct App. 1997) (parent and subsidiary treated as separate entities unless the *alter ego* of each other). But compare *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP* 69 Cal. App. 4th 223 (Cal. Ct App. 1999). There is discussion of the conflicting approaches in the US cases (bright line test? weighing of factors? *alter ego* analysis?) on William Freivogel's conflicts site at Corporate Families. See also Simon Chester, 'Conflicts of Interest' in Derek Lundy, *Barristers & Solicitors in Practice*, loose-leaf (Toronto & Vancouver: Butterworths, 1998), at §10.52. A recent California case suggests that where a number of subsidiaries share an 'integrated' legal department, they should be treated as a single entity for conflicts purposes: *URS Corp. v. Earth Tech, Inc.*, 2006 Cal. App. Lexis 11349 (Cal. App. 19 December 2006).

As noted by the ABA, “the circumstances of a particular representation may be such that the corporate client has a reasonable expectation that the affiliates would be treated as clients, either generally or for purposes of avoidance of conflicts.”²⁴⁵ This will more likely be the case if there is significant business integration, common management or directors, and geographic proximity amongst members of a corporate group. It may also be obvious from the circumstances of a particular file. For example, if the parent company retained a lawyer to act in a sale of assets held by a subsidiary company it would be reasonable to expect that both the parent company and the subsidiary would be clients of the lawyer. Similarly, in circumstances where there is a corporate group and the lawyer has been the trusted advisor to the group and occupies a position akin to that of a family solicitor it is likely that there is a lawyer-client relationship with the corporate group and not just the one retaining entity from within the group.

Obviously, where a lawyer provides legal assistance to a corporation as well as to its affiliates, the lawyer will have a duty of loyalty to both the corporation and its affiliate. Where a duty of performance exists, a duty of loyalty also exists.

Where a lawyer has acted as a trusted advisor to a corporate group, there is usually little difficulty concluding that the lawyer has provided legal assistance to the group members and owes a collective duty of loyalty. Also, where a lawyer acts as legal advisor to such a group, it is more likely that the lawyer will receive confidential information *qua* lawyer from group members such that a duty of confidentiality arises.

Alternatively, where a lawyer has a specific retainer for a specific entity and does not provide legal assistance to affiliates or receive confidential information from affiliates, there can be no basis to conclude that any duty is owed except to the specific entity that retained the lawyer.

However, the logic underlying the *ABA Model Rule*, apparently adopted in *Neil*, suggests that there may be situations where the duty of loyalty may require that a lawyer not act against an affiliate even if the affiliate is neither a client nor the source of confidential information. As the duty of loyalty exists *inter alia* to protect the **relationship** between lawyer and client, there may be circumstances where acting against an affiliate may impair the relationship with the actual client.²⁴⁶ In this context, the affiliate is not a client and is owed no duty, yet the duty owed to the client affects the ability of the lawyer to act against the affiliate.

Members of a corporate family

To date, there is little Canadian case law regarding whether a duty to avoid conflicting interests is owed to members of a corporate family, *G.W.L. Properties Ltd v. W.R. Grace & Co. of Canada Ltd*,²⁴⁷ suggests that a parent and subsidiary could be considered together for the purposes of conflict analysis, although it does not deal with the question directly.

²⁴⁵ *Ibid.*

²⁴⁶ For example, one could easily imagine that an estates retainer for a husband could be impaired by an oppression proceeding against his wife. Similarly, a fraud claim against a controlling shareholder of a private company might well impair representation of the private company.

²⁴⁷ [1992] 5 W.W.R. 76 (B.C.S.C.).

In *Stanley v. Advertising Directory Solutions Inc.*,²⁴⁸ a lawyer was disqualified from acting for Advertising Directory Solutions, the defendant in an employment dispute, because his firm had also provided legal advice to Verizon, the defendant's former corporate parent, with respect to the termination of the employee in question (which resulted from the sale of the Advertising Directory Solutions to a third party). It was sufficient that the lawyer had provided legal advice even though no instructions were received or any bills paid by Verizon.

*Re Credit Suisse First Boston Canada Inc.*²⁴⁹ the law firm was held to owe a duty to an entity created as a result of advice to a former client.

In-house counsel may face special issues if a multi-company conglomerate has an integrated legal department. The in-house counsel must treat each member of the group as a distinct client but, as long as interests are aligned, the in-house counsel may act for all of them. However, once the interests of different entities diverge or where there may be a particular reason for independence (for example pensions), the in-house counsel will be required to manage the situation differently²⁵⁰ and may need to report to the board of directors any issues that could present troublesome internal conflicts of interest. There are times when the in-house counsel may be able to continue to act for one entity and hire outside counsel for the other but, with other situations such as litigation, the in-house may be called upon to hire separate outside counsel to individually represent the interests of the different companies. Generally, in-house counsel of such large groups must become quite expert at managing risk, conflicts, balancing interests, etc.

The government as a client

As noted above, for government lawyers their client is ordinarily the government that employs or retains them. But government lawyers often act in a statutory function (for example the office of the public guardian or children's lawyer²⁵¹) who are part of the government, or for government entities created as entities separate from the government proper (e.g. boards, commissions and Crown corporations). These entities are not merely organizational units of the government, and differ from ministries or departments. As with in-house and private practice lawyers, there is potential for government lawyers to have multiple clients and, accordingly, clarity in client identification is required in government practice as well.

²⁴⁸ 2007 BCSC 1125 (CanLII).

²⁴⁹ (Hearing Panel, Market Regulation Services Inc., 9 February 2004); aff'd 27/27 O.S.C.B. (2 July 2004) (O.S.C.).

²⁵⁰ While the interests of corporate affiliates may be aligned at the outset, the situation may change. Difficult issues of conflict, confidentiality and privilege can arise as circumstances change. *Teleglobe*, *supra* note 22, provides a useful example of the effect of changing economic circumstances and underscores the need for all counsel, including in-house counsel, to carefully assess the consequences of joint representation, to be clear as to who is the client and to continue to consider conflicts which may first arise during the course of a matter.

²⁵¹ In these situations, a government lawyer may have non-government clients by virtue of their statutory function. For example, Children's Lawyer can act for a child in certain circumstances in litigation. In that situation, the client is the child and not the government. e.g. *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (O.C.A.).

Limits to the extension of a lawyer-client relationship

In summary, therefore, the Task Force believes that absent evidence that the lawyer is assuming a lawyer-client relationship with a larger group, a lawyer-client relationship should extend only to the specific retaining entity and not to affiliated entities or directors, shareholders, or employees. If, however, based upon objective evidence, there are reasons to conclude that the retaining entity or other entities in the group has a reasonable expectation that the lawyer is assuming a lawyer-client relationship with respect to them, then a lawyer-client relationship exists and the attendant duties will be found.

Partnerships

Although partnerships are not legal entities, they are often treated as such. The issues that arise in determining the identity of the client are similar to those that arise for corporations. Firstly, it must be determined whether the lawyer is representing the partnership itself or the individual partners (or some of them). The interests of the partnership – that is the interests of the partners as a whole – may differ from those of the individual partners, so it will be especially important to identify the actual client.

Where it is determined that the lawyer represents the partnership, the issue becomes whether the lawyer also represents the individual partners. The nature and scope of the retainer is clearly important in this analysis. A lawyer engaged by partners of a firm collectively is thus engaged by the firm, and the duties of performance, loyalty and confidentiality are owed to the firm. However, it does not follow that a retainer for the firm should create obligations to each partner beyond their common venture as partners.

Clearly, the partners of a firm are collectively clients of the lawyer. However, the fact that each partner is not a separate client should mean that, ordinarily, the firm (i.e. the partners collectively) rather than each partner should be treated as the client for conflicts purposes. In unusual situations, it is possible that the lawyer-client relationship with the firm could be adversely affected by an adverse retainer against a partner in his or her individual capacity such that the duty of loyalty owed to the partners collectively would preclude acting against an individual partner.

Other unincorporated entities

Conflicts among members may, in fact, be *more* likely to arise and more difficult to resolve in unincorporated organizations because of the types of organizations (charitable, religious, etc.) that do not incorporate.²⁵² However, as with partnerships, these organizations are often treated as unitary “entities” or “legal persons” and it is suggested that the lawyers’ duties to such

²⁵² *Supra* note 213 at 427-8. For a recent conflict-of-interest case involving an unincorporated association, see *De Guzman v. de la Cruz*, [2004] B.C.J. No. 72 (S.C.).

clients are analogous to their duties to one client.²⁵³ The previous analysis regarding conflicts and partnerships applies here as well, where a number of persons collectively retain a lawyer for their collective purpose rather than their individual purposes.

Although the CBA Code of Professional Conduct²⁵⁴ suggests that the organization may be treated as a unitary client, the lawyer must make it clear that representation is for the group as a whole and not for an individual member or group of a whole and any of its individual constituents. The ABA has stated that a lawyer who acts for an association should not normally be considered to represent its members individually, drawing an analogy with a lawyer who has a corporate client – whose shareholders, officers or employees would not usually be regarded as the lawyer’s clients.²⁵⁵ The ABA notes, however, that this position could change in light of factual circumstances. For example, in *Westinghouse Electric Corp. v. Kerr-McGee Corp.*²⁵⁶, a law firm which acted for a trade association was prevented from suing individual members of the association since the firm had been collecting confidential information from the members, and it was reasonable for the members to believe that the firm was representing them individually as well as the association as a whole.

The duty to protect confidential information received from near-clients and non-clients

It is particularly important to analyze conflicts regarding so-called near-clients and non-clients with careful attention to underlying principles.

As discussed above, the duty of loyalty owed to a current client may, in certain circumstances, preclude a lawyer from acting adversely to a related person or entity where so acting creates a real risk of impairment of the relationship with the current client. However, the implication of a duty owed to a client should not be confused with a separate duty owed to a near-client or non-client.

Where it is properly concluded that a person or entity is not in a lawyer-client relationship with the lawyer, the lawyer owes no duty of performance because a retainer does not exist. A lawyer owes no duty of loyalty to a non-client because there is no lawyer-client relationship to protect.

In appropriate circumstances, a lawyer may owe a duty of confidentiality to a non-client in respect of confidential information received from the non-client. A near-client is a likely source of confidential information in aid of the actual client. While confidential information from a near-client or non-client may not be privileged,²⁵⁷ a duty of confidentiality owed may affect the ability of the lawyer to act against that near-client or non-client or may require protective measures such as confidentiality screens and separate teams of lawyers.

²⁵³ *Hutchinson*, *supra* note 213 at p. 427.

²⁵⁴ Chapter V, commentary 16.

²⁵⁵ See ABA Op. 92-365 (1992). A lawyer representing a general partnership is also used as a basis for comparison.

²⁵⁶ 580 F.2d 1311 (7th Cir.), cert. denied 439 U.S. 955 (1978).

²⁵⁷ Even if solicitor-client privilege does not arise, common-interest privilege may arise in such circumstances.

Canadian jurisprudence is generally supportive of this analytic approach. The Court of Appeal for Newfoundland and Labrador addressed these issues recently in *Dobbin v. Conway*²⁵⁸ in the context of a law firm which had acted for a bank in respect of a credit facility and thereby received confidential information about the borrower's proposed strategy in dealing with certain litigation. The borrower then objected to the law firm acting against the borrower in that litigation. The Court of Appeal observed that:

... the focus when assessing a particular situation must be the mischief which the conflict of interest rule is designed to address.

In this case, the mischief about which Vector complains is that, in obtaining the credit facility, the Bank required, and was given, confidential information about Vector's proposed strategy in dealing with the claim by the employees. ...

... The applications judge found that, for purposes of obtaining the credit facility, Vector had provided information as to the claim for damages by the employees, including Vector's intended defence strategy. If such information was passed from the Bank to its solicitor, an inference which would properly be drawn in the absence of evidence to the contrary, there was a potential for that information to be accessed by Mr. Harrington since there is no evidence that Stewart McKelvey attempted to establish Chinese Walls or cones of silence to prevent that outcome.

In concluding on this point, I would stress that, consistent with Commentary 8 of Chapter V of the Code of Professional Conduct, a near client relationship will engage a conflict of interest concern only where the information relates to the particular matter at issue between the parties, or involves a situation where the lawyer might be tempted or appear to be tempted to breach the rule relating to confidential information. ...

In Newfoundland and Labrador, the *Law Society Rules of Professional Conduct* deal with subsequent retainers against persons involved with or associated with clients. Commentary 8 of Chapter V of the Newfoundland and Labrador Code states:²⁵⁹

A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who are involved in or associated with the client in that matter) in the same or any related matter or take a position where the lawyer might be tempted or appear to be tempted to breach the rule relating to confidential information. (Emphasis added)

In *Métro Inc. v. Regroupement des Marchands Actionnaires Inc.*,²⁶⁰ the Quebec Court of Appeal dealt with a situation in which lawyers who had acted for the underwriters of Métro Inc. in three public offerings thereafter sought to act against Métro Inc. The law firm had undertaken significant due diligence on behalf of its clients and had thereby become privy to a significant amount of confidential information about Métro Inc., such as its business strategies, planned acquisitions, and finances. The Court of Appeal observed that, "Métro management held nothing back and told all to their lawyers regarding their corporate situation."²⁶¹

²⁵⁸ (2005), 246 Nfld. & P.E.I.R. 177.

²⁵⁹ Commentary 12 to Chapter V of the CBA Rule is to the same effect.

²⁶⁰ *Metro*, *supra* note 41.

²⁶¹ *Ibid.*

The Court of Appeal disqualified the lawyers from acting for the defendant in a law suit brought by Métro Inc. on the basis that the lawyers had received confidential information from Métro Inc. in the prior retainer for their underwriter clients and that the current and prior retainers were sufficiently related that it should be inferred that the confidential information was relevant to the current retainer against Métro Inc. While the Court of Appeal was prepared to consider protective screens as a measure to protect the confidential information, it concluded that the screen had not been established in time.

The Manitoba Court of Appeal considered a similar situation in *Roadrunner Apparel Inc. v. Gendis Inc.*²⁶² In this case, the client was a senior corporate executive who personally sought legal advice regarding his responsibility and liability as Executive Vice-President, Finance, in the context of corporate financial difficulties. In order to obtain legal advice, the client disclosed confidential information regarding the financial and strategic affairs of the corporation of which he was a senior officer and its sole shareholder. Subsequently, lawyers in the same firm acted on behalf of a corporate creditor alleging improprieties on the part of other corporate officers and directors as well as on the part of the sole shareholder.

The Court of Appeal held that the defendants had standing to seek to disqualify the firm despite not having been clients of the firm. The Court relied, at least in part, on the *Manitoba Code of Professional Conduct*²⁶³ which contains a guideline that is also found in the Newfoundland and Labrador and the CBA rules previously cited. While the Court of Appeal expressly reasoned that the disqualification was in order to protect the former client,²⁶⁴ the result is consistent with protection of confidential information from those involved with or associated with the client.

In these three cases, we have seen the courts protecting confidential information received (i) by the lawyer for the bank from a lender, (ii) by the lawyer for underwriters from the issuer, and (iii) by the lawyer for a senior corporate officer from the corporation and its sole shareholder. While the reasoning in each case is slightly different, it is clear that those “involved in or associated with the client” in a matter have standing²⁶⁵ to protect confidential information disclosed by them to the lawyer for the client in the matter.

The decision of the *Prince Edward Island Appeal Division in Prince Edward Island v. Simmonds*,²⁶⁶ is similar in effect. While concluding that there was no basis for disqualification in the case at bar, the Appeal Division focused on the principles involved as follows:

The overall “mischief” the near-client relationship rule deals with is the situation in which someone is closely involved in a matter that subsequently becomes the subject of litigation and then finds him or herself facing legal counsel with whom they had closely worked as the “situation” was developing.

²⁶² [2007] 3 W.W.R. 459.

²⁶³ Guiding principle #8 of Chapter 5.

²⁶⁴ While it is no doubt true that disqualification protects the former client, it is not obvious why anyone other than the former client should have standing to protect the interests of the former client. Analyzing these cases in terms of the legitimate interests and expectations of the discloser of confidential information provides a stronger basis for the conclusions of these three appellate courts.

²⁶⁵ Of course, these cases do not suggest that these near-clients have standing to seek to disqualify the lawyer from acting for the original client who is obviously entitled to the confidential information disclosed to the client’s lawyer.

²⁶⁶ [2007] 265 Nfld. & P.E.I.R. 337.

The courts have found it unseemly, in fact improper, for counsel in such circumstances to be able to represent one side of the dispute where counsel have been closely involved with and likely have given advice to all concerned. Confidences were likely imparted to that counsel over time which would not have been imparted knowing that the counsel might be able to use these confidences in future litigation. The finding of a disqualifying conflict of interest in such circumstances is an application of that oft-quoted principle: justice must not only be done but must be seen to be done.²⁶⁷

As discussed earlier, where legal advice has been provided, it may be concluded that a lawyer-client relationship has been established, in which case the analysis is straightforward. Where confidences have been imparted but no legal advice has been given, the near-client may well be entitled to protection against subsequent misuse of confidential information.

Near clients and the duty of loyalty

One case, in *obiter* on the issue of costs, has gone further in suggesting a duty of loyalty to a near-client. In *GMP Securities Ltd v. Stikeman Elliott LLP*,²⁶⁸ a law firm was simultaneously acting for an underwriter/advisor on an equity financing for an issuer and for a bidder in a takeover bid for the same issuer. The client/underwriter and the issuer together sought to disqualify the law firm on the basis of breach of the duty of loyalty but not on the basis of duty of confidentiality.

Justice Hoy concluded that the retainers for the underwriter and for the takeover bidder were inconsistent. Success in the takeover bid would prevent completion of the equity financing. On this basis, a breach of the duty of loyalty owed to the client/underwriter was established. This legal conclusion should not be controversial. A lawyer cannot act for one client seeking to achieve a result while, at the same time, seeking an entirely inconsistent result for another client. The duty of performance for the second client clearly conflicted with the duty of performance for the first client and the duty of loyalty owed to the first client was thereby breached.

Having disqualified the law firm, Justice Hoy went on to consider the duty owed to the issuer with respect to the question of costs of the motion. Ontario Rule 2.04(4) provides that:

²⁶⁷ *Ibid.* at para. 20.

²⁶⁸ (2004), 71 O.R. (3d) 461 (S.C.J.) [*GMP*].

A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

- (a) in the same matter,
- (b) in any related matter, or
- (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.²⁶⁹

Partly reliant on this rule, Justice Hoy concluded that the underwriter's counsel owed a limited duty of loyalty to the issuer but only to the extent that the issuer's interests and the underwriter's interests coincided. In addition to the Law Society rule, Justice Hoy reasoned that:

... most investment bankers [likely] believe that their counsel will not act against the interests of the investment banker's client in respect of the transaction involving that client that the investment banker has retained counsel to provide advice on, *to the extent the investment banker's clients' interests are consistent with the investment banker's*. In fact, I suspect most investment bankers would be shocked to think that their counsel could so act. ... Similarly, I think companies which retain investment bankers with respect to a transaction reasonably believe the investment banker's counsel will not act against the interests of the company with respect to that transaction, *to the extent such interests are consistent with those of the investment banker*.²⁷⁰

This reasoning does not appear to be sound. The Law Society rule relied upon is in respect of former clients and not current clients. This rule has its genesis in *MacDonald Estate* and serves to protect against misuse of confidential information (albeit not as expressly as the equivalent rules in other jurisdictions). In the Task Force's view, it is an undue leap of logic to conclude that entities associated with **current** clients are owed duties of loyalty by reference to a rule which deals with **former** clients and confidential information, especially when the duties owed to current and former clients are so different. Justice Hoy suspected that investment bankers would be shocked to think that their lawyers would act against the interests of the investment bankers' clients when aligned with their own interests. If this suspicion is correct, there is no reason to think that shock would arise from anything other than the fact that the lawyers would be acting against the interests of their own client. No second, but limited duty, to the investment bankers' clients is required to supplement the clear duty owed to the lawyer's client.

The *obiter* conclusion that a limited duty of loyalty is owed to a near-client in *GMP Securities* is not supported by the jurisprudence and is inconsistent with the central premise of the duty of undivided loyalty. While duties of confidentiality (as against third parties) owed to non-clients do not undermine the duties owed to clients, the extension of the duty of loyalty to non-clients, even on a limited basis, would be inconsistent with underlying principle and likely to weaken and confuse the duty of loyalty owed by lawyers to clients.

²⁶⁹ *Ibid.* at para. 50.

²⁷⁰ *Ibid.*, at para. 56.

The shift from current client to former client

The key question here is: When does the full duty of loyalty owed a current client end, to be replaced by the diminished duty of loyalty owed to a former client? It is the duty of loyalty, and not the duty of confidentiality, at issue because the duty of confidentiality remains in effect for former clients just as for current clients.

As the duty of loyalty is protective of the lawyer-client relationship during the course of the retainer, it necessarily follows that the duty of loyalty owed to a current client ends when the work that the lawyer has been retained to perform is completed, i.e. the duty of performance is spent because performance is completed. When there is no further duty of performance, there is no remaining duty that can conflict with the duty of performance owed to another client or with the personal interests of the lawyer. When the work is done, there remains no relevant relationship to protect.

Accordingly, while the cases and rules speak of current and former clients, the deeper and more essential question is whether a retainer is completed or is ongoing.²⁷¹ A well-crafted engagement letter is valuable in determining when work has been completed because it describes what the lawyer has been retained to do. This is important both as a matter of substance and as a matter of evidence, and is discussed in greater detail in the chapter on engagement letters.

Of course, a client can elect to terminate the retainer at any time. Proper documentation evidencing this fact is valuable in the event of any subsequent dispute.

Completed retainers

The fact that the lawyer considers the work to be completed and so advises the client is evidence of the end of the retainer and the lawyer-client relationship. However, as William Freivogel, an American author on conflicts, notes, lawyers rarely send such a letter. They generally want to remain in contact after the conclusion of a matter, in the interests of obtaining further business.²⁷² This reticence may be tied to a failure to focus on the completion of retainers. There should be no reticence in documenting the completion of a retainer. Indeed, lawyers could usefully thank their clients for the opportunity to assist and indicate that they look forward to the opportunity to serve again in the future.

The risk inherent in not documenting the start and conclusion of a retainer is illustrated by the conflicting views of the Supreme Court of Canada judges in their disposition of the appeal in *Strother*.²⁷³ Justice Binnie, for the majority, found that, after the termination of a written retainer in 1997, an oral retainer on more limited terms continued to govern the relationship

²⁷¹ The nature of the relationship may depend on more than just the existing retainers at any point in time. With a deep and lengthy relationship, the client may react differently to an adverse retainer than where a narrower relationship has existed. However, when there is no work left to be done and the lawyer is free to accept, or not accept, the next retainer, there is then no relationship to protect because lawyer-client relationships are protected for the purpose of representation and not for their own sake.

²⁷² William Freivogel, "Former Client - The Substantial Relationship Test", online: <http://www.freivogelonconflicts.com/new_page_34.htm>.

²⁷³ *Strother*, *supra* note 3.

between the parties, resulting in a conflict when the lawyer preferred the interests of a new client over those of the earlier one. Justice Binnie cautioned that “[w]here a retainer has not been reduced to writing ... and no exclusions are agreed upon, ... the scope of the retainer may be unclear” (at para. 40), and any ambiguities will be resolved in favour of the client. Chief Justice McLachlin, for the minority, took the view that the retainer had ended and that no conflict arose by virtue of the retainer by the subsequent client. The fact that the majority and minority in *Strother* reached such divergent results highlights the value of documenting the scope of a retainer and its completion.

American case law suggests that a lawyer-client relationship may continue to exist even where advice has not been provided for a considerable period of time and brief, recent contact with the client can be seen as sufficient to perpetuate the relationship.²⁷⁴ Freivogel therefore advises great caution in treating a client as a “former client.” He cites *Jones v. Rabanco, Ltd.*,²⁷⁵ where a law firm had not provided advice to a client for over three years but failed to terminate its retainer formally and continued to store 49 boxes of documents belonging to the client. The presence of the boxes gave rise to the inference that the firm continued to make itself available to respond to requests for legal advice, with the result that it was precluded from arguing that it no longer acted for the client – and precluded from acting for a new client whose interests were adverse.

Following a principled approach to the duty of loyalty, the Canadian response to the same fact situation should be different. Where a law firm simply stores boxes and has no ongoing mandate, there will be no duty of performance to protect nor any relationship of any substance which might be impaired. We see no principled reason to prohibit a lawyer from taking on a new retainer simply because a client might, or might not, return for assistance in a further matter.

Ending a retainer prematurely

It is important to note that a lawyer cannot end the relationship with an existing client in order to accept a better retainer from new client. In *Toddglen Construction Ltd v. Concord Adex Developments Corp.*,²⁷⁶ the law firm tried to, in the Master’s words, “‘dump’ one client in order to take on another ‘conflicted’ proposed client whose file is felt to be more attractive” (at para. 39). This case is solidly grounded in the duty of loyalty owed to a current client. Simply said, a lawyer cannot be zealously representing clients by “dumping” them. Allowing a lawyer’s personal interest in a new retainer to interfere with the lawyer’s duty of performance in an existing retainer is obviously improper. Ontario Rule 2.09(1) also provides that:

A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

²⁷⁴ See, for example, *Kabi Pharmacia AB v. Alcon Surgical, Inc.*, 803 F.Supp. 957 (D. Del. 1992); *Research Corp. Tech. v. Hewlett-Packard Co.*, 936 F.Supp. 697 (D. Ariz. 1996).

²⁷⁵ 2006 U.S. Dist. LEXIS 53766 (W.D. Wash., 3 August 2006).

²⁷⁶ [2004] O.J. No. 1788 (Master) [*Toddglen*].

The logic in *Toddglen* was extended by Justice Hoy in *GMP*²⁷⁷ in which she concluded that a lawyer whose retainer is properly terminated by a client for breach of duty of loyalty is not thereby released so that the lawyer can continue the impugned retainer. This extension is sensible. If a lawyer cannot “dump” a client in order to take a retainer, the lawyer can hardly be in a better position if the lawyer acts improperly with the result that the lawyer’s retainer is understandably terminated. Such a result would be inconsistent with fiduciary law principles.

Law firm responsibilities

Lawyers in private practice commonly work together in partnership. In a partnership, each partner is an agent of the firm.²⁷⁸ In a law firm, the partners practise law as agents of the law firm and employed lawyers practise on behalf of the law firm.

Accordingly, once it is established that a party is a client of a particular lawyer, there will be implications for the lawyer’s law firm. The members of the law firm, including lawyers, office staff, students and articling students, will generally be treated as being in a “professional relationship” with the client and owe them appropriate “professional obligations,” as seen from some of the cases on the establishment of a lawyer-client relationship. The other lawyers in the law firm will, in the absence of an exception, owe the client the same panoply of particular lawyer-client duties, including the obligation of loyalty, as the lawyer who directly represents the client.²⁷⁹ Hutchison makes this point as follows:

One lawyer’s client is considered to be the client of all the firm’s lawyers and, therefore, will be entitled to the same duties and obligations as the circumstances allow: “it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients.”[*R. v. Neil*, [2002] 3 SCR 631 at para. 29, Binnie J.] For instance, clients in a Vancouver office have claims to professional obligation against lawyers in Toronto whom they will never meet and who might not even know of their existence, let alone have any details or information about the clients’ business.²⁸⁰

Where a client engages a law firm, it is the law firm that owes duties of performance, loyalty and confidentiality. Whether a client engages the firm, a specific partner of the firm, or a specific lawyer who is an employee of the law firm, the result is the same because the partners and employees of a legal partnership are agents for the partnership.

Where lawyers hold themselves out as practising as a firm but are not in fact partners, clients are entitled to treat these lawyers as if they were practising as partners. Where lawyers work together but are not in partnership to the knowledge of the client, issues of client confidentiality can arise even if duties of loyalty do not.

The CBA Code of Professional Conduct²⁸¹ reflects this concept in the following commentary:

²⁷⁷ *Supra* note 268.

²⁷⁸ The firm being simply a label for the partners collectively.

²⁷⁹ Ont. 2.04(5) Commentary.

²⁸⁰ *Hutchinson*, *supra* note 226 at p. 419.

²⁸¹ Paragraph 13 of the Commentary to Chapter V, “Impartiality and Conflict of Interest between Clients.”

For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and client. However, the term “client” includes a client of the law firm of which the *lawyer* is a partner or associate, whether or not the lawyer handles the client’s work. It also includes the client of a lawyer who is associated with the lawyer in such a manner that they are perceived as practising in partnership or association, even though in fact no such partnership or association exists.

Nominal partnerships relationship

In Quebec, a situation arose where lawyers practised in a nominal partnership.²⁸² In *Côté v. Rancourt*,²⁸³ a number of lawyers practised in a ‘nominal partnership’ where they shared a secretary and receptionist as well as other common expenses but did not share profits. The lawyers in question practised in the same area of practice but did not ordinarily share files or work together. The Supreme Court of Canada agreed with the Court of Appeal that a duty of loyalty was owed by the nominal partners of this firm to the clients of the nominal partnership. The Court of Appeal was clear to say that this result would not necessarily be the same for all nominal partnerships. The Court of Appeal noted that there are many types of nominal partnerships and that each case would have to be decided on its own particular facts.

Agency arrangements

In *Stoneman v. Gladman*,²⁸⁴ the issue was whether a lawyer accredited in several American states as well as in Ontario, who often referred work from a certain law firm and whose name appeared on the Canadian firm’s letterhead as their “U.S. counsel” was in a lawyer-client relationship with the firm’s clients. Justice Pitt, sitting as a single judge of the Divisional Court, concluded that foreign lawyers are generally in agency arrangements with domestic firms and provide advice on foreign law, and that the connection between the foreign lawyer and the firm was “too remote to constitute a solicitor-client relationship.” Justice Pitt distinguished the facts of *Schober v. Walker*,²⁸⁵ in that the former partners in that case “were still holding themselves out to the public as a partnership or at the very least as two lawyers working together in the same firm.”

Space-sharing

The *Alberta Code of Professional Conduct*²⁸⁶ focuses upon information sharing by lawyers practising together in stating that:

G.2 Definitions: The terms “firm”, “firm member” and “lawyer” are defined in *Interpretation*. They have particular relevance to confidentiality because a lawyer’s duty to keep client information confidential extends to each member of the lawyer’s firm and, if a lawyer is prevented from acting due to possession of confidential information, a member of the same firm is also prevented from acting. ...

²⁸² Société Nominale

²⁸³ *Supra* note 41.

²⁸⁴ [2003] O.J. No. 2676 (Div. Ct.).

²⁸⁵ [2003] B.C.J. No. 1161 (S.C.).

²⁸⁶ Commentary G.2 of Chapter 7, Confidentiality.

When lawyers share space, the risk of advertent or inadvertent disclosure of confidential information is significant even if the lawyers involved exert efforts to insulate their respective practices. Consequently, for the purposes of this chapter, “firm” includes lawyers practising law from the same premises but otherwise practising law independently of one another.

This expanded definition of the label “firm” carries the same risk as does expanded definitions of the label “client.” While convenient as a drafting technique, the risk of confusion arises where a group of lawyers are said to be a firm for confidential information purposes but are not a firm for performance or loyalty purposes.

The sharing of space by lawyers who are not in partnership may be structured to avoid the assumption of duties to each other’s clients. However, generally, it will be necessary to ensure that each lawyer’s practice is independent, with separate support staff, filing systems, etc.²⁸⁷

Distinctions between the duties of loyalty and confidentiality

In the Task Force consultation paper, the terms “near-clients”, “non-clients” and “related entities” were examined in the context of the duty of loyalty.

The Task Force presented the preliminary view that generally:

- the duty of loyalty should be limited to the individual or entity with whom the lawyer or law firm has a direct lawyer-client relationship (as opposed to others such as family members, beneficiaries, shareholders or affiliated entities);
- duties of loyalty and confidentiality should be owed to the actual client and not extended to clients, customers, advisors, or agents of current clients;
- the duty of loyalty should not extend to non-clients.

The respondents to the consultation showed substantial agreement with these propositions subject to certain reservations. The principle reservation, which is consistent with the analysis set out above, is that it is important to distinguish between the duty of loyalty and the duty of confidentiality.

For example, in a closely-held corporation, lawyers for the corporation would commonly be privy to confidential strategic or financial information from the shareholder in the course of their legal work for the corporation. While this sharing of confidential information should not impose a duty of loyalty, the duty of confidentiality might well require that the lawyer not act against the shareholder. This is consistent with the case law cited above and with established principle.

²⁸⁷ See *Prakash v. Jain* [1998] O.J. No. 412 (Gen. Div.); *Baumgartner v. Baumgartner* (1995), 122 D.L.R. (4th) 542 (B.C.C.A.), rev’g in part (1994), 113 D.L.R. (4th) 579 (B.C.S.C.); *Bezzeg v. Bezzeg* (1994), 33 C.P.C. (3d) 94 (N.B.Q.B.); *Sharpe v. Sharpe* [1996] 4 W.W.R. 438 (Man. Q.B.). See Rule 4 of Chapter 7 of the Alberta Code which provides, *inter alia*: “A lawyer who shares office space, equipment or support staff with others must also ensure that such arrangements are structured in a manner that protects confidentiality.”

Some respondents also suggested that where a non-client has relied on legal advice or instructed the lawyer, the duty of loyalty might properly be extended. Given the singular importance of the duty of undivided loyalty, we think that this suggestion is best dealt with by a careful examination of the possibility, in a given factual context, that a non-client has actually become a client and is therefore owed a duty of loyalty.

There were also concerns expressed that adverse retainers against those associated with a client might be adverse to the interests of the client. We agree that this is a proper concern but, as in the discussion of *GMP* above, consider that the proper analytic framework is the examination of the duty of loyalty to the actual client which may be breached by adverse retainers against other entities. We think it dangerous and inappropriate to impose duties of loyalty in favour of non-clients.

Taking into account the analysis above and the consultation process, we conclude that the duty of loyalty should be reserved exclusively for clients and should not be extended to others. As to the duty of confidentiality, we conclude that **generally** the duty of confidentiality should be owed only to clients. However, as in the circumstances described in the cases above, the duty of confidentiality may properly be imposed in favour of non-clients where those non-clients disclose confidential information to the lawyer in the reasonable expectation that confidentiality will be preserved. We do not, of course, intend to suggest that this duty of confidentiality to non-clients would interfere with disclosure to the client.²⁸⁸

RECOMMENDATIONS

Definition of “client”

That the CBA Code of Professional Conduct be amended to:

13. clarify that a client is the person who:
 - a. consults the lawyer and on whose behalf a lawyer renders or undertakes to render legal services or
 - b. having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services;
14. clarify that 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;
15. clarify that the definition of client does not extend to near-clients, affiliated entities, directors, shareholders, employees, or family members unless there is objective evidence

²⁸⁸ Where a lawyer, in the course of a retainer for a client, obtains confidential information from third parties that relates to the retainer, the lawyer is obliged to disclose that information to the client. However, the client (and thereby the lawyer) may be limited as to the use of that confidential information. confidentiality.”

to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established;

16. clarify that lawyers owe a duty of loyalty only to clients and that this duty should not be extended to others; and
17. clarify that lawyers owe a duty of confidentiality to clients and that a similar duty of confidentiality may extend to near-clients and non-clients when they have disclosed confidential information to the lawyer in the course of the retainer, reasonably expecting that it would be protected, and the lawyer knows or ought to know that the information is confidential.

Notes

The duty of loyalty should not extend to non-clients, but the lawyer's relationship with a client may be harmed by acting adverse to a person or entity that is related to the client. The duty of loyalty owed to a client may require that the lawyer not act against related persons in order to protect the lawyer-client relationship. This might occur when the lawyer's relationship with the client may be materially impaired.

When a lawyer acts generally for members of a corporate group, it is likely that the lawyer will not be able to act against any individual entity within the group for reasons of both loyalty and confidentiality. Conversely, the mere fact of a retainer with one member of a corporate group will not automatically result in duties to the group as a whole or to other entities within the group.

Lawyers acting for partnerships and unincorporated associations are not acting for the individual partner or association member unless it is so stated or evident from the facts. Practically, it is appropriate to consider partnerships and unincorporated associations as separate legal entities for conflicts purposes.

To complement its Report and recommendations, the Task Force has prepared a Conflicts of Interest Toolkit which includes model letters and checklists. The Toolkit can be found at pages 183 to 259. The following items are of particular relevance to this chapter:

| | |
|--|----------|
| Checklist for avoiding phantom clients | Page 192 |
| First contact conflicts screening form | Page 201 |
| Guidelines for non-engagement letters | Page 206 |
| Model non-engagement letter | Page 207 |
| Model “I am not your lawyer” letter | Page 224 |
| Model litigation “beauty contest” pre-meeting letter | Page 246 |
| Model pre-RFP meeting and review letter | Page 247 |
| Model RFP response letter | Page 248 |
| Model termination of mandate letter | Page 209 |
| Guidelines for multiple representations | Page 226 |
| Serving as a director of a client corporation | Page 255 |

CHAPTER 5

Engagement letters

Canadian rules of professional conduct do not currently require lawyers to use engagement letters when a client retains their services. But it is becoming increasingly clear that engagement letters provide a valuable service to both lawyers and clients. Indeed, recent developments in Canadian law and the direction of the law in other jurisdictions suggest that there are good reasons to require, or at least encourage, lawyers to adopt engagement letters as a standard practice.

As with any commercial contractual arrangement, there are obvious benefits to both lawyer and client confirming, in writing, the material terms of their contract, including the scope of the engagement, the parties to the engagement, fees and billing arrangements, and how the engagement may be terminated. In addition to the general benefits of a written agreement, specific benefits arise from the clarification of and, in appropriate circumstances, limitations on, the scope of obligations lawyers owe their clients, allowing those obligations to be modified with the client's informed consent.

A written agreement that addresses conflict issues may make it possible for the lawyer to act and for other clients to secure counsel of their choice where it might not be possible without the agreement. An engagement letter also enables the lawyer to demonstrate that professional obligations were met, protecting against after-the-fact allegations of a breach of duties.

In particular, the ability to clarify and tailor the duty of loyalty through a written engagement letter is a significant benefit, from both a lawyer's and a client's perspective. As recent case law has shown, lawyers and clients who do not avail themselves of this opportunity may suffer significant and unexpected consequences.

This chapter reviews the state of the law relating to engagement letters with a view to identifying specific areas of concern. After noting the applicable rules of professional conduct, the chapter reviews the leading Canadian cases, with particular attention on the recent decision of the Supreme Court of Canada in *Strother*.²⁸⁹ The chapter then outlines several areas of concern in the enforceability of conflict waivers, before concluding with a recommendation.

²⁸⁹ *Strother*, *supra* note 3.

The use of engagement letters in Canada

No Canadian jurisdiction requires lawyers to use engagement letters to confirm the terms on which they are engaged by clients, although the *Alberta Code of Professional Conduct* requires lawyers to provide clients with written information about fees and disbursements.²⁹⁰ In the U.S., most jurisdictions require engagement letters for contingent fee matters but only recommend and do not require them in other situations.²⁹¹

With respect to conflicts of interest, all jurisdictions in Canada have rules that provide a basic prohibition against conflicts of interest and then an exception for circumstances when clients have provided an informed consent.²⁹² The requirements for consent are similar, but notably none of the jurisdictions requires that consent be in writing.²⁹³

In the absence of a rule requiring engagement letters, Canadian lawyers have yet to adopt a uniform practice. Nonetheless, consistent with practice in the U.S., many lawyers now use engagement letters for each engagement.²⁹⁴

Engagement letters are generally recognized as a best practice in most situations. As one noted commentator has observed, it is highly desirable that the scope of the firm's retainer be recorded and communicated to the client in writing:

The scope of the firm's retainer is relevant to both the question of whether a later retainer is related to an earlier one, and to the question of whether the representation has been completed (that is, whether the client remains a current client). To avoid future conflicts, in other words, it is desirable that both the scope and the duration of the retainer be defined in writing as narrowly as possible.²⁹⁵

²⁹⁰ The Law Society of Alberta's *Code of Professional Conduct* does not require written retainers generally but does require lawyers to provide clients with written information about fees and disbursements after being retained. The Alberta rules also require that in circumstances in which abbreviated or partial services may be rendered competently, the client must be fully apprised of the risks and limitations of the retainer, and that discussions with the client in this regard are confirmed in writing.

²⁹¹ Since 2002, the American Bar Association Model Rules have required written conflict waivers but states do not have to adopt the model rules. See http://www.abanet.org/cpr/mrpc/model_rules.html, accessed December 6, 2007.

²⁹² Under no circumstances, however, may a lawyer advise or represent more than one side of a dispute. See for example Law Society of Upper Canada's *Rules of Professional Conduct* Rule 2.04(2).

²⁹³ See by way of example the extracts from the CBA Code of Professional Conduct, Chapter V and the Law Society of Upper Canada's *Rules of Professional Conduct* Rule 2.04.

²⁹⁴ The responses to our October 2007 consultation paper suggest that lawyers in a wide variety of practices use engagement letters, including many large Canadian firms. There are also indications that large firms in the United Kingdom are tightening their practices with respect to engagement letters. See Julius Melnitzer, "Conflicts: No Exit" *Expert Magazine* (May 2005) at 67.

²⁹⁵ Gavin McKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Thomson Carswell, 2007) at 5.52.

Benefits of engagement letters

There are at least four benefits to be gained from the use of engagement letters.

First, an engagement letter identifies the client(s) to whom the lawyer's services are to be provided and to whom the lawyer owes a fiduciary duty. Although obvious in most situations, as explained in the chapter on clients, the identity of the client to whom these duties are owed is sometimes unclear. The engagement letter can clarify this.

Second, an engagement letter enables a lawyer and client to ensure that they have the same expectations. By articulating their understanding of what they have been asked to do and for whom, and by explaining their approach to managing conflicts of interest, lawyers give their clients the information they need to make an informed decision about the legal services they are retaining. If a client finds that a proposed retainer is insufficient, modifications to it at the outset can prevent the wasteful expenditure of valuable resources and ensure that the client's expectations can be met. An engagement letter is also helpful in clarifying when a matter has been completed and the lawyer-client relationship terminated – something that can be particularly important in conflicts matters. Further, the benefit of proactively managing client expectations is beneficial in circumstances when a lawyer wishes to take on an unrelated matter for another client. In this type of situation, which has been the subject of much discussion following the Supreme Court of Canada's bright line test in *Neil*,²⁹⁶ a clearly worded waiver in an engagement letter should alleviate any sense of betrayal if the lawyer acts against the client on an unrelated matter.

A third and related benefit of engagement letters is that they improve client service and have a positive influence on the overall lawyer-client relationship. By providing the terms of a lawyer's engagement in a clear and easily accessible format, an engagement letter facilitates communication between the lawyer and the client. It also allows the parties to identify problems up front and to prevent erroneous assumptions, thereby significantly reducing the chances of disputes arising in relation to the retainer.

Finally, an engagement letter is a risk management tool for lawyers. As Justice Binnie observed in *Strother*, "where a retainer has not been reduced to writing ... and no exclusions are agreed upon ... the scope of the retainer may be unclear."²⁹⁷ A lack of clarity may result in a subsequent assertion that the lawyer had a conflict of interest. Ambiguities in a retainer will inevitably be resolved against the lawyer. In other words, the client will get the benefit of the doubt.²⁹⁸ By contrast, if the retainer is in writing and signed by the client, it is less likely that the client will be able to assert successfully that he or she was not made aware of the need to consider a conflict or did not understand the conflict. Similarly, an engagement letter can be extremely

²⁹⁶ *Neil*, *supra*, note 4.

²⁹⁷ *Strother*, *supra* note 3 at para. 40.

²⁹⁸ *Chiefs of Ontario*, *supra* note 111 at paras. 95-97. See also *Restatement (Third) of the Law Governing Lawyers*, §122, cmt. c(i) which provides that the requirement of consent generally requires an affirmative response by each client, and that ambiguities in a client's purported expression of consent should be construed against the lawyer seeking the protection of the consent.

helpful in managing future conflicts of interest. For example, two criminal law clients may choose to be represented by the same lawyer, but the lawyer and the clients are well served by advising the clients in writing at the outset of the consequences of a conflict arising between them.

It is important to note that written confirmation of a retainer agreement does not need to be complex, involved, or otherwise burdensome on either the lawyer or the client. Indeed, it may require only the preparation of a brief e-mail that confirms the material terms of the lawyer's engagement.

Concerns about making engagement letters mandatory

In the Task Force consultation paper, we took the preliminary view that lawyers should be strongly encouraged, if not required, to use engagement letters to define the scope of the lawyer-client relationship and asked lawyers what problems, if any, this might pose. Although many respondents said that they already used engagement letters, there were some concerns about making them mandatory. These concerns included:

- (i) **client distrust or resistance**, sometimes on the basis that clients perceive engagement letters as benefiting only lawyers;
- (ii) **administrative costs** that could be onerous for lawyers and clients alike. For lawyers, the costs would be particularly acute in situations where the matter is small or “one-off” or where the lawyer's practice is unable to bear these costs. Lawyers in this category include legal aid lawyers, those practising in low-income, northern or remote communities, and those with a small firm practice with a large number of matters that individually are low in value. For clients, the costs would most likely be burdensome where the lawyer handles a large number of files for the client, resulting in a multiplicity of engagement letters, where files endure for long periods of time, thereby imposing an obligation to ensure that the letters are kept current, or if a client of modest income has to seek independent legal advice before agreeing to the retainer;
- (iii) the **difficulty of drafting** a comprehensive retainer letter in a situation where the lawyer has a long-standing, multifaceted relationship with the client;
- (iv) difficulties for clients with **special needs**, including developmental delays, learning disabilities, health problems or mental illness, and child clients or clients who are elderly. For example, young people may not wholly understand their situation because of their age and lack of experience;
- (v) problems with **unsophisticated clients**, who may generally lack legal sophistication, or who lack the capacity to understand the issues in question because, for example, they have little or no formal education, or have alcohol or substance abuse problems;

- (vi) situations where it is **not possible to provide a retainer letter** including, for example, criminal law clients who are detained and receiving emergency services, human rights clients who are detained in inaccessible locations, or legal aid clients receiving emergency services at a courthouse or limited scope services from a legal aid clinic, often over the telephone;
- (vii) situations where there is a **language or literacy barrier** between lawyer and client;
- (viii) in **Aboriginal law practices**, where the nature of the relationship between a law firm and its clients often involves ill-defined legal issues that can extend for many years (even decades) and may involve complex overlapping claims, such that it can be difficult to define a retainer to a specific limited transaction or to restrict one's client to a well-defined individual or group of individuals;
- (ix) the **inapplicability of retainer letters** for many in-house counsel or lawyers working in government; and
- (x) the **unique nature of an insurance law practice**, where the lawyer is frequently retained by the insurer, not the insured client, and often has little contact with the client.

Engagement letters that include a conflicts waiver

To the extent that a retainer letter seeks to vary the rules of professional conduct that would apply without such an agreement in place (for instance, where a consent or waiver is sought due to an actual or potential conflict), the enforceability of the retainer letter will depend on a number of factors. These factors are summarized later in this chapter, after a review of the case law that has brought these areas of concern to the forefront.

Strother v. 3464920 Canada Inc.

A review of the current state of the law in Canada must begin with the 2007 decision of the Supreme Court of Canada in *Strother*.²⁹⁹

At issue in *Strother* was whether and to what extent a lawyer's duty of loyalty may be limited by a retainer agreement. The case is significant in underscoring the importance of retainer letters.

The facts of the case are as follows. The plaintiff, Monarch, was in the business of promoting tax-assisted film financing, a business which had grown in Canada due to the financing of the American motion picture industry in Canada. In 1996 and 1997, Monarch engaged the defendant law firm and the defendant Strother, a senior tax lawyer in the firm, to provide it with advice in connection with its tax-shelter scheme. The law firm's engagement was

²⁹⁹ *Supra* note 3.

expressed in written retainer agreements. The 1997 retainer contained an exclusivity clause which, with limited exceptions, expressly prohibited the firm from acting for clients other than Monarch in relation to that tax-shelter scheme.

In October 1997, Monarch's tax-shelter scheme was shut down by the federal government's new tax rules. At that time, Strother advised Monarch that he did not have a "fix" to avoid the effect of the new rules and suggested that they defer the discussion of a solution until the new year. Subsequently, in November 1997, Strother was advised by a lawyer at another law firm about a possible solution to the new rules. The potential viability of the solution was then confirmed at the end of the year by Revenue Canada (now the Canada Revenue Agency), which advised Strother that a favourable tax ruling was not out of the question. Strother, however, did not advise Monarch about any of this new information.

Meanwhile, the Monarch business was being wound down. The 1997 retainer terminated at the end of 1997, but Monarch continued as a firm client under an oral retainer (the 1998 retainer). Under the 1998 retainer, the firm was retained for general corporate and tax planning work, which included the services of Strother in exploring other "tax-assisted business opportunities."

The facts were further complicated when, in late 1997 or early 1998, Strother was approached and ultimately retained by a former Monarch executive who wished to set up his own company in the tax-assisted film financing business. On behalf of his new client, Strother drafted a proposal for Revenue Canada's advance ruling in relation to the solution that he had learned of earlier in 1997. Strother and his new client agreed that Strother would receive 55 % of the first \$2 million of profit of the new company should the tax ruling be granted and 50 % thereafter. At no time did Strother advise Monarch about the possibility of a solution with respect to the new rules.

Revenue Canada issued a favourable advance ruling to Strother and his new client in October 1998. Strother did not advise Monarch about the advance ruling, even though it would have been favourable to Monarch's business and even though Strother and the firm continued to act for Monarch on its general corporate and tax planning matters pursuant to the 1998 retainer.

When the tax ruling was made public some months later, Monarch terminated its relationship with the firm and Strother. It also brought an action for breach of fiduciary duty and breach of confidence against the firm and Strother. The trial judge dismissed the claim. The Court of Appeal substantially allowed the appeal and ordered an accounting and disgorgement of Strother's profits. It also ordered the law firm to disgorge the profits it earned in the form of legal fees from acting for the new client in breach of its duty to Monarch from January 1, 1998 and return to Monarch all fees paid by it from that date. Strother and the law firm appealed to the Supreme Court of Canada.

The Supreme Court of Canada partially allowed the appeals as to the remedies ordered against Strother and the firm. The court held that the remedies awarded by the Court of Appeal were excessive. However, the case is primarily important for *upholding* the Court of Appeal's finding that Strother had breached his duty of loyalty. On this issue, the court split 5-4. More specifically, the court was divided on the extent to which the retainer agreements had modified Strother's obligations to Monarch.

Both the minority and majority opinions agreed that the provision of legal services by Strother was governed by contract law. A retainer between a lawyer and a client is, after all, ordinarily a contract, albeit a special one attracting a duty of loyalty, and therefore "it is for the parties to determine how many, or how few, services the lawyer is to perform."³⁰⁰ The judges further agreed that, in the circumstances (which included the retainer), Strother and the firm were free to act for their client's competitor.³⁰¹

The court was divided, however, on the extent to which the 1998 oral retainer had modified Strother's obligations to Monarch.

The majority opinion in *Strother*

Writing for the majority, Justice Binnie held that the 1998 retainer had not "sufficiently limited" Strother's contractual responsibilities and that, accordingly, Strother was at all times obliged to provide Monarch with advice in connection with its tax-shelter business. As Justice Binnie observed:

Monarch's tax business was in a jam. Strother was still its tax lawyer. There was a continuing "relationship of trust and confidence." Monarch was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of "didn't ask, didn't tell", and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.³⁰²

The existence of a continuing relationship of trust and confidence was based on the notion that the lawyer-client relationship is "overlaid with certain fiduciary responsibilities, which are imposed as a matter of law."³⁰³ According to the majority, this meant that Monarch, as a current client, was entitled to the continuing loyalty of Strother and the firm even though the 1997 retainer had expired. The majority thus downplayed the termination of the 1997 written retainer and the shift from the retainer to the 1998 oral retainer.³⁰⁴ In Justice Binnie's words, "the written 1997 retainer had come to an end but the solicitor-client relationship based on a continuing (if more limited) retainer carried on into 1998 and 1999."³⁰⁵ Importantly, this continuing retainer was held to include a duty to provide advice on the tax issues that affected

³⁰⁰ *Ibid.* at paras. 34 (per Binnie J.) and 133 (per McLachlin C.J.).

³⁰¹ *Ibid.* at para. 54.

³⁰² *Ibid.* at para. 42.

³⁰³ *Ibid.* at para. 34.

³⁰⁴ *Ibid.* at para. 53. Justice Binnie stated that "too much was made in argument about the shift from the 1997 written retainer to the 1998 oral retainer."

³⁰⁵ *Ibid.* at para. 46.

Monarch's business in respect of which the rules, as articulated in *Neil*, imposed an obligation to put Monarch's interests ahead of those of Strother and the firm. Accordingly, Strother breached his duty of loyalty when he took an interest in, and facilitated the tax-assisted business of Monarch's competitor and failed to advise Monarch that Monarch should obtain independent legal advice. Strother breached his fiduciary duty to Monarch because there was a "substantial risk" that his representation of Monarch would be "materially and adversely affected" by his own conflicting interests.³⁰⁶

The minority opinion in *Strother*

The minority, on the other hand, held that the retainer agreements had sufficiently modified Strother's fiduciary duty by narrowing the ambit of the contractual retainer, such that Strother was not precluded from pursuing his personal financial interest in Monarch's competitor because he was not obligated to advise Monarch about the favourable tax ruling. Rejecting the notion of a "general, free-floating" duty of loyalty that overlays the contract of retainer, the minority held that the fiduciary duty is *itself* molded by the terms of the contract of retainer:

Whether a conflict ... exists is dependent on the scope of the retainer between the lawyer and the client in question. The fiduciary duties owed by the lawyer are molded by this retainer ... It is not open to us to superimpose a broad fiduciary obligation independent of and inconsistent with the retainer.³⁰⁷

...

A retainer between lawyer and client is essentially an agency agreement, albeit a special one attracting a duty of loyalty. The lawyer commits to doing certain things for the client. It is to this commitment that the fiduciary duty of loyalty attaches ... Where the retainer is written, one looks to the words of the retainer. Where it is oral, one asks what the oral terms were ... *The duty of loyalty is not a duty in the air. It is attached to the obligations the lawyer has undertaken pursuant to the retainer* ... The problem, to use the language of *Hilton*, arises when the lawyer "has conflicting duties to two clients" and cannot prefer one to the other - that in performing his "contractual duties" to one (or taking a personal interest in the matter), he will be in breach of his contractual duties to the other.³⁰⁸

Referring to the High Court of Australia's decision in *Hospital Products Ltd v. United States Surgical Corp.*³⁰⁹ and the Privy Council's decision in *Kelly v. Cooper*,³¹⁰ Chief Justice McLachlin held that the fiduciary duty between lawyer and client is "rooted in the contract between them. It enhances the contract by imposing a duty of loyalty with respect to the obligations

³⁰⁶ *Neil*, *supra* note 4 at para. 29, cited in *Strother*, *supra* note 3, at para. 61.

³⁰⁷ *Strother*, *supra* note 3 at paras. 118-119.

³⁰⁸ *Ibid.* at paras. 133-135 (emphasis added). Chief Justice McLachlin's reference to *Hilton* refers to *Hilton v. Barker Booth & Eastwood*, [2005] 1 All E.R. 651 (H.L.), a leading English case on the lawyer's duty to avoid conflicts of interest. In that case, the House of Lords held that a lawyer's duty of loyalty is "primarily contractual and its scope depends on the express and implied terms of his retainer." While the duty of loyalty has its roots in the fiduciary nature of the solicitor-client relationship, that duty "may have to be molded and informed by the terms of the contractual relationship" (citing Mason J. in *Hospital Products Ltd v. United States Surgical Corp.* (1984), 156 C.L.R. 41 at 97 (H.C.A.), cited in *Kelly v. Cooper*, [1993] A.C. 205 at 215).

³⁰⁹ (1984), 156 C.L.R. 41 at 97 (H.C.A.) [*Hospital Products*].

³¹⁰ [1993] A.C. 205 (P.C.).

undertaken, *but it does not change the contract's terms*. Rather it must be molded to those terms.” (emphasis added).³¹¹ Chief Justice McLachlin quoted the following “classic statement” of Justice Mason in *Hospital Products*:

[T]he existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. *The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.* (emphasis added).³¹²

Accordingly, the minority found that the fiduciary relationship under the expired 1997 retainer was irrelevant to the construction of Strother’s fiduciary duty of loyalty under the 1998 retainer. Unlike the 1997 retainer, which Chief Justice McLachlin characterized as a “comprehensive written document [which] required Strother to stay apprised, and keep Monarch apprised, of all legal developments that could affect Monarch’s ability to continue to promote tax-assisted film production services,” the 1998 retainer was “decidedly different” and only required Strother to provide advice to Monarch if Monarch specifically asked for it. As a result, under the 1998 retainer, Strother was free to act for Monarch’s competitors and was not obliged to disclose any information of a competitive nature to Monarch.³¹³ For all of these reasons, Strother’s duty of loyalty did not preclude him from pursuing a personal financial interest in Monarch’s competitors or require him to advise Monarch unless Monarch sought his advice.

While emphasizing that its approach was not meant to “dilute the rigor” of the lawyer’s fiduciary duties, the minority described its approach as practical and realistic.³¹⁴ As noted by Chief Justice McLachlin, there is a “public interest” in allowing lawyers and law firms to serve a variety of clients in the same field.³¹⁵ Indeed, it was on this basis that Chief Justice McLachlin rejected the notion of a general, free-floating duty of loyalty:

If the duty of loyalty is described as a general, free-floating duty owed by a lawyer or law firm to every client, the potential for conflicts is vast ... If the duty that the lawyer owes to each client is conceived in broad general terms, it may well preclude the lawyer from acting for each of them; at the very least, it will create uncertainty. *If the duty is referenced to the retainer, by contrast, these difficulties do not arise.* The lawyer is nonetheless free to act for both, provided the duties the lawyer owes to client A do not conflict with the duties he owed to client B. (emphasis added).³¹⁶

Strother reinforces the advisability of written retainer agreements. Had the second, narrower oral retainer explicitly addressed the scope of the obligations the law firm was assuming, disclosed any actual or potential conflicts arising from activities that might be undertaken by Strother or the firm on their own or other clients’ behalf, and obtained the client’s express

³¹¹ *Strother*, *supra* note 3 at 141.

³¹² *Supra* note 323 at 97, cited in *Strother*, *supra* note 3 at 141.

³¹³ *Strother*, *supra* note 3 at para. 123.

³¹⁴ *Ibid.* at para. 138.

³¹⁵ *Ibid.* at para. 140.

³¹⁶ *Ibid.* at para. 136.

agreement in advance to those activities, then arguably no issue would have arisen, following either the majority or the minority approach in *Strother*. Indeed, the court seemed to be in agreement as to the law with respect to retainer agreements – that the duty of loyalty can be modified by contract – but split on the issue of whether the second retainer agreement had sufficiently limited Strother’s obligations so as to permit him to act as he did. As both the majority and minority judgments suggest, the issue of the scope of Strother’s limited, contractual obligations under the second retainer agreement would not have arisen had that agreement been reduced to a clear, written expression of those obligations and the exclusions they implied.³¹⁷

Chiefs of Ontario v. Ontario

A second relevant Canadian case is *Chiefs of Ontario v. Ontario*,³¹⁸ a decision that underscores the importance of clarity in a written retainer.

In *Chiefs of Ontario*, the Mnjikaning First Nation (MFN) brought a motion for removal of a law firm in the underlying action on the grounds of a conflict of interest. The law firm was representing MFN and 133 other First Nations, under the direction of the Chiefs of Ontario, in an action against the Province of Ontario. Prior to its retainer with the Chiefs of Ontario, the law firm acted as general counsel for MFN in relation to revenue matters arising out of the operation of Casino Rama. In order to act for the Chiefs in the case at bar, the law firm obtained the consent of MFN. That consent extended to acting for the Chiefs in “possible future litigation” relating to (a) MFN’s claim to a 35% share of the net revenues from Casino Rama and (b) the imposition by the Province of Ontario of a 20% ‘win tax’ on the gross revenues.

The alleged conflict arose when, during the course of its litigation retainer with the Chiefs, the law firm amended its pleadings to allege breach of fiduciary duty on the part of MFN, effectively making MFN, its client, a co-defendant in the proceedings. MFN claimed that the law firm’s conduct put it in a conflict of interest which was not covered by the consent.

At issue, then, were the validity and scope of MFN’s advance consent to the law firm acting for the Chiefs against MFN.

On the validity issue, Justice Campbell held that the consent was valid and binding as MFN had obtained independent legal advice and full disclosure, such that its consent was properly informed.³¹⁹ The court held that:

“[t]here are obviously cases where a law firm is obliged to discuss with its client the nature of the conflict or potential conflict which triggers the request for a consent. The more direct the apparent conflict and the more obvious the potential for future trouble down the road, the more likely a duty arises to consult directly with the client.”³²⁰

³¹⁷ *Ibid.* at para. 40 (per Binnie J.).

³¹⁸ *Chiefs of Ontario*, *supra* note 111.

³¹⁹ *Ibid.* at para. 45.

³²⁰ *Ibid.* at para. 39.

In this case, however, there was no such duty, since the type of conflict that ultimately arose was not foreseeable. The law firm therefore fulfilled its obligations to its client.³²¹

However, on the scope issue, Justice Campbell held that the scope of the consent was not so broad as to allow the law firm to act in the case at bar. As indicated by the wording of the consent and the circumstances in which the consent was given, neither the law firm nor the client had contemplated the nature of the conflicting interest which eventually arose, which Justice Campbell characterized as “a direct attack against the honour of the client in respect of matters related to those on which the law firm had acted.”³²² The consent was also “ambiguous:”

[The consent] does not identify the specific items of litigation. It does not incorporate by reference or even refer to the provisions of the [relevant agreement out of which the litigation arose]. It does not identify the parties to present or future litigation ... It does not use the word “adversity” or “conflict” or “potential conflict” or any word that suggests adversity of any kind.

Overall, the “brevity, informality and vagueness” of the consent were fatal to the law firm’s position that it had secured sufficient consent from MFN to act against it so adversely.³²³

Importantly, Justice Campbell suggested that a formal letter requesting consent for a specific course of action would have made a difference in the case.³²⁴ Such a letter could have confirmed the scope of the client’s consent, which otherwise “has to be interpreted in light of what was objectively known to the parties at the time and what was then within their reasonable contemplation.”³²⁵ In addition, the court held that where there is any doubt about the scope of consent, the issue is decided against the lawyer or law firm on the basis of onus:

The evidentiary onus is on the law firm, when it wants to attack a former client, to ensure clarity of consent. If the law firm fails to ensure clarity, the law firm pays the price.³²⁶

Thus, by illustrating the dangers of unclear retainers and identifying how a clearly worded written retainer can benefit both clients and lawyers by clarifying the parties’ expectations and preventing misplaced assumptions, the court’s judgment in *Chiefs of Ontario* strongly supports the use of retainer letters. In addition, the case confirms that the enforcement of retainer agreements will depend very much on what was reasonably foreseeable by the lawyer and the client at the time consent was given.

³²¹ *Ibid.* at para. 40.

³²² *Ibid.* at para. 36.

³²³ *Ibid.* at para. 92.

³²⁴ *Ibid.* at para. 72.

³²⁵ *Ibid.* at para. 90.

³²⁶ Similarly, cmt. c(i) to section 122 of the *Restatement* provides that the requirement of consent generally requires an affirmative response by each client. Ambiguities in a client’s purported expression of consent should be construed against the lawyer seeking the protection of the consent.

Enforceability of conflict waivers in engagement letters

As the review of these two important Canadian cases illustrates, the enforceability of conflict waivers in written retainers will depend on several factors, most importantly: (1) informed consent; (2) the sophistication of the client; and (3) the availability of independent legal advice.

The factors that influence enforceability have also been enumerated in American law. The ABA's *Model Rules of Professional Conduct*, for instance, list the factors for the enforceability of conflict waivers in the Comments to Model Rule 1.7:

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [which provides the rules for client consent]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver 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. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, *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, e.g., 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*. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).³²⁷ (Emphasis added)

These three factors (informed consent, client sophistication and the availability of independent legal advice)³²⁸ are the 'areas of concern' in the enforcement of conflict waivers. The factors are closely related, but each indicates a unique area of concern in assessing the validity of advance waivers and it is therefore useful to review each factor separately.

Informed consent

Informed consent requires full disclosure, which is arguably the most critical factor in the enforcement of conflict waivers in retainer agreements. A retainer agreement that modifies the scope of a lawyer's duty to avoid conflicts of interest will not be upheld unless there is full disclosure by the lawyer of both the relevant facts and the implications of the client's consent.³²⁹ More specifically, disclosure must be specific about the parties involved, the nature of the potential conflict, and the risks of consent.

³²⁷ Model Rule 1.7, cmt. 22 (emphasis added).

³²⁸ As noted by Anthony Davis, "the efficacy of ... advance waivers will be in direct proportion to [these] three criteria." See Anthony E. Davis, "Professional Responsibility: Permissible Advance Waivers" *New York Law Journal* (September 12, 2005).

³²⁹ *McKenzie*, *supra* note 295 at 5.52.

The *Restatement (Third) of the Law Governing Lawyers* is a comprehensive guide to the law governing professional conduct in the United States.³³⁰ Its provisions are commonly cited by U.S. courts and have recently figured prominently in the Supreme Court of Canada's decisions on the duty of loyalty (see *Neil and Strother*). Its provisions on informed consent have received particular attention.

The *Restatement* provides for informed consent in both its general provisions on the client-lawyer Relationship (Chapter 2) and its more specific provisions on conflicts of interest (Chapter 8). Under its general provisions relating to a lawyer's duties to a client, the *Restatement* says that limitations on a lawyer's duties to a client in a lawyer-client contract will be valid only if: (a) the client is adequately informed and consents and (b) the terms of the limitation are reasonable in the circumstances.³³¹

The *Restatement* then provides more specific rules for informed consent in the context of a lawyer's duty to avoid conflicts of interest. After setting out the basic prohibition against conflicts of interest in section 121,³³² the *Restatement* sets out the exception for client consent in section 122 as follows:

§122 Client Consent To A Conflict Of Interest

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by §121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

The commentary to section 122 states that informed consent requires that:

[E]ach affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.³³³

These provisions of the *Restatement* and their application to engagement letters were discussed by the U.S. District Court for the Northern District of Georgia in *Worldspan, L.P. v. Sabre Group Holdings, Inc.*³³⁴ In that case, a law firm was disqualified on the basis of a conflict arising from its simultaneous representation of the plaintiff and defendant. The law firm acted as counsel for the defendant in the case at bar (a tort action), but also continued to represent the plaintiff in tax matters. The plaintiff successfully moved for the disqualification of the law firm as opposing counsel in the tort action. Referring to sections 121 and 122 of the *Restatement*

³³⁰ *Supra* note 48.

³³¹ *Restatement*, §19.

³³² *Restatement*, §121 (The Basic Prohibition Of Conflicts Of Interest) provides as follows: "Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved 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 by the lawyer's duties to another current client, a former client, or a third person."

³³³ *Restatement*, s. 122, Cmt. c. Similarly, Model Rule 1.7, Cmt. 18 provides that "informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."

³³⁴ 5 F.Supp.2d 1356, 1360 (N.D.Ga. 1998).

(which were draft provisions at that time) the court held that while the matters were unrelated, the standard engagement letter which the firm had sent to the plaintiff five years earlier contained insufficient consent to future simultaneous representation. Much like the decision in *Chiefs of Ontario*, the U.S. decision illustrates that the sufficiency of consent may be affected by the circumstances and nature of the adversity that develops over time.

The overwhelming importance of informed consent is summarized by commentator Anthony Davis as follows:

The validity and effectiveness of any conflict waiver — and, especially “advance” or “blanket” waivers of future conflicts — is likely to be judged in large part by the degree of specificity of the disclosures made in order to obtain the waivers ... Thus, even sophisticated clients who have actually sought and received independent counsel before signing an advance waiver may later be permitted to repudiate the waiver, or to withdraw their consent, if the disclosure made was inadequate, or even just because the circumstances have changed.³³⁵

Notably, the *Restatement* does not require that the client’s informed consent be in writing. By contrast, the ABA Model Rules say that a client must give informed, written consent to a conflict of interest. Model Rule 1.7(b) provides that a lawyer may represent a client notwithstanding a conflict of interest 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*.³³⁶

Sophistication of the client

Canadian courts have consistently looked to the sophistication of the client when considering whether or not to uphold a conflict waiver in a retainer agreement. In this context, sophistication refers to the client’s sophistication about legal conflicts of interest, not the

³³⁵ Anthony E. Davis, “Professional Responsibility: Effective Waivers of Conflicts” *New York Law Journal* (May 1, 2006).

³³⁶ Model Rule 1.7(b) (emphasis added). Comment 20 to Model Rule 1.7 states that a writing “may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter ... The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”

client's sophistication about its own business. Thus, for example, sophistication is often found in corporate clients with in-house counsel who are involved in retaining a lawyer, as in-house counsel are uniquely qualified to assess and advise on the corporation's vulnerability.³³⁷

At the same time, it can be imprudent to rely too much on client sophistication as a substitute for consent that is truly and unambiguously informed. Indeed, as Justice Binnie noted in *Strother*, while the sophistication of the client may lead to an inference of implied consent, a client cannot be taken to have consented to conflicts of which it is ignorant.

In the U.S., the *Restatement* and the Model Rules identify client sophistication as a relevant factor in the enforceability of retainer agreements.³³⁸ The commentary to section 122 of the *Restatement*, for example, provides that a client's open-ended agreement to consent to all conflicts normally would be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.³³⁹

Sophistication was a significant factor in the enforceability of an advance waiver letter in a recent Californian case. In *Visa U.S.A., Inc. v. First Data Corp.*,³⁴⁰ the defendant moved to disqualify the plaintiff's law firm in a trademark infringement proceeding on the grounds of a conflict of interest. The defendant, First Data Corp., had retained the law firm earlier to represent it in unrelated litigation and had, at that time, executed an advance waiver which specifically provided for the defendant's consent in relation to the law firm's continuing representation of Visa. Visa and the defendant were major competitors in the credit card processing business. Mindful of this, the law firm drafted its advance waiver letter so that it specifically referred to the significant risk of future adversity between the two clients, including litigation. Nonetheless, the defendant argued that a second waiver was required once the situation between Visa and the defendant ripened into an actual conflict.

In denying the motion, the court held that the law firm was not disqualified from representing both parties. The court held that the law firm's use of a prospective waiver, which purported to waive all future conflicts between the parties, was proper, and that a second waiver once the situation between the parties had ripened into an actual conflict was not required since the defendant was a knowledgeable and sophisticated user of legal services and could be expected to understand fully what it waived when it signed the law firm's explicit waiver letter. The court held that a second waiver letter would only be required if the first waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.³⁴¹

The court further held that, under California law and ABA Model Rule 1.7(b), an advance waiver of potential future conflicts is permitted even if the waiver does not specifically state the exact nature of the future conflict.³⁴² On this point, the court stated that the law does not

³³⁷ *Strother*, *supra* note 3 at para. 55. Such remarks underscore the primary importance of informed consent.

³³⁸ See Model Rule 1.7, cmt. 22; *Restatement*, §122, cmt. d.

³³⁹ *Restatement*, s. 122, cmt. d.

³⁴⁰ 241 F.Supp.2d 1100 (N.D. Cal. 2003).

³⁴¹ *Ibid.* at 1106.

³⁴² *Ibid.* at 1105.

require that every possible consequence of a conflict be disclosed for a consent to be valid. Rather, “the only inquiry that need be made is whether the waiver was fully informed.”³⁴³ Factors that may be examined in determining whether a waiver was fully informed include:

the breadth of the waiver, the temporal scope of the waiver, the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict, the sophistication of the client, and the interests of justice.³⁴⁴ (emphasis added)

These remarks illustrate that the enforceability of a client’s consent to a future conflict of interest is a fact-specific inquiry. They also illustrate the close relationship between the factors of informed consent and client sophistication.

Availability of independent legal advice

The third major factor that influences the enforceability of conflict waivers contained in retainer agreements is the availability of independent legal advice. This factor is closely tied to the first two. As Gavin McKenzie notes, depending on the sophistication of the client, independent legal advice may be a prerequisite to a valid waiver.³⁴⁵ The commentary to Ontario Rule 2.04(3) also states that while the rule does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which 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 not coerced. In *Neil*, Justice Binnie also noted that independent legal advice is “preferable” where a lawyer seeks the consent of a current client to act directly against the client’s immediate interests, even in an unrelated matter.³⁴⁶

It is important to emphasize that clients may provide informed consent even where independent legal advice is not available. As indicated above, the extent to which this factor applies is highly fact-specific and will often depend on the sophistication of the client. The fact that the validity of a consent may, in the circumstances of a particular case, depend on the availability of independent legal advice does not mean that lawyers must advise clients on each occasion that such advice is desirable. It is also important to note that this factor refers only to the *availability* of independent legal advice, and does not require that the client actually obtain such advice. With the exception of lawyer-client business transactions,³⁴⁷ rules of professional conduct in both Canada and the United States do not require lawyers to ensure that their clients have obtained independent legal advice with respect to conflict waivers.

Nonetheless, as noted by Anthony Davis, conflict waivers are much more likely to be upheld if clients have actually consulted independent counsel, rather than merely having had the opportunity to do so.³⁴⁸ The Supreme Court of Canada’s decision in *Neil*, and particularly Justice

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* at 1106, citing Model Rule 1.7, cmt. 22.

³⁴⁵ *McKenzie*, *supra* note 295 at 5.52.

³⁴⁶ *Neil*, *supra* note 4 at para. 29.

³⁴⁷ See for example Ontario Rule 2.06(2); Model Rule 1.8.

³⁴⁸ Anthony E. Davis, “Professional Responsibility: Permissible Advance Waivers” *New York Law Journal* (September 12, 2005).

Binnie’s *dictum* that independent legal advice is “preferable”, underscores the advisability of at least recommending independent legal advice. Finally, it is worth noting that in *Chiefs of Ontario*,³⁴⁹ Justice Campbell upheld the validity of MFN’s advance consent in large part because MFN had actually obtained independent legal advice.

Practical considerations

The Task Force thoroughly debated whether it would recommend that engagement letters be mandatory. The benefits of such a recommendation as well as some of the practical concerns were discussed earlier. In the end, we concluded that the benefits of engagement letters in the context of conflicts issues (the mandate of the Task Force) were not sufficient to justify a recommendation for a mandatory rule in the CBA Code of Professional Conduct, although we believe that such letters have great value in practice. The Task Force is therefore recommending that engagement letters should be strongly encouraged in the CBA Code.

We were guided to this conclusion by the feedback we received through the consultation process. While some respondents told us that a mandatory rule would “level the playing field” and make it easier to explain to clients why they were being given an engagement letter, many other respondents reported practical difficulties with the mandatory approach. We identified several specific practice areas and specific situations where an exception to the rule might be warranted, for instance duty counsel work, and thought that a rule with many exceptions could be hard to apply consistently.

We realized that the administration of justice and the reputation of lawyers would not benefit from a rule that would be difficult for some lawyers in some situations to honour, and would be difficult for the profession to enforce.

We also considered the value of engagement letters in determining issues that are central to the duty of loyalty. We recognized that although written retainers are definitely helpful and advisable, they will not always be upheld. They are therefore not a complete solution to the challenge of providing clarity for clients and lawyers on what would constitute a breach of a lawyer’s duty of loyalty. We believe lawyers should assess their duty to a client not only on the basis of the words in a retainer, but also by assessing if there is a substantial risk that the lawyer’s representation of one client will be materially and adversely impaired by the existence of a particular retainer for another client. In some cases, an advance waiver will carry the day. In others, it will not.

Notwithstanding the many benefits of engagement letters for clients and their lawyers and the value of such letters in determining issues that are central to the duty of loyalty, we finally decided that the best course of action would be to encourage strongly their use without going so far as a recommendation to change the CBA Code of Professional Conduct to make engagement letters mandatory.

³⁴⁹ *Chiefs of Ontario*, *supra* note 111 at para. 45.

RECOMMENDATIONS

That the CBA Code of Professional Conduct be amended to:

18. encourage strongly the use of engagement letters as the preferred way to
 - a. define and determine the nature and scope of the lawyer-client relationship; and
 - b. clarify the expectations that lawyers and clients have regarding this relationship.

Notes

Engagement letters ensure that the lawyer and client have a shared understanding of the expectations of the working relationship. By setting out the terms of the engagement, such letters contribute to better client service and fewer disputes.

An engagement letter need not be long or complex. In many cases, all that is required is a simple letter that sets out what the lawyer will do for the client and what the fees for the service will be. The letter can also clarify, as appropriate, the lawyer's ability to represent other clients in the future when there is no conflicting interest and prevent any material and adverse affect on representation by reaching an understanding in advance as to the lawyer's ability to act against the client on unrelated matters.

Where an engagement letter includes this type of advance waiver in respect of unrelated matters, lawyers and their clients should expect that it will be upheld.

Engagement letters should become part of routine file-opening procedures for most lawyers in most situations.

To complement its Report and recommendations, the Task Force has prepared a Conflicts of Interest Toolkit which includes model letters and checklists. The Toolkit can be found at pages 183 to 259. The following items are of particular relevance to this chapter:

| | |
|--|----------|
| Model engagement letter (long) | Page 211 |
| Model engagement letter (short) | Page 222 |
| Guidelines for giving independent legal advice | Page 231 |
| Independent legal advice checklist – generic | Page 232 |
| Independent legal advice checklist – family law matter | Page 234 |

Conclusion

The presentation of this Report and the accompanying Toolkit marks the completion of this phase of the Task Force's mandate. Much work remains. With the approval and support of CBA Council, the recommendations in this Report will be transformed into rules and commentaries in the CBA Code of Professional Conduct.

The CBA Code reflects the best thinking of leading legal professionals in Canada and is a reference for CBA members, the courts, and the regulatory bodies that govern the profession. The CBA Code is not, however, mandatory or enforceable. Only lawyers' governing bodies have the authority to compel compliance with the professional standards that they set in their own codes of conduct.

The Federation of Law Societies of Canada is the national coordinating body of Canada's law societies. We have been in contact with the Federation since we began our work. We are aware that the Federation is developing a model code of conduct and we have kept the Federation informed of our progress on the conflicts issue. We are recommending that this Report be officially delivered to the Federation for consideration, and we are hopeful that the Federation's own deliberations will be informed by ours.

During the consultations, a few respondents cautioned that the Task Force's preliminary views could not hope to become the governing rules as the courts had already decided the issues. We appreciate this comment but do not entirely agree with it. For one thing, as has been discussed in the chapter on conflicting interests, some elements of the current conflicts situation come from *obiter* remarks and are open to further refinement. For another, we believe that our analysis of the law in other jurisdictions and in Canada has shown a way forward that builds on the case law and is not in contradiction to it.

We also believe that it is absolutely appropriate for the law societies, the courts and the legal profession to enter into a dialogue through rules, cases and task forces as to the appropriate conflicts rules. The perspectives, expertise and roles are different; the underlying values, purpose, and goals are the same. The ethical practise of law, built on the foundation of principles and consistent rules, is essential to our system of justice and to the public interest.

Throughout our work, the Task Force has kept in focus the need to maintain the high standards of the legal profession and the integrity of the justice system. We have looked for solutions to the practical problems that are plaguing the current conflicts rules with a view to ensuring that clients may have their choice of counsel and that lawyers may have reasonable mobility in the legal profession.

The dialogue and discussion that we anticipate will follow the publication of this Report can only serve to increase understanding about the current conflicts rules and generate reflection on the opportunities for improvements that we believe our recommendations suggest. It has been our honour to serve the profession and the public in this way.

RECOMMENDATIONS

That the CBA:

19. undertake the work necessary to transform the Task Force recommendations into rules and commentaries in the CBA Code of Professional Conduct; and

Notes

The rules and accompanying commentary regarding screens in lawyers' codes of professional conduct support screen integrity and the protection of confidential information. There would be value in the professional associations representing professional, specialist and administrative staff similarly to recognize the importance of screens, and screen compliance, by their members.

20. communicate recommendation 11 with respect to the transfer of professional, specialist and administrative staff to their appropriate professional associations so they may consider adopting parallel provisions in their codes of conduct.
21. forward the Task Force Report to the Federation of Law Societies of Canada for the Federation's consideration in the development of its Model Code of Conduct, noting the importance of having harmonized conflicts rules in place across Canada.

Notes

Consistent conflict rules across Canada will assist lawyers when they interpret and implement them, and will help clients understand what ethical standards apply to the lawyer-client relationship.

APPENDIX 1

Cases Cited and Bibliography

Legislation

Companies' Creditors Arrangement Act, R.S., 1985, c. C-36.

Legal Aid Manitoba Act, s. 20(2), C.C.S.M. c. L105

Loi sur l'aide juridique, L.R.Q., c. A-14.

Loi sur le Barreau, L.R.Q., c. B-1, a. 15.

Public Servants Disclosure Protection Act, S.C. 2005, c. 46.

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APPENDIX 2

CBA Task Force on Conflicts of Interest Report on Consultations, March 2008

During the Fall 2007, CBA members were asked to provide their input to the CBA Task Force on Conflicts of Interest. They were invited to Branch meetings and special events across the country and to visit the CBA web site to answer the questions found in the Consultation Paper, “Practical difficulties with today’s conflict of interest rules.”

This is a short report on what the Task Force heard during this consultation. The Task Force is working with this feedback to prepare a report to Council for the August Annual Meeting.

Background

First, a review of the Task Force’s composition and mandate.

The CBA established the CBA Task Force on Conflicts of Interest in March 2007 in response to growing evidence that the current conflict rules are having serious and perhaps unintended consequences for clients and their lawyers.

The 15-person Task Force is a cross-section of the CBA’s membership with representatives from small, medium, and large-sized firms, from both rural and urban settings, and from different practice backgrounds, including in-house counsel. A member of the Federation of Law Societies provides a liaison to the regulatory bodies governing the legal profession.

The Task Force’s mandate is:

1. to propose practical guidelines for the profession
 - a. in applying the duty of loyalty, and
 - b. in implementing appropriate modifications or waivers of the duty;
2. to consider the appropriate scope and content of client engagement letters; and
3. to propose practical guidelines for the profession in the application of the duty of confidentiality, particularly in areas of deemed knowledge and relevance of information.

The Task Force began its work looking at the scope of the conflicts problem and considering possible solutions. A Consultation Paper was developed to generate discussion and test a number of preliminary views of the Task Force.

The Consultation Paper provides some information about the law on conflicts in Canada today – post *Neil* and post *Strother* – and presents the Task Force’s preliminary views on a more workable interpretation of the duties of loyalty and confidentiality.

The Consultation Paper asked 15 questions that were designed to improve the Task Force’s understanding of the impact conflict rules are having on legal practitioners today and to gather respondents’ ideas on ways to solve the problems that they are experiencing.¹

The Consultation Paper was published on the CBA’s web site in October 2007, and an electronic note went out to all members to invite them to read the Paper and respond to the questions. The deadline for participating in the consultation was November 29, 2007.

In addition to the almost 300 people who provided detailed answers to the consultation questions, the Task Force received letters from law firms, legal aid organizations, departments of justice, and others, and received input from hundreds of people through the meeting process.

Overview of the feedback

The respondents from the CBA membership were clear that the current rules on conflict of interest are creating unnecessary barriers to access to legal counsel for clients and are difficult for lawyers to interpret and implement. Regardless of the type of practice, the size of firm, or the region of the country where a lawyer works, the answers to the consultation questions were consistent. The vast majority of respondents find the current rules in need of change. They used words such as “impractical”, “troubling”, and “unrealistic” to describe them.

One law firm wrote:

“The current conflict rules are confusing, overly rigid and do not address many issues that arise in everyday practice. We believe that the rules are in need of refinement and clarification.”

Lawyers in small communities and in Canada’s North reported that the current conflict rules make it hard for some citizens to find a lawyer who can represent them. Lawyers who work in a specialty area, such as competition law or aboriginal law, reported a similar challenge for clients, noting that the small pool of lawyers makes it difficult for clients to find a lawyer who is not barred from acting because of the conflict rules.

“The existing conflict rules ... limit client’s choice of counsel and, in some cases, delay the provision of counsel which may be required on an urgent basis.”

A legal aid provider wrote:

“It is imperative that ethical and procedural guidelines are developed to enable the legal profession to provide limited-scope and duty counsel services.”

Without these guidelines, the writer said that access to justice would be at further risk.

Respondents also reported finding the current rules overly complex and difficult to apply.

“Clarification of the rules and an update that reflects current practice realities would relieve a great source of stress for practicing lawyers, and would be a welcome change.”

Not every respondent believed that the conflict rules should be reviewed. A few respondents said that the existing rules were adequate, and trying to change them would be an impossible mission. Some thought the pursuit of different rules might be perceived as self-serving.

“In my view the overriding concern should be to protect clients and the integrity of the legal profession, not to ameliorate inconveniences and to maintain business opportunities for law firms.”

A few others thought that problems are occurring because of an inconsistent application of the rules in different firms and a lack of clarity about what is required.

“I don’t think the rules are necessarily in need of change. The big problem is that no one seems to understand them.”

Respondent interest in the model materials and checklists proposed in the consultation paper was extremely high.

Respondents also supported revising the CBA’s *Guidelines on Conflicts from Transfer Between Law Firms* and were looking for more guidance with respect to a broad range of transfer situations including government to government transfers, secondments, transfers of in-house counsel, *pro bono* work, and members of the judiciary returning to practice.

The responses to the consultation questionnaire and at the consultation meetings all reflected a strong interest among members to see clarification of the conflict rules and some specific nuances to ease problematic situations that arise on a regular basis in all practice situations.

Themes

The consultation asked for specific feedback on the three elements of the Task Force mandate – the duty of loyalty, the duty of confidentiality, and the use of client engagement letters. Some themes emerged with respect to all three issues.

Sophisticated and long-term clients

Many respondents noted a distinction between individual clients who are seeking legal advice and sophisticated clients who work with lawyers frequently, hire lawyers from different law firms for different tasks, or have in-house counsel. They felt that protections needed for individual clients seem less pressing for institutions, governments, and large corporations, but see benefits to adding some precision to the general statements made by the courts in *Neil* and *Strother*. As one respondent wrote:

“Whenever a client is represented by in-house counsel, I believe that the level of protection should be different than someone dealing with unsophisticated individuals.”

Respondents also noted the difference in the type of lawyer / client relationship when counsel is seeing a client for a routine matter such as a will, home closing, or government filing, and when counsel has a long-term relationship with a client on a variety of matters on an on-going basis.

Counsel who become intimate with a client’s business, who know what motivates a client, and who are a party to strategic discussions are seen to have a different type of lawyer / client relationship. Some respondents suggested that it is reasonable for clients to have higher loyalty and confidentiality expectations from these counsel.

In-house counsel respondents had unique concerns, and warned against assuming homogeneity among corporate clients. They generally favoured a practical and flexible conflicts approach which would fit with the reality of their type of legal practice.

Lawyers frequently have to answer the question “who is my client?” Government lawyers identified the particular challenges that this question poses for them in the context of the conflict rules.

Inadvertent lawyer / client relationships

Many lawyers worry that the current conflict rules increase the possibility of being considered a person's lawyer inadvertently, resulting in uninvited obligations. They do not want duties of loyalty or confidentiality to be applied to them without a deliberate action on their part.

“The existence of the lawyer-client relationship should be advertent, deliberate, and mutual.”

And they worry about the tactical use of a phone call or request for proposal process to knock counsel out of a file.

“A five minute phone call on a blind basis should not lead to a motion to remove the solicitor.”

“... the use of beauty pageants as a tactical means to “tie up” counsel is a current reality that must be prevented.”

The current conflict rules are felt to create an environment of uncertainty for lawyers. They are worried about having significant duties extend to difficult to identify or unknown strangers.

Large firms / small firms / solo practices

While some conflicts issues transcend all types of legal practices, respondents noted that the reality of practicing in a very large law firm has some significant differences from a small firm or solo practice and that the impact of the conflict rules are therefore felt differently. For example, with respect to confidentiality rules, a respondent wrote:

“The reality is that the assumption of shared information is difficult to accept in today's world of large firms, where some lawyers have never even met or talked with their so called “colleagues”, never mind actually shared information.”

But that is not to say that small firms and solo practices are immune to the impact of conflict issues. On the contrary, lawyers in smaller practices, particularly in small towns, and rural and remote settings report that they must be constantly vigilant to the possibility of a conflict.

“Small town + few law firms = many conflicts.”

“Our Yellowknife office has to be more aware of possible conflicts, given the size of the community.”

The consultation responses leave no doubt that problems coping with the conflict rules affect all lawyers, no matter their practice setting.

The duty of loyalty

Five consultation questions focused specifically on the duty of loyalty.

The terms of the retainer

The Task Force offered its preliminary view that the duty of loyalty should be determined by the express or implied terms and circumstances of the retainer.

Respondents generally supported this approach, especially when the limitation on the duty of loyalty was expressly stated in a written retainer. A few respondents thought that the waiver of the duty could not be generic but that the client would have to give informed consent knowing the specifics of the circumstance.

« Pour ce faire, les conditions et circonstances du mandat doivent être explicites dans un mandat écrit qui stipule qu'à la fin du mandat, qui lui aussi doit être explicite, que le devoir de loyauté de l'avocat envers son client se termine avec la fin du mandat, sous réserve de la protection des renseignements confidentiels. »

A few respondents did not think clients should be able to sign away their right to loyalty from counsel.

Respondents identified a wide variety of factors that could be relevant in determining the extent of the duty of loyalty, including the sophistication of the client, the client's expectations, the type of work being done for the client, and the nature of the information the lawyer has about the client.

For some respondents, the confidentiality of the information imparted by the client to the lawyer would be a key factor to consider in determining the scope of the duty of loyalty.

Unrelated matters

With confirmation that confidential information would always have to be safeguarded, the Task Force suggested that a lawyer or law firm should be able to work for another client on an unrelated adverse matter without this necessarily being considered a conflict of interest with an existing client. Most respondents supported the Task Force's preliminary view.

For many the test relates to the impact of the work for another client on the first client.

“As long as the client is not prejudiced, there should be no bar against this.”

Some respondents were concerned about the lawyer or law firm’s ability to provide zealous representation to both clients and about the public perception that there might be favouritism for one client over the other.

“I disagree with the preliminary view generally. As it is likely that there would be an economic or public image effect on one or both of the clients, I think that there would be very few circumstances where a law firm could represent zealously each client’s interests without some ill-feeling developing between the people involved on adverse sides and a concern about the loyalty of the firm.”

There was also concern among some respondents that it might be difficult to determine at the start of work that a matter was definitely “unrelated.”

Before taking on representation for another client on an unrelated matter, the specific consent of a client was often thought necessary when the clients had an adversity of interest; when there was a possibility of harm to a client; and when the matter was a direct claim against the client.

Generally, respondents were most comfortable with an adverse retainer situation when it involves a different lawyer, in a different practice area, perhaps even in a different part of the country. It is felt that in those circumstances confidentiality can most easily be assured.

Limit duty to the solicitor / client relationship

The Task Force suggested that the duty of loyalty should be limited to the individual or entity with whom the lawyer or law firm has a direct solicitor / client relationship, as opposed to family members, beneficiaries, shareholders, or affiliated entities.

Many respondents agreed with this view. They often cited large corporations and the reality today that ...

“... some of our clients have hundreds of related entities. We can’t even know what they are. Sometimes they don’t know either (or your contacts at the entity don’t know).”

Other respondents thought that sometimes it would be hard to distinguish between a client and a family member or a related corporate entity.

“I wouldn’t agree entirely. There are circumstances where a family member or affiliated entity is so closely related to the subject matter of the retainer that it should be afforded consideration in respect of conflicts of interest.”

The type of confidential information a lawyer might have about the related entity is again a factor of concern for some respondents.

“It should not apply if the companies are closely held or the operations are tightly linked without express consent. If the solicitor / firm is privy to strategic or financial information about the company which might also be related to the affiliated company, there should be no right to act against the affiliate absent express consent.”

Duty to near-clients

With respect to obligations to near-clients, the Task Force presented its preliminary view that the duties of loyalty and confidentiality should be owed to the actual client and not extended to clients, customers, advisors, or agents of current clients.

There was strong support for this position. Again, some respondents noted that in some situations it is very difficult to know the extent of the larger client or whether a given entity is in the group, and therefore it is too difficult to manage conflicts with respect to them.

Some respondents suggested that it would be advisable to look at the duty of confidentiality and the duty of loyalty separately for near-clients. They recognize that a lawyer may have confidential information about a client’s customers or clients and there is an obligation in this regard.

« En matière de devoir de loyauté, tout à fait d’accord. Toutefois, si l’avocat détient des informations confidentielles sur d’autres personnes que son client par l’entremise de ce dernier, celles-ci devraient également être protégées. »

With respect to the duty of loyalty, however, some respondents believe the duty of loyalty should be confined to clients with whom there is a direct lawyer / client relationship. Others wrote that the duty of loyalty may extend to near-clients when they have relied on the lawyer’s advice or given instructions to the lawyer. There were also concerns that actions against agents or advisors which might be directly adverse to the immediate interests of the client would be problematic.

When possible, some respondents thought that making the terms of the relationship explicit would be beneficial.

“This comes back to the question of ‘who is my client’ and the lawyer has to act in a manner which makes it clear to near-clients and non-clients that the lawyer does not act in their interest.”

Duty to non-clients

The Task Force’s preliminary view that the duty of loyalty should not extend to non-clients clearly resonated with respondents. For the most part, they whole-heartedly agreed. They are concerned about having obligations towards someone who casually asks a question at a social event, who attends a community presentation on a legal topic, or who connects with a lawyer with the intention, not of truly retaining the lawyer, but of keeping the lawyer from representing the opposing party. They suggest that obligations should flow only as a result of a retainer, after a person has clearly become a client.

“While there may be extreme circumstances where the duty of loyalty should extend to non-clients, I cannot think of any, and I think that it would be a dangerous and unmanageable approach to consider otherwise.”

Generally, with respect to the duty of loyalty, respondents most often agreed with limiting the duty when the client has specifically consented and when a new matter is not directly related to the client. They were more cautious about situations in which the lawyer would have had access to a client’s confidential information.

The duty of confidentiality

In *MacDonald Estate v. Martin*, the Supreme Court said that there is a “strong inference that lawyers who work together share confidences.” The case law following this 1990 decision has emphasized the timing of the placement of conflict screens, and the assessment of client perceptions about the possibility of an improper disclosure.

Two consultation questions focused on duty of confidentiality issues.

The presumption regarding confidential information

The Task Force asked for comments on the presumption that confidential information has been shared, suggesting instead that a disqualification should not be based on a presumption and on the timing of screen placement but rather on whether or not confidential information has in fact been misused or disclosed.

Respondents offered strong support for the Task Force approach. Some respondents noted that the current irrebuttable presumption is “absurd”, “unfair” and “lacking in natural justice.”

Some respondents thought that a lawyer’s sworn statement that no disclosure had occurred and that safeguards were in place would be sufficient.

“The lawyer is an officer of the court. A false sworn statement leads to obvious and most unfortunate consequences for the lawyer. I would accept the sworn statement.”

Other respondents favoured a different approach, requiring corroborating evidence that steps, including the use of electronic screens, had been taken to prevent disclosure. A few respondents suggested that safeguards independent from the lawyer him or herself would be beneficial.

“A lawyer’s own statement is not sufficient. This is a classic example where the lawyers’ interests are in conflict. Certainly someone else at the firm responsible for putting the necessary screens in place should be required to confirm this was done.”

While there was support for the Task Force view that the presumption of disclosure should be rebuttable, some respondents identified a few situations in which the presumption could not be rebutted. These included situations in which the lawyers were in close proximity, where there was a possibility of harm, and where confidential information was involved.

The timing of information barriers

Many respondents agreed with the Task Force preliminary view that the timing of the placement of information barriers should not determine the presence of a conflict if it can be proved that no disclosure of confidential information has in fact occurred. For them, the critical factor is whether or not confidential information was disclosed.

“The key question is whether confidential information has in fact been disclosed or not; whether a screen went up at a particular time is not the critical question and should not be determinative of the issue.”

Other respondents, however, felt that timing is critical and a delay gives rise to suspicions.

« Ce serait une invitation à la procrastination et ce ne serait pas dans le meilleur intérêt de la justice. Les murailles doivent être érigées rapidement si l'on reconnaît qu'elles constituent des moyens raisonnables pour protéger la divulgation des renseignements confidentiels. »

All respondent answers reflected the view that maintaining client confidentiality is paramount.

Retainer letters

The Task Force suggested the use of retainer letters (client engagement letters) as a way to confine the scope of the client-lawyer relationship, and asked for feedback on the problems a requirement for retainer letters might pose.

Some respondents welcomed the use of retainer letters.

“Letters would not negatively affect my practice, in fact it would greatly improve work relations and facilitate billing. It would also reduce misunderstandings with clients.”

Several respondents said that they already use retainer letters with clients, and feel their use is beneficial. Other respondents were concerned that retainer letters might be problematic when the work is urgent, and that their use might offend some clients, especially existing clients with whom there is an established working relationship.

“Where there is an ongoing relationship with a client, new matters often arise organically and over time. It may be jarring to the client relationship to have to stop and say “this has developed into a new matter, we need a new retainer letter.””

Some respondents said that retainer letters would not always be practical or appropriate, and that for small or repeat matters they may not be worthwhile.

There were some concerns that drafting a retainer letter would be time-consuming and add to the administrative burden and overall cost of providing legal service.

“Would make it more complicated - would require my client’s time in reviewing and approving.”

Many respondents favoured a voluntary approach to retainer letters, although some respondents would prefer a mandatory approach to “level the playing field.”

“My firm already has a policy requiring the use of an engagement letter for each new matter that is opened (regardless of whether it is for a new or an existing client.) The only problem we experience is resistance from some clients who regard this as something that is for the lawyers’ benefit, not theirs, and who would prefer not to have to bother with it, particularly since other law firms do not require this of them. This problem would be overcome if obtaining engagement letters were made mandatory for all lawyers.”

Overall, respondents recognized a value in retainer letters, and were generally open to seeing an increased emphasis on their use.

Conclusion / Next Steps

This report is only a summary overview of the rich-in-detail responses received during the consultation, either in written answers to the questionnaire or through input given in person at the various consultation meetings that took place.

The Task Force is studying all the comments carefully, and re-assessing the preliminary views presented in the consultation paper in light of the feedback received. It is preparing a Toolkit with sample materials, and a report with recommendations for the consideration of members at the August 2008 CBA Annual Meeting in Québec City.

Questions about the Task Force’s work can be directed to Joan Bercovitch, Senior Director, Legal and Governmental Affairs, joanberc@cba.org, 800-267-8860 or, in the Ottawa area, 613-237-2925.

Practical Difficulties with Today's Conflict of Interest Rules

Consultation Questions

Question 1 – The application of the conflict of interest rules

How often do you encounter a situation involving a conflict of interest?

☐ Never ☐ Rarely ☐ Often ☐ Very frequently

Question 2 – Terms and Circumstances of the Retainer

It is our preliminary view that, as a general rule, the scope of the duty of loyalty should be determined by the terms and circumstances, express or implied, of each retainer.

- (a) What do you think?
- (b) If this approach is adopted, what factors should be relevant?
For example, where the matter is limited in scope?

Question 3 – Duty of Loyalty – Unrelated Matters

It is our preliminary view that, in appropriate circumstances, a lawyer or law firm should be able to act on an unrelated matter which involves another current client, without this necessarily being regarded as a legal conflict of interest or breach of duty. Of course, client confidentiality must always be safeguarded and the lawyer or law firm must remain able to represent zealously the current client's interests.

- (a) What do you think?
- (b) If this approach is adopted, in what circumstances do you think that a client would be harmed or the public interest not served if a lawyer were permitted to act against the current client without express consent?
- (c) If this approach is adopted, in what circumstances might an adverse retainer against a current client be permitted?

Question 4 – Duty of loyalty and the solicitor/client relationship

It is our preliminary view that, as a general rule, the duty of loyalty should be limited to the individual or entity with whom the lawyer or law firm has a direct solicitor/client relationship (as opposed to others such as family members, beneficiaries, shareholders, or affiliated entities).

- (a) What do you think?
- (b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

Question 5 – Limits on extending the duty of loyalty

It is our preliminary view that, as a general rule, duties of loyalty and confidentiality should be owed to the actual client and not extended to clients, customers, advisors, or agents of current clients.

- (a) What do you think?
- (b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

Question 6 – Duty of loyalty to non-clients

It is our preliminary view that, as a general rule, the duty of loyalty should not extend to non-clients.

- (a) What do you think?
- (b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

Question 7 – The presumption regarding confidential information

It is our preliminary view that a law firm should be able to rebut the presumption that lawyers in the firm shared confidential information if the firm is able to prove that there has been no improper disclosure of the information and that, where necessary, sufficient safeguards are in place to prevent disclosure.

- (a) What do you think?
- (b) If this approach is adopted, how would you suggest that the presumption be rebutted? For example, is a lawyer's sworn statement that there has been no disclosure sufficient?
- (c) If this approach is adopted, in what circumstances do you think the nature of the information and the consequences of disclosure of confidential information would be so great that the presumption cannot be rebutted?

Question 8 – The timing of information barriers / ethical screens

It is our preliminary view that the timing of the placement of information barriers / ethical screens should not determine the presence of a conflict if it can be established that no disclosure of confidential information has in fact occurred.

What do you think?

Question 9 – Lawyer transfers

It is our preliminary view that the CBA's *Guidelines on Conflicts from Transfer Between Law Firms* should be revised to include transfers between corporations and other practice settings and secondments.

- (a) Do you agree?
- (b) If yes, what other situations might be included?
- (c) Please describe any problems stemming from the *Guidelines on Conflicts from Transfer Between Law Firms* that you have experienced.

Question 10 – Retainer letters

It is our preliminary view that, as a general rule, lawyers should be strongly encouraged, if not required, to use retainer letters to define the scope of the client-lawyer relationship.

- (a) What problems, if any, would this pose in your practice?
- (b) Should there be exceptions?
- (c) If you practice in a setting where, as a client, you retain law firms, how would retainer letters affect your practice?

Question 11 – Specific practice areas

It is our preliminary view that conflict rules may need to be nuanced to reflect the realities of practice in different circumstances.

- (a) Please describe any particular problems that the conflict of interest rules pose for you or your clients in your community or practice area?
- (b) How could such problems be addressed?

Question 12 – Model materials and checklists

- a) Would any of these model materials and checklists be useful to you in your practice?
 - ☐ Model retainer letters (litigation-related)
 - ☐ Model retainer letters (non-litigation-related)
 - ☐ Model termination of mandate letters
 - ☐ Model non-representation letter
 - ☐ Various models regarding common retainer issues
 - ☐ Request for proposal checklist
 - ☐ Independent legal advice checklist
 - ☐ Checklist for multiple representations
 - ☐ Checklist for client waiver of conflict
 - ☐ Checklist for construction of information barrier/ethical screen
 - ☐ Checklist for interview of transferring lawyer

If yes, which three would be most useful :

- 1.
- 2.
- 3.

b) What other tools would be useful?

Question 13 – Consequences of the current formulation of conflicts rules

(a) Do you believe the current conflict rules are in need of change?

- ☐ Yes
- ☐ No

(b) Please describe any practice-related or other types of problems with the conflicts rules that you or your clients have experienced that you have not already described.

Question 14 – Other comments

Please add any other comments on conflict of interest rules.

Question 15 – Demographics

It would be helpful to have some demographic information about you and your practice.

(a) What is your practice setting?

- ☐ Private practice of law
- ☐ In-house counsel
- ☐ Corporate law department
- ☐ Government ministry, department, or agency
- ☐ Legal aid or clinic setting
- ☐ Law teacher / academic
- ☐ Other (describe)

(b) In what size firm or legal department do you practice?

- ☐ Solo practice
- ☐ 2 to 5 lawyers
- ☐ 6 to 10 lawyers
- ☐ 11 to 20 lawyers
- ☐ 21 to 50 lawyers
- ☐ 51 to 100 lawyers
- ☐ Over 100 lawyers

(c) In what areas of law do you practice (three main areas if there are several)?

(d) Where is your main practice located?

- ☐ remote or rural location, less than 5,000 population
- ☐ village, town, or small city of less than 50,000 population
- ☐ regional centre with population of 50,000 to 500,000
- ☐ major metropolitan centre with population of 500,000+

APPENDIX 3

CBA Task Force Mandate and List of Members

In *R. v. Neil*, the Supreme Court of Canada reaffirmed the duty of loyalty owed by lawyers to current clients. The Court recognized that the duty of loyalty may be modified or waived with the informed consent of clients. However, the Court expressed the duty and its potential modification or waiver in broad and indeterminate terms, creating uncertainty and practical difficulty for lawyers and their clients in applying this duty in particular situations. In its broadest interpretation, the rule expressed in *Neil* is felt to be unworkable for both small and large firms, in small and large centers, and in both general and specialty areas of practice, and does not serve the interests of justice or the public.

There is also concern that the duty of confidentiality as expressed in recent case law has been applied in a manner that is impractical in day-to-day practice, particularly with the increased mobility and concentration of the profession and in the context of the size and concentration of the market for legal services in Canada. Although there is no disagreement with the existence of an unqualified duty of confidentiality of client information, a more practical approach and guidance in situations involving, for example, deemed knowledge and relevance of information, would be of assistance to the profession and the public.

Task Force Mandate:

1. to propose practical guidelines for the profession
 - (i) in applying the duty of loyalty, and
 - (ii) in implementing appropriate modifications or waivers of the duty;
2. to consider the appropriate scope and content of client engagement letters.
3. to propose practical guidelines for the profession in the application of the duty of confidentiality, particularly in the areas of deemed knowledge and relevance of information.

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APPENDIX 4

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Conflicts of Interest Toolkit

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Conflicts of Interest Toolkit

Welcome to the CBA Task Force on Conflicts of Interest Toolkit. These materials provide practical checklists and precedents that are intended to help lawyers to recognize, deal with and avoid conflicting interests. These documents complement and supplement the in-depth legal discussion and analysis that is in the final Report and recommendations of the Task Force.

What are conflicting interests?

A conflict of interest is an interest that gives rise to a substantial risk of material and adverse effect on the representation. A conflicting interest can arise when:

- a lawyer's self-interest conflicts with the performance of a client retainer (a conflict of duty and interest),
- a lawyer's duty to another client conflicts with the performance of a client retainer (a conflict of duty and duty),
- a lawyer's duty to another client impairs the lawyer's relationship with a client and thereby impairs client representation (a conflict of duty with relationship).

What is it about a conflict of interest that is so bad? The answer is quite simple. Conflicts can impair effective representation of a client. It is fundamental to the lawyer-client relationship that a lawyer be free of conflicts other than those willingly accepted by the client. And if a client has reason to question the representation provided by his or her lawyer, the very functioning of our legal system is called into question.

Further, the consequences of a conflict of interest for the lawyer can be severe and costly. They can include:

- disqualification from representation of one or more clients;
- forfeiture of fees charged; and the inability to charge for work in progress and other time invested;
- a damage claim which may include punitive damages;
- embarrassment and cost in time and money of defending a malpractice claim or investigation.

The courts may disqualify a lawyer to protect a client's confidential information, which must be preserved whether or not there is a conflict of interest.

Checking for, identifying and avoiding conflicts of interest and ensuring that a client's confidential information is protected need to be a part of every lawyer's practice. In fact, every time you have a new client or a new matter for an existing client, and throughout the course of any active matter, you should be on the lookout for the existence of a real or potential conflict of interest and alert to the possibility that confidential client information you have about one client may bar you from acting for another.

The file management systems used by law firms usually catch conflicts, and most lawyers instinctively recognize a conflicts issue when it actually arises. Unfortunately, lawyers, in a rush to please a client, could get into trouble if they miss the early warning signals of a conflict.

The requirements for successfully managing conflicts of interest are quite basic: be aware of your obligations; exercise good judgment; and effectively communicate and document the decisions you make and actions you take when dealing with conflicts of interest. The guidelines, checklists and precedents in this Toolkit are designed to assist you in achieving this objective.

Acknowledgement of Sources

Like most other lawyers working on drafting endeavours, the members of the CBA Task Force on Conflicts of Interest have drawn on the work others have done before us. We felt it better to rely on experience and tested approaches, knowing that our work will in turn be adapted and used by others who will follow us. We express our gratitude to everyone who directly and indirectly contributed to this resource. In terms of information and precedents for professional conduct matters, and in particular for dealing with conflict of interest issues, there was a wealth of material from the work of some people we would like to specifically acknowledge, including:

- The comments and precedents that came from various CBA member lawyers and law firms;
- Resources on the Law Society of British Columbia's website (www.lsbcc.org);
- Resources on the LAWPRO (www.lawpro.ca) and practicePRO (www.practicepro.ca) websites, including the Managing Conflict of Interest Situations booklet by Karen Bell;
- Practice Management Advisors from various state and provincial bar associations; and
- an informal work group of Toronto law firm risk management counsel.

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- Professor Gary A. Munneke, Pace University Law School.

We would also like to recognize and thank Blakes (Toronto and Montreal offices) who were instrumental in the standardization and translation of this Toolkit.

Disclaimer

The information, checklists, and model agreements and letters provided in this resource are for your consideration and use when you draft your own documents. They are NOT meant to be used “as is.” Their suitability will depend upon a number of factors, such as the current state of the law and practice in each area of law, your writing style, your needs and the needs and preferences of your clients. The model documents may require modifications to correspond to current law and practice. The information and documents provided in this Toolkit are not intended to report, establish or create the standard of care for lawyers.

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How to analyze a potential conflict of interest

This diagram sets out the thought process required when opening a new matter. It is a graphical depiction of the four steps needed to consider conflicts and confidential information in a disciplined way, consistent with the recommendations of the Task Force. It is not a flow chart or decision tree that explicitly describes every step of this process.

STEP 1 Information collection

The first step is to obtain the information you will need for the analysis. This is split into two rows. In the first row, you must identify the client, determine what the lawyer is retained to do and determine who may be affected by the work to be undertaken. All this information is needed to undertake the analysis (and to draft a proper engagement letter). Working through the steps in the second row, the lawyer must identify all three of the following: current matters for adverse parties; all current matters where the new client's interests may be adverse; and all related matters for former clients whose interests may be adverse in the new matter.

STEP 2 Assess the issues raised by the information gathered

The three ovals at the start of Step 2 emphasize a key point: conflicts issues must be assessed from three perspectives: the perspective of the new client, the perspective of adverse parties who are or were clients and the perspective of the lawyer and law firm.

Note that a different analysis is required for current matters/clients (all boxes) and former matters/clients (the dark coloured boxes).

In each case where the lawyer/law firm has matters for adverse parties in the new matter and in each case where the lawyer/law firm has matters adverse to the new client, the lawyer must assess (follow all boxes):

- a) whether any of the three conflicting interests are present (performance conflicts, relationship issues, and personal interests), and
- b) whether there is a risk of misuse of confidential information.

In each case where the lawyer/law firm has former matters for adverse parties in the new matter, the lawyer must assess (follow dark coloured boxes):

- a) whether the new matter would require the lawyer to undermine the work done in the former matter, and
- b) whether there is a risk of misuse of confidential information from the former matter.

STEP 3 Possible outcomes

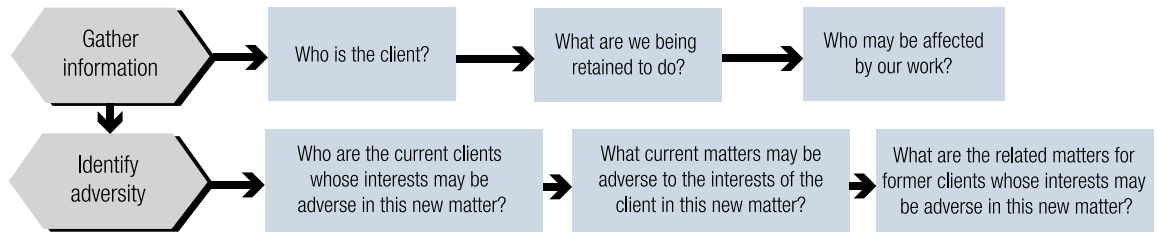
There are four potential outcomes depending on the results of your analysis. Some require further steps (erecting confidentiality screens or obtaining client consent).

STEP 4 Be prepared to reconsider

Remember that facts and circumstances may change as a matter progresses, and that you must always be ready to re-do this analysis.

HOW TO ANALYZE A POTENTIAL CONFLICT OF INTEREST

STEP 1 Facts you will need



STEP 2 Perspectives to be considered in answering the following questions

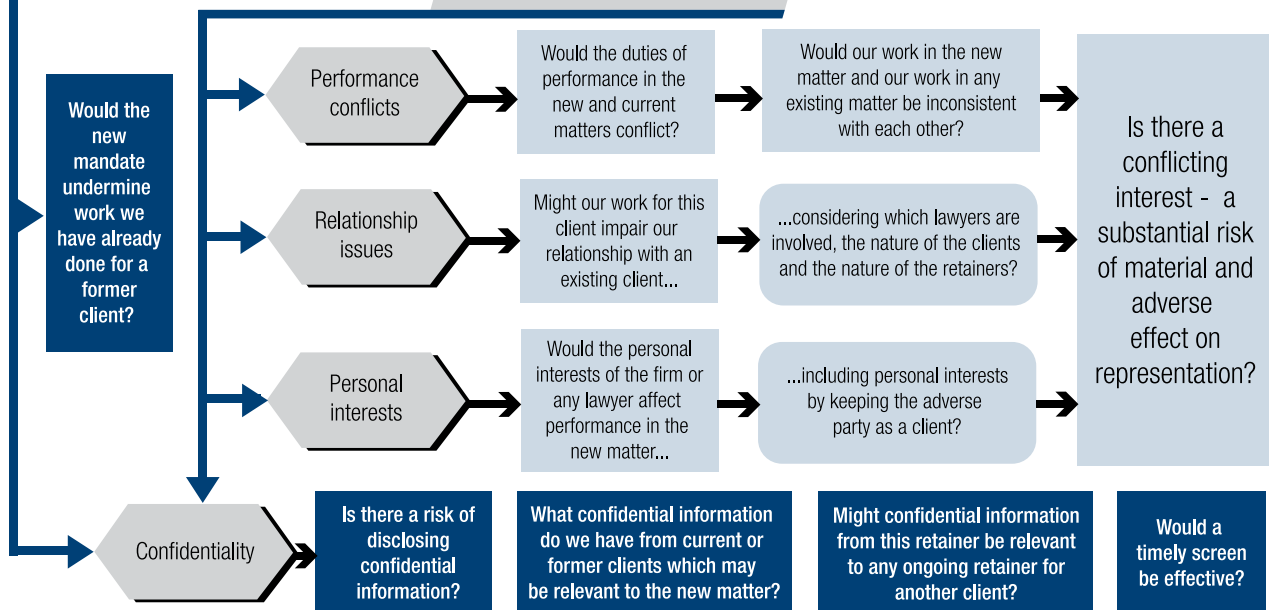
Consider issues from new client's perspective

Consider issues from other client's perspective

Consider issues from both lawyer's and firm's perspective

For former matters / clients follow steps in dark coloured boxes

For current matters / clients follow all steps



STEP 3 Possible outcomes depending on the results of your analysis

Note - engagement letters are highly recommended

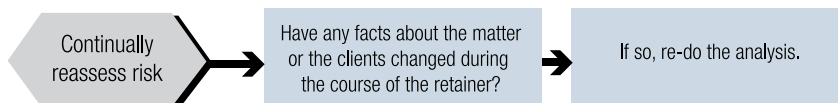
Go ahead - no problem

Go ahead, with timely screen, if appropriate

Go ahead, with informed client consent

Stop - do not act

STEP 4 Reconsideration



Conflicts of Interest Systems Checklist

This checklist is designed to help you evaluate your firm's procedures for detecting real and potential conflicts of interest and to raise questions that could help you to avoid conflicts problems.

| | Yes | No |
|---|--------------------------|--------------------------|
| 1. Do you have a system for discovering real or potential conflicts of interest? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Do you have routine procedures to obtain basic conflict of interest information before opening a file? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Do you check for any potential conflicts prior to receiving confidential information from a potential client? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Do you circulate information on the identity of new and prospective clients throughout the firm promptly? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Do you have a central file index, either in a file book, card system or computerized list of all files? | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Does your central file index include the following information? | <input type="checkbox"/> | <input type="checkbox"/> |
| 1. client name, including known aliases | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. affiliates or partners of client | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. "also known as" name(s) | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. directors, officers or shareholders of client | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. adverse parties | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. co-plaintiffs, co-defendants, third party defendants | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. known relatives of client and other parties | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. common law spouses of client | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. lawyers for any names in the index | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. If a potential conflict is detected, does your firm have one or more lawyers assigned the responsibility of determining whether a conflict does exist? | <input type="checkbox"/> | <input type="checkbox"/> |

- | | | |
|--|--------------------------|--------------------------|
| 8. If a potential conflict is found, do you either decline to take the case or notify the client of the potential conflict in writing? | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Are your conflicts procedures expressed in writing so that all your staff are aware of them? | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. Does your firm have one person responsible for maintaining the central file index? | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. Are the lawyers and staff in your office aware of rules of professional conduct pertaining to conflicts of interest? | <input type="checkbox"/> | <input type="checkbox"/> |
| 12. Are you and the members of your firm aware of the legal principles established in the <i>MacDonald Estate v. Martin, R. v. Neil</i> , and <i>Strother v. 3464920 Canada Inc.</i> ? | <input type="checkbox"/> | <input type="checkbox"/> |
| 13. If you share office space with a lawyer who is not a member of your firm, do you have a policy on acting for clients who have adverse interests? | <input type="checkbox"/> | <input type="checkbox"/> |
| 14. Do you have standard letters for dealing with disclosure of conflicts and conflict waivers? | <input type="checkbox"/> | <input type="checkbox"/> |
| 15. If you are asked to represent clients jointly, do you ask them to sign a consent letter? | <input type="checkbox"/> | <input type="checkbox"/> |
| 16. Do you review potential conflicts of interest when dealing with the lateral hire of a lawyer? | <input type="checkbox"/> | <input type="checkbox"/> |
| 17. Do you act for two or more clients in the same matter without their written informed consent? | <input type="checkbox"/> | <input type="checkbox"/> |
| 18. Do you act for a client in a matter in which you, your relative, friend, or partner has a financial interest which would reasonably be expected to affect your professional judgement? | <input type="checkbox"/> | <input type="checkbox"/> |
| 19. Do you represent opposing parties in "friendly" litigation or transactions where there seem to be no opposing interests? | <input type="checkbox"/> | <input type="checkbox"/> |

Your answers to questions 1-16 should be YES.

Your answers to questions 17-19 should be NO.

Failure to give the preferred answer does not necessarily mean you have a problem, but it does suggest you should evaluate your practice and procedures.

Source of document: [Law Society of British Columbia website](#)
(with updates by CBA Task Force on Conflicts of Interest).

Checklist for Avoiding Phantom Clients

Entering into a lawyer-client relationship imposes considerable obligations on you as a lawyer, and when it comes to conflicts of interest, those obligations can have repercussions for every other lawyer and client of your firm. For that reason, you should enter into a lawyer-client relationship only with full knowledge of the implications that the relationship may have.

In particular, you want to avoid the “phantom” or “ghost” client – the client you don’t even know you have.

Special care should be taken with e-mail and voicemail communications, both of which tend to be informal, and with websites, which reach a very wide audience.

Take the following steps to avoid having an unknown “phantom” or “ghost” client:

1. Don’t give legal advice over the phone or during casual social contacts to people whom you don’t intend to take on as clients. Invite prospective clients to come to your office and complete a client intake form and a full conflicts search.
2. In cases where you think doubt may exist, or it is otherwise important to disavow a lawyer-client relationship, have people whom you choose not to represent sign a non-engagement statement, or send them a non-engagement letter. Write to clients who come to you for summary advice to confirm the limits and qualifications of that advice.
3. When a current client asks about a new matter; clarify whether the client wants you to act or represent them on that new matter and, if so, complete a full conflicts check and open a new file.
4. Treat work you do for friends or family with the same formality as other work (including doing a full conflicts check and opening a file), even if you intend to charge them reduced fees, or no fees at all.
5. Be very clear in your file opening documentation and in correspondence with the client(s) whether you represent a legal entity, such as a corporation, a partnership or unincorporated association, as opposed to other affiliated or related persons, such as officers, shareholders or members. The same issue can arise in estate law and family law and in cases involving the elderly or minors. Send them letters confirming their status as clients (an engagement letter) or an “I am not your lawyer letter” to non-clients.

6. Avoid undermining the statement that you don't represent the person with phrases like 'but if you have questions, get back to me.'
7. Record the names of everyone (individuals and entities) you see, whether you accept them as a client or not, and include rejected clients' names in your conflicts-checking system. This ensures that all names necessary for checking for conflicts of interest are entered into the firm's list of past, current and rejected clients.
8. On your firm's general voicemail greeting, and if appropriate, on individual lawyers' voicemail greetings, include a warning for callers not to leave confidential information.
9. On your firm's website, include terms of use and disclaimer statements that warn site visitors that unsolicited information or materials sent to the firm or left on voicemail will not be guaranteed confidentiality, and that access to or use of the site or firm voicemail does not create a lawyer-client relationship.

Model Law Firm Website Terms of Use and Disclaimer

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The contents of the website do not necessarily represent the opinions of [*lawfirm ABC*] or its clients. If you require legal advice, you should retain competent legal counsel to advise you. If you would like to retain [*lawfirm ABC*], please contact one of our lawyers, who will be pleased to discuss whether our firm can assist you. A solicitor-client relationship will arise between you and our firm only if we specifically agree to act for you. Until we specifically agree to act for you on a matter, you should not provide us with any confidential information or material.

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Privacy

The model privacy policy is on the next page.

Feedback

We welcome your feedback, if you have questions or comments about the [*lawfirm ABC*] website, the legal notice or the firm's privacy policy please contact our marketing department at [*marketing@lawfirmabc.com*].

Model Privacy Policy

[*Firm name*] is a firm that specializes in intellectual property law with offices in [*locations*]. The lawyers, patent and trade mark agents and staff at [*firm name*] (sometimes referred to as “we”) are committed to protecting your privacy. This Privacy Policy outlines how we handle your personal information to protect your privacy.

Privacy Legislation

Since January 1, 2004, all Canadian organizations engaged in commercial activities have been required to comply with the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) and the Canadian Standards Association Model Code for the Protection of Personal Information incorporated by reference into PIPEDA. These obligations extend to lawyers and law firms, including [*firm name*].

In addition, an *Act respecting the Protection of Personal Information in the Private Sector* has been in force in Quebec since 1994 and sets out rules regarding the collection, use and disclosure of personal information within that province.

Lastly, as a professional services firm, we have professional and ethical obligations to keep confidential the information we receive in the context of a lawyer-client and agent-client relationship.

Personal Information

Personal information is defined in PIPEDA as information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization. In other words, it does not include the information that one expects to find on a business card.

Consent to Our Collection of Personal Information

In most cases, we obtain your consent to collect, use and disclose your personal information. Usually, if you retain our firm, we assume that we have your implied consent to our collection and use of your personal information, however, at times we may ask for your express consent, either verbally or in writing. Generally, we collect your personal information directly from you at the start of or during the course of your retainer with our firm. Sometimes we may obtain information about you from other sources such as a government registry or other professionals who serve you.

Use of Personal Information at *[firm name]*

We use your personal information to provide legal advice and services to you, to issue invoices and to maintain our database of clients. In addition, if you apply for a position with *[firm name]*, we will use your personal information to assess your candidacy. Lastly, we may use your contact information (name, e-mail and postal address) so that we may communicate with you about recent developments in the law, keep you abreast of *[firm name]* news and invite you to our firm events.

Withdrawal of Consent

You may withdraw your consent to our collection, use and disclosure of your personal information at any time, subject to legal and/or contractual restrictions and upon reasonable notice. Your withdrawal of consent to our collection, use and disclosure of your personal information may impact our ability to represent you and provide you with legal advice.

You can ask us not to send you marketing communications by following the opt-out instructions in each communication or you may let us know by contacting our marketing department at *[unsubscribe@firmname.com]*

Disclosure of Personal Information

Generally, we do not disclose your personal information to third parties without your consent unless permitted or required by applicable laws or court orders. The following are some examples where we may disclose your personal information: such disclosure is necessary to collect fees or disbursements; we contract with a third party to provide us with certain services such as archival file storage or insurance. (In such cases, we will use contractual or other means to ensure the third party service provider is bound by obligations regarding privacy which are consistent with this policy); or we engage expert witnesses or other law firms on your behalf.

Accuracy of Your Information

It is important that the information that we have on file be accurate and up-to-date. If, during the course of the retainer, any of your information changes, please inform us so that we can make any necessary changes. We may also ask you from time to time whether your personal information is up-to-date.

Safeguards

[*Firm name*] uses various safeguards to ensure that your personal information is protected against loss, theft, misuse, unauthorized access, disclosure, copying or alteration. These include: security of our physical premises; our professional obligations; security software and firewalls to prevent unauthorized computer access or “hacking”; and internal passwords that restrict access to our electronic files.

Access to your Personal Information

You have a right to challenge the accuracy and completeness of your personal information and to have it amended, as appropriate. You also have a right to request access to your personal information and receive an accounting of how that information has been used and disclosed, subject to certain exceptions prescribed by law. For example, if the requested information would reveal personal information about another individual, your request for access may be limited or denied. If your request for access is denied, [*firm name*] will notify you in writing of the reason for the denial.

To request access or to amend your personal information, please contact the lawyer or agent with whom you normally correspond or write to our Privacy Contact at the address below. [*Firm name*] will respond within thirty (30) days of receipt of your written request.

Challenging Compliance

[*Firm name*] will respond to inquiries about its policies and practices relating to its handling of your personal information. Inquiries should be directed to [*firm name*’s] Privacy Contact using the contact information below. [*Firm name*] will investigate all complaints and will respond within 30 days of receipt of a written inquiry. If the complaint is found to be justified, [*firm name*] will take appropriate measures to resolve it, including, if necessary, amending this Policy and its procedures.

Website Privacy

Like most other commercial websites, we may monitor traffic patterns, site usage and related site information to optimize your visit to our website.

We do not use cookies or any electronic means to collect personal information from you or your computer; however, our website server will automatically collect IP addresses. We may view the IP log from time to time, for example, to maintain the security of our website. We do not link the IP addresses to other personally identifiable information.

Privacy Contacts

If you have any questions or complaints about this Policy or the handling of your personal information, if you wish to withdraw your consent to our use of your personal information, or to request access to or update any information we have on file, please contact the lawyer or agent with whom you are dealing, or contact:

[*contact person*]

[*law firm*]

[*address*]

If any complaint or inquiry is not handled to your complete satisfaction, you may contact:

Privacy Commissioner of Canada
112 Kent Street
Ottawa, Ontario
K1A 1H3

Telephone: 613.995.8210
Toll free: 1.800.282.1376.

Commission d'accès à l'information du Québec
480 St. Laurent
Suite 501
Montreal, Quebec
H2Y 3Y7

Telephone: 514.873.4196
Toll Free: 1.888.528.7741

Changes to this Privacy Policy

We may change this Privacy Policy from time to time. Any changes will be posted on our website at [*www.lawfirm.com*] and will be made available upon request through your contact at [*firm name*]. Please check from time to time to ensure you are aware of our current policy. This Privacy Policy is effective [*date*].

Avoiding Tactical Conflicts

On occasion a party will intentionally contact or attempt to meet with one or more lawyers for the sole purpose of creating a conflict that will prevent the lawyer(s) from acting for another party on a pending matter. Despite the bad intentions of the individual making these contacts, the lawyer(s) contacted may not be able to act for the other party, especially if confidential information was disclosed.

This behaviour occurs quite frequently in the family law area, and in specialized areas of the law where there are a limited number of experts. In smaller communities this can be very frustrating as such behaviour can make it difficult or even impossible for someone to retain a local lawyer. And when a client is looking for lawyers with specialized expertise, choices may be limited. In both cases it means that a lawyer or firm must turn away a matter that they could otherwise have handled.

To prevent these tactical conflicts from occurring, law firms should have clear and established procedures to screen all incoming calls and enquiries for potential conflicts. Staff and lawyers should be on the lookout for these types of calls, especially on family law matters. They should be trained to collect enough information to evaluate potential conflicts, while at the same time being sensitive not to ask for or collect confidential information. An intake conflicts screening form can help ensure that the appropriate information is collected to identify possible conflicts. .

When it appears that a caller may be trying to create a tactical conflict, this should be carefully confirmed and if so, a non-engagement letter should be sent to the caller.

On your firm's general voicemail greeting, and if appropriate, on individual lawyers' voicemail greetings, consider including a warning for callers not to leave confidential information. And on your firm's website, include statements that warn site visitors that unsolicited information or materials sent to the firm or left on voicemail will not be guaranteed confidentiality, and that access to or use of the site or firm voicemail does not create a solicitor-client relationship.

First Contact Conflicts Screening Form

This form is intended to ensure that any lawyer or staff person having an initial conversation or communication with a potential client collects all information necessary for a conflicts of interest search while at the same time avoiding any disclosure to the firm of any confidential information that would trigger conflicts of interest issues with current or future clients.

Please use this form to screen incoming calls for potential conflicts of interest. In particular this form is intended to help prevent clients from intentionally creating a conflict of interest that would disqualify one of the lawyers at the firm from action on a matter.

Instructions to user:

- Please use this form for the purpose of collecting information from a potential client for the purposes of conducting a conflicts of interest search prior to conferring or meeting with the client.
- **PLEASE DO NOT COLLECT ANY CONFIDENTIAL INFORMATION WHEN COMPLETING THIS FORM.**
- Please use the attached list of potentially relevant people or entities to make sure you collect all relevant information so that the firm can complete a proper search for a conflicts of interest search

Date: _____

Person taking call: _____

Responsible lawyer if matter is opened: _____

Person making contact: _____

Contact information

Phone number: _____

E-mail: _____

Address: _____

(Continued)

Potential Client(s) (people and entities)

☐ New client ☐ New matter for existing client

Brief description of matter

All other people or entities involved in the matter and their roll/status*

Conflicts search information:

Done by:

Steps taken:

Date completed:

Search results: ☐ No conflicts ☐ Confirmed conflicts ☐ Possible conflicts

Details on confirmed/possible conflicts:

Refer to conflicts person/committee: ☐ Yes ☐ No

Retainer declined: ☐ Yes ☐ No

***Potentially relevant people or entities for a conflicts of interest search by matter type:**

Litigation: insured, plaintiffs, defendants, guardian ad litem, spouse, expert witness(es), lay witness(es), opposing counsel

Corporate/Business/Real Estate: owner/spouse, partner(s), shareholder(s), director(s), officer(s), subsidiaries/affiliates, key employees, buyer(s), seller(s), property address, any opposing party in transaction, property PIN number.

Estate Planning: executor, spouse or partner/children/heirs/devisees, personal representative, testator

Probate: deceased, personal representative, spouse or partner/children/heirs/devisees, trustees/guardian/conservator

Family law: client, spouse, prior married names, maiden name, children, grandparents

Criminal: client, witness(es), victim(s), co-defendant(s)

Worker's Compensation: injured worker, employer, insurer

Bankruptcy: client, spouse or partner, creditor(s)

Beware the Dangers of Acting for Family and Friends

At one time or another, every practising lawyer has been approached by a friend or family member for legal advice. For most, the natural inclination is to help. However, acting for friends and family is risky business: You should think twice before doing so.

Due to the closeness of the relationship, the help offered by lawyers acting for family or friends tends to be informal, or is at a level that is less formal than it would be for a regular client. This lack of formality can result in the cutting of corners, or a failure to obtain consents or written instructions. Misunderstandings as to the scope and nature of the services to be provided are more likely due to the informal handling of the matter. Lastly, standard procedures may not be followed, including completing a conflicts check, opening a file, signing a retainer agreement, sending correspondence, etc. All these standard procedures are supposed to be followed for good reason, and should occur on every matter that you handle, regardless of your relationship to a client.

For several reasons family and friends can be the most difficult and awkward of clients:

- They can be extremely demanding clients. They can (and will) ask you questions 24 hours a day.
- It is more difficult to give them honest, objective, independent and professional advice. No matter how hard you and they try, your personal relationship will cloud your judgment and their ability to listen to the advice that you are giving.
- They can be the most unreasonable of clients. An inability to properly listen to and accept the advice you are giving makes for unreasonable expectations.
- Family members and fees don't mix. The discussion of fees is more difficult with family members, and often you will find yourself doing the work on a *pro bono* basis, or at a reduced hourly rate.
- If the matter doesn't go as expected, the consequences for the relationship can be disastrous. A malpractice claim is often the result, notwithstanding the family or personal relationship. The inevitable hurt feelings may affect your relationship with that person, and with other family members.
- Similarly, changes in family relationships or circumstances – such as separation or divorce – can also colour how family members view your earlier legal advice or services.

Be aware that *dabbling* (working outside your usual area of expertise) is also dangerous. Lawyers are more inclined to dabble when they are trying to help a family member or friend. In all cases you should avoid acting on a matter that is outside your area or areas of expertise, and this is especially true in the case of matters for family or friends. Don't be a dabbler!

What do you do when a family member or friend approaches you for help on a legal matter? Politely and firmly explain to them that it would be better to have someone else in the firm or an even an outside lawyer handle the matter for them. Explain that by doing this they can better ensure that the lawyer acting on their behalf has the right expertise and is able to offer independent and objective advice. Using outside counsel ensures that errors do not affect personal relationships, things are more likely to be documented, family members are more likely to be more realistic in their expectations, and the acting lawyer can more easily give the client the advice they would prefer not to hear (e.g. "you don't have a case").

Guidelines for Non-Engagement Letters

Whenever you decline to represent someone, you should send a non-engagement or non-representation letter. The point of sending such letter is four-fold:

- To document that you are not representing a particular person;
- To advise the party to seek other representation; and
- To confirm that you have not received any confidential information regarding his or her interests in the matter. (If this is true).
- To confirm the client's circumstances as explained to you, and the advice that you gave to the client, in the case of a consultation.

Without such a letter, the person can later allege that he or she relied on you for legal representation even though you provided none, or that you received confidential information which could prevent you from acting against the interests of that person in the future.

Routinely using non-engagement letters for all matters the firm cannot or does not wish to accept will help to avoid these problems. Your non-engagement letters should be clearly worded and address the following issues:

- Confirm that the representation is declined and that there is no lawyer-client relationship.
- Include the date of the interview and, if possible or appropriate, why the firm cannot or will not represent the individual, although you need not give reasons.
- Return any documentation or other property obtained during the consultation.
- Advise the person to seek other legal counsel as soon as possible to pursue his/her rights.
- Refer to the fact that statutes of limitations may apply to bar recovery if steps are not taken promptly to pursue rights or remedies. If a specific statute of limitations poses as an immediate problem, specific reference should be made to a need for the person to take urgent action.
- Take care not to express an opinion on the merits of a claim or other legal position, unless, after completing an initial consultation, you have a full and clear understanding of the client's circumstances and gave the client advice specific to those circumstances.
- Where possible, ask the client to countersign and return the non-engagement letter.

Maintain a file for the non-engagement letters you send out so that you have a clear record of what was done in the event questions arise in the future. Put the names of clients or matters that did not engage the firm in your conflicts system so that appropriate flags are raised in the event of a future conflicts search.

Model Non-Engagement Letter

This is a general non-engagement letter that confirms to a potential client, after a consultation or phone conversation, that the firm is unable to act on the matter. Reasons for declining the retainer may or may not be stated. It contains a warning about limitation periods. Although perhaps impractical for some types of matters, if you have done the consultation without receiving confidential information confirm this in the letter so that you are protected from future allegations of a conflict of interest.

[Firm letterhead]

[Delivery method]

[Date]

[Potential client address]

Re: Potential Engagement Regarding [Describe potential mandate]

Dear [Potential client name]:

Thank you for your visit [call] today regarding [describe matter]. I appreciate the confidence you have expressed in our firm, but for various reasons the firm has decided it cannot represent you in this matter.

In declining to undertake this matter, the firm is not expressing an opinion on the likely outcome of the matter. Please note that since we are not expressing an opinion in this instance, no charge is being made.

[Where potential client is a claimant: There are statutes of limitations or deadlines that may apply to prevent you from pursuing your claim if you do not take action on a timely basis to protect your rights or remedies.] **[Where a specific statute of limitations poses as an immediate problem:** Please note that there is a statute of limitation that applies with respect to you pursuing your claim. You must commence a court action by [date]. If you fail to do so, you will not be able to pursue a claim for damages against [name of defendant]. For this reason, we recommend that you immediately contact another lawyer/law firm for assistance regarding your matter].

[Where you completed an initial consultation: From my consultation with you, I understand [set out details of client's circumstances as explained to you]. In your circumstances, I would advise you to [set out the advice you gave the client]. I do not charge fees for initial consultations].

(Continued)

[If there is a local lawyer referral service: If you do not have another lawyer in mind to represent you, we suggest contacting the *[name of local lawyer referral service]* which maintains a list of lawyers who may be available to represent your interests in this matter. They can be reached at *[insert telephone number]*.

[Where communications with the potential client involved document or property exchange: We are returning with this letter documents we reviewed regarding this matter and confirm that we are not in possession of any further documents or property received from you.]

[If you did not receive any confidential information when meeting with the client: Finally, we confirm *[if you, ideally, agreed when the appointment was set-up, as was agreed when we initially set-up our appointment,]* that you did not reveal any confidential information to us at the meeting today, and as such, there can be no objection on a conflict of interest basis to our firm acting in this or related matters for any other current or future client.]

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

We appreciate your having approached us regarding this matter. If you ever have need of legal assistance in the field of *[practice concentration]*, we hope that you will think of us again in that context. **[If appropriate, add:** We enclose a copy of our brochure describing our practice in *[practice area]*.]

Sincerely,

[Signature]

I, _____ hereby acknowledge receipt of the above letter and my agreement with all that is stated in it.

[Signature]

[Date]

Source of document: Law Society of British Columbia website
(with updates by CBA Task Force on Conflicts of Interest).

Model Termination of Mandate Letter

The purpose of this letter is to make clear that the engagement has ended and to avoid the inference that the firm has a continuing obligation to the former client. The purpose is also to make clear that the former client is not a current client for conflict of interest purposes. In plain language it states to the client: the matter is over, you have paid our fees, and you are no longer a client of the firm. That means we have no further duty to look after your interests. That also means we are free to sue you when we act for other clients on matters that are not related to the completed matter.

[Firm letterhead]

[Delivery method]

[Date]

[Client address]

Re: Final reporting letter and termination of retainer

Dear [client]:

We are writing to provide you with our final report and account on your matter.
We confirm that [set out details of work that was done].

As there is nothing left to be done on your matter, we enclose our final account and confirm that our representation of you has ended. We appreciate your having retained us regarding this matter.

[Ideally you have had the language in the following paragraph in your retainer agreement, and reviewed it with the client at the time of retainer]

Please note, as you are no longer our client, under applicable professional rules we may represent another client in any matter that is directly adverse to your immediate interests provided that (i) the other matter is not the same as or related to the matter in which we previously represented you and (ii) we protect your relevant confidential information. [You acknowledge that the timely establishment of a confidentiality screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

(Continued)

[Note that how you protect confidential information will depend on the circumstances of each matter. If you would like your client to consent to the firm's future use of confidentiality screens to protect confidential information, include the last sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the last sentence.]

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

If you ever have need of legal assistance in the field of *[practice concentration]*, we hope that you will think of us again in that context. *[If appropriate, add: We enclose a copy of our brochure describing our practice in [practice area].]*

Sincerely,

[Signature]

I, _____ hereby acknowledge receipt of the above letter and my agreement with all that is stated in it.

[Signature]

[Date]

Model Engagement Letter - Long

[Firm letterhead]

[Delivery method]

Privileged & Confidential

[Client address]

Re: Retainer With Respect to [Describe mandate]

Dear [client]:

We write to confirm that you wish to retain [firm name]. We are pleased to represent you on the basis set out below:

1. Description of Mandate

- (a) You have retained us to provide you with legal services in connection with [•].

[Provide as much detail as possible about the specific work contemplated by the matter. Identify clearly any restrictions or limitations on the retainer. If the retainer is limited to certain areas of practice, identify such limitations in order to ensure that there will be no subsequent misunderstanding as to the extent of your responsibilities. For example, specify whether or not tax advice is included as part of the retainer. Describe the retainer in such a way that the scope of work does not carry on indefinitely but will come to a definite and identifiable end.]

- (b) We will provide you with legal services which in our professional judgment are reasonably necessary and appropriate to carry out this mandate.
- (c) We confirm that (i) we are not providing legal advice or services except as described above, and (ii) once our work on this matter has been completed (see Section 9 below), we will not advise you as to subsequent legal developments relating to this matter.

(Continued)

2. Description of Client

We will be representing [*name(s) of person(s) or entity(ies)*] (“you”) in this matter. **[If another entity will be paying the fees, add: *even though in certain instances the payment of our fees may be the responsibility of [•] [specify arrangements].*** Our representation of you does not include the representation of related persons or entities, such as the individuals or entities that are shareholders, directors or officers of a corporation, its parent, subsidiaries or affiliates; partners of a partnership or joint venture; or members of a trade association or other organization. In acting for you, we are not acting for or taking on any responsibilities, obligations or duties to any such related persons or entities and no lawyer-client or other fiduciary relationship exists between us and any such related persons or entities.

[Consider tailoring this paragraph to the circumstances of your client(s). Where you are acting for more than one client, you must include provisions on the joint representation – See Section 7 below.]

3. Instructions

We will accept instructions from anyone in your organization who has apparent authority in connection with this matter, unless you instruct us otherwise.

[or]

We will accept instructions for this engagement from [*name of person*] or such other person as [*name of person*] advises us is authorized to instruct us.

[Consider whether the person designated to provide instructions has or might have a conflict given the subject matter of the engagement.]

4. Undertaking to Preserve Confidentiality

- (a) We undertake not to disclose or misuse your confidential information, subject only to applicable law and our professional and ethical obligations.
- (b) Because we owe this duty to all of our clients, we will not disclose to you information we hold in confidence for others (even where such confidential information would be relevant to our representation of you) or disclose to others information we hold in confidence for you (even where such confidential information may be relevant to our representation of those others).

[Consider whether to expand this sentence in circumstances where it is anticipated that the firm may have information from another client that is material to this client. This could require, for example, the establishment of a confidentiality screen.]

5. Identification of Potential Conflicts

- (a) We undertake not to take on any matter that would create a substantial risk that our representation of you on this matter would be materially and adversely affected (a “conflicting interest”).
- (b) We have conducted a review of our records and we confirm that we have not identified a conflicting interest in representing you in this matter. We searched your name as well as the following names that you have provided to us as being relevant:

[List all names searched.]

[If the conflict search reveals a conflicting interest, the firm requires the informed consent of both clients to the firm acting. This paragraph should be amended to reflect the conflicting interest. In addition, this may be an appropriate place to describe the conflicting interest and confirm the consent of this client.]

- (c) Please let us know immediately if there are any other names that we should search in connection with this matter or if there are any changes or additions to these names in the future. We are relying on you to let us know of any other parties who become involved in this matter, including any parties whose interests may be adverse to yours.
- (d) Please note that we do not normally consider ourselves to have a conflicting interest because we represent another client who is a business competitor, customer or supplier of yours; or is asserting through us legal positions or arguments that may be inconsistent with those you are asserting or may wish to assert; or is adverse in interest in another matter to an entity with which you have a relationship through ownership, contract or otherwise. Unless you have asked us to perform a search against particular entities described in one of the above categories, our conflict search will not identify any issues arising from our representation of them.

6. Representation of Other Clients

We wish to avoid any circumstances in which you would regard our representation of another client to be inconsistent with our duties to and understandings with you.

[Option 1: normally for long-standing clients of the firm]

- (a) While you are our client, we will not act for another client in a matter which creates a conflicting interest.

(Continued)

- (b) We are not aware of any current matters where we act on behalf of other clients which create a conflicting interest.

[If a conflict search reveals a matter in which there is a conflicting interest and both clients consent to the firm acting, this paragraph should be amended to reflect that fact. In addition, this may be an appropriate place to describe the conflict and confirm the consent of this client.]

- (c) If we learn, while we are representing you, that we are engaged in a matter which creates a conflicting interest, we may ask for your agreement to our continuing to act on terms satisfactory to all concerned.
- (d) *[Consider including the following clause which addresses the firm's obligations to the client when it becomes a former client.]*

When you are no longer our client, under applicable professional rules we may represent another client in any matter that is adverse to your interests provided that (i) the other matter is not the same as or related to the matter in which we previously represented you and (ii) we protect your relevant confidential information. [You acknowledge that the timely establishment of a conflict screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

[Note that how you protect confidential information will depend on the circumstances of each matter. If you would like your client to consent to the firm's future use of confidentiality screens to protect confidential information, include the second sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the second sentence.]

[Option 2: Consider for limited mandates, agency retainers and other one-off matters where you want to be free to act against the client in other matters.]

- (a) While you are our client, we will not act for another client in a matter which creates a conflicting interest unless you consent. Our acceptance of this matter is on the basis that you now consent to our representation of other clients in other matters that may be adverse to your interests and to our representation in other matters of the party that is adverse to you in this matter provided that (i) the other matter is not the same as or related to any matter in which we are then representing you and (ii) we protect

your confidential information. [You acknowledge that the timely establishment of a conflict screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

[Note that how you protect confidential information will depend on the circumstances of each matter. If you would like your client to consent to the firm's future use of confidentiality screens to protect confidential information, include the second sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the second sentence.]

- (b) Your consent means that while we are representing you in this matter, we could represent another client in an unrelated matter that is adverse to your interests including a lawsuit, negotiation, financing transaction, auction or other acquisition transaction, regulatory proceeding, insolvency/restructuring or other matter.

[This consent will permit you to act against an Option 2 client in unrelated matters, but does not extend to your acting against an Option 2 client in a related matter. If you want to do this, you should obtain an express consent from each client.]

- (c) When you are no longer our client, under applicable professional rules, we may represent another client in any matter that is adverse to your interests provided that (i) the other matter is not the same as or related to the matter in which we previously represented you and (ii) we protect your relevant confidential information. [You acknowledge that the timely establishment of a conflict screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

[If you would like this client to consent to the firm's future use of confidentiality screens to protect confidential information, include the last sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the last sentence.]

We are relying on the consents described above in agreeing to represent you in this matter and we will not be seeking any further consent from you or consulting with you before advising, acting for or representing another client with interests adverse to yours. We therefore recommend that you seek advice from independent legal counsel (*which may include your in-house counsel*) if you have any questions concerning the implications of providing this consent.

7. Joint Representation*[Delete this paragraph if you are acting only for one client in this matter or transaction]*

[Consider whether these are appropriate circumstances for a joint retainer under the Rules. For example, it is permissible (with client consent) to act for multiple parties on the same side of a transaction but a lawyer must not advise them on any contentious issues or act on more than one side of a dispute. It is important that your joint clients understand that there can be “no secrets” as between them. Note that this paragraph may not reflect the rules relating to joint representation in Alberta or the required form in British Columbia.]

- (a) We have been asked by each of you to jointly represent you in this matter. We understand from you that there are currently no contentious issues between you. However, because of the potential for conflict that arises whenever we are representing more than one client in the same matter in which each client has separate and potentially conflicting interests, we can only accept such an engagement if (i) we believe that we can provide competent and diligent representation to each client, and (ii) we have the informed consent of each client to the terms of the joint retainer as they relate to conflicts and confidentiality.

[Ensure that the informed consent is being given independently by each client and not by a person who is subject to a conflict of interest.]

- (b) We believe that we will be able to provide competent and diligent representation to each of you in a joint retainer because

[List the reasons why you believe a joint retainer is appropriate. Include any assumptions you are making about the potential for conflict, the sophistication of the parties, limitations on the engagement, the representation of third party interests (such as minority shareholders) and any other considerations that might be relevant, such as information the client has given you and on which you are relying to satisfy yourself as to the appropriateness of the joint representation.]

- (c) Because we are jointly representing each of you under this engagement, under our professional and ethical obligations:
 - (i) No information received by us from either *[any]* of you in connection with this matter can be treated as confidential insofar as each other is concerned.

- (ii) If a conflict develops between *[among]* you that cannot be resolved, **[include one of the following options:]** we will be unable to act for all of you and may be required to withdraw completely.

[or]

you have agreed that we may continue to act for *[•]*, including against *[•]* (which will seek other counsel to represent *[it/them]*). *[•]* recognizes that we are permitted to continue to use all information obtained from *[it/them]*. *[•]* *[agrees/agree]* that *[it/they]* will not assert that our prior representation of *[it/them]* prevents us from acting for *[favoured client]*.

- (iii) **[In appropriate circumstances, you may wish to include the following.]**
[[•] acknowledge that our firm has a long-standing and continuing relationship with [•].]
- (d) We recommend that you take the opportunity to consult with independent legal counsel *[which may include your in-house counsel]* regarding the terms of this joint representation.

8. Terms

The attached Schedule sets out the financial terms of our engagement on this matter including, where appropriate, an identification of the personnel who will be working on the matter and their standard rates.

9. Termination

- (a) You may terminate your engagement of us for any reason prior to the completion of this engagement by giving us written notice to that effect. On such termination, all unpaid legal fees and disbursements will become due and payable. Subject to our professional and ethical obligations, we may terminate our legal representation of you prior to the completion of this engagement for any reason including as a result of conflicts of interest that arise or unpaid legal fees or disbursements.
- (b) Unless our engagement has been previously terminated, our representation of you will cease upon receipt by you of our final account for services rendered. If, upon termination or completion of this engagement, you wish to have any documentation returned to you, please advise us. Otherwise, any documentation that you have

(Continued)

provided to us and the work product completed for you will be dealt with in accordance with our records retention policies and practices. Please note that our records retention policies and practices may not be synchronized with yours. If you have any concerns about what we retain in our records or dispose of, you must alert us to your concern. Absent written agreement with you to the contrary, we are free to retain or destroy the records we possess with respect to this engagement as we determine to be appropriate.

The fact that we may subsequently send you information on legal developments without charge or that we may include you in general mailings will not change the fact that our engagement has been terminated.

10. Electronic Communications

During the course of our engagement, we may exchange electronic versions of documents and e-mails with you using commercially available software. Unfortunately, the available technology is vulnerable to attack by viruses and other destructive electronic programs. As a result, while we have sought to take countermeasures, our system may occasionally reject a communication you send to us, or we may send you something that is rejected by your system. Accordingly, we cannot guarantee that all communications and documents will always be received, or that such communications and documents will always be virus free, and we make no warranty with respect to any electronic communications between us. In addition, we make no warranty with respect to the security of any electronic communication between us and you consent to our exchange of electronic communications, including confidential documents, unencrypted.

11. Privacy

In the course of acting for you, you may provide to us (and we may collect) personal information that is subject to applicable privacy protection laws. On your behalf, we will collect, use or disclose that personal information for the sole purpose of providing our services to you [*all in accordance with our Privacy Policy*].

12. Governing Law

Our engagement with you is governed by the laws of the province of [•] and the federal laws of Canada. Any dispute between us will be dealt with exclusively in the courts of that province.

[*The governing law should normally be the law of the place in which the partner in charge of the matter practices.*]

Schedule of Fees, Costs and Payment Terms

Staffing

Unless you instruct us otherwise, our staffing of this matter will be to draw on the necessary resources of the firm in order to handle this matter properly. If it is appropriate to do so, we will involve different lawyers, articling students or legal assistants to deal with different aspects of the matter.

Our legal assistants include law clerks, law students, research librarians and technical specialists.

[The person(s) primarily responsible for handling this matter and reporting to you is/are: [•].]

Legal Fees

[Option 1: hourly-based retainer]

Our fees are based on our assessment of the reasonable value of our services. To assist us in determining that value, we assign hourly billing rates to each of our lawyers and legal assistants, and record the time spent and services rendered by them on the matter. Currently, the hourly billing rates for the lawyer[s] who will be involved in this matter *[is/are]*:

- \$ [•] per hour
- \$ [•] per hour

It may be necessary to involve other lawyers, articling students and legal assistants to work on this matter, in which case their time will also be recorded and billed at their current hourly rates.

Our rates may change to reflect increases in our costs, the increased experience and abilities of our lawyers and legal assistants and other factors. If our rates change before this matter has been completed, the new rates will apply to the balance of the engagement.

[We would be pleased to provide an estimate of legal fees and costs and expenses that we anticipate will be incurred, and to provide updated estimates as the matter progresses. Because of the inherent difficulty of predicting the amount of time a particular matter will require and the course the engagement will take, the estimate will be an approximation only. Our actual fees and costs and expenses may vary, possibly significantly, from the estimate. Estimates are based on the circumstances as we understand them at the time and on assumptions about events that will affect the scope and nature of our work.]

(Continued)

[Option 2: fixed fee retainer]

Given the nature of this engagement, we agree that our fee, *[excluding/including]* costs and expenses, will be \$ [•] assuming the following:

[•],

[•], and

[•].

We will revisit this fee if these assumptions prove incorrect, or in the unlikely event that we can complete the matter without having to perform all of the work assumed to be involved.

Costs and Expenses

Our legal fees do not include costs and expenses that we incur in connection with this matter. These costs and expenses will be billed in addition to our fees for legal services. They typically include long distance telephone charges, messenger and express delivery charges, postage and courier charges, computer research charges, word-processing charges, printing and reproduction costs, overtime costs for administrative staff, facsimile transmission costs, travel expenses, filing charges, *[court reporter fees for examinations and transcripts, witness fees, fees for service of legal process]* and other costs and expenses.

Where we obtain these services directly from outside suppliers, we bill you the amount billed to us. Where the amounts charged for these services are significant, we may forward the invoices from these outside suppliers directly to you, in which case, you will be responsible to pay the invoices, in accordance with their terms, directly to the outside supplier. Certain costs and expenses are incurred in-house, and are billed at an amount intended to cover our direct costs and associated overhead.

[It may be necessary for us to engage outside experts, *[such as accountants, economists, appraisers or investigators]* to assist in this matter. We will consult with you before retaining any experts.] [It may *[also]* be necessary for us to retain lawyers and others as agents in other jurisdictions. Fees for *[outside experts]* *[and]* *[agents in other jurisdictions]* are not included in our legal fees. You will be responsible for payment of all fees and costs and expenses of all *[experts]* *[and]* *[agents in other jurisdictions]* retained on your matter. Ordinarily, you will be asked to pay the invoices, in accordance with their terms, directly to these parties.]

Payment

Our statements of account for fees and costs and expenses will be sent to you monthly [*and at the closing of the file*] and are payable [*on receipt/at closing*]. Interest is charged at the prejudgment rate of interest on amounts outstanding greater than 30 days. [*Each statement will provide a detailed summary of the services provided.*] [*You will appreciate that our continued work on this matter is contingent on the timely payment of our statements of account [and the honouring of the financial retainer arrangement discussed below].*]

Financial Retainer

For us to accept this matter, we ask that you provide us with an advance retainer payment on account of fees, costs and expenses in the amount of \$ [●]. [This retainer will be held in trust and credited against the final statement of account—but not against any interim statements of account—and any amount remaining after final payment will be returned.] [This retainer will be held in trust. We will render our monthly statements of account against this retainer, on the basis that you will refresh the retainer to this level on receipt of each statement of account.] [We may request an increase in the amount of the retainer before any period of significant activity.]

[*In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.*]

Please confirm the terms of the Retainer by signing this letter and returning a copy to my attention.

Yours truly,

[Signature]

We hereby acknowledge and agree to the terms of the Retainer, as set forth above.

By:
Name:
Title:

Model Engagement Letter – Short

Engagement Confirmation

Client[s]: The client[s] for which we are engaged to act in this matter [is/are] [•]. We are not acting for any [other] related corporations or individuals.

Scope of Engagement: We are engaged to do the following: [•].

Responsible Lawyer: The lawyer[s] responsible for this engagement [is/are] [•].

Instructions: We are authorized to act for the client[s] in this engagement on the instructions of • or such other person as you advise us in writing is authorized to instruct us.

Legal Fees: [Legal fees will be based on our assessment of the reasonable value of our services having regard, among other factors, to the time and effort expended, the novelty and complexity of the legal issues involved, the results of the representation, the effect of the engagement on our ability to undertake other engagements and the hourly rates at which we record the time of those involved.] or [Legal fees will be based on the hourly rates generally charged for those involved, as adjusted over the period of the engagement [•].]

Costs and Expenses: [Costs and expenses incurred by us in connection with the engagement (including any disbursements) will be billed in addition to our legal fees.[•].]

Billing Arrangements: [We ordinarily bill on a monthly basis. Our fees are based on the assumption of prompt payment. Amounts that remain unpaid after 30 days will bear interest.[•].]

Termination: The engagement may be ended by you or us at any time (in our case, subject to applicable lawyer professional/ethical rules). Unless otherwise terminated, the engagement ends when our work on the engagement is completed and our final account in the matter is rendered.

Conflicts and Confidentiality

Confidentiality. We undertake not to disclose or misuse your confidential information subject only to applicable law and lawyer professional/ethical rules.

Acting adverse to you after you are no longer a client. You acknowledge that after you are no longer a client we may represent other clients whose interests may be adverse to yours, provided we protect your confidential information.

Acting adverse to you while you are a client. While you are a client, we will not act for another client whose interests conflict with your interests in this matter, unless you consent. [In this regard, provided that (i) the other matter is not the same as or related to any matter in which we are currently representing you, and (ii) we protect your confidential information, you agree not to object to our representation of another client in any engagement that is adverse to your interests (including in litigation).] [Another client's interests will not normally be considered adverse to yours

merely because the other client is a business competitor of yours or is asserting through us legal positions that are inconsistent with legal positions you are asserting or is adverse in interest to entities with which you have a relationship through ownership or otherwise.]

[Joint representation. We have been asked by each of you to jointly represent you in this matter. Because of the potential for conflict that arises whenever we are representing more than one client on matters on which each client has separate and potentially conflicting interests, we can accept such an engagement only if (i) we believe that we can provide competent and diligent representation to each client, and (ii) we have the informed consent, given by representatives of each client who are themselves not subject to the potentially conflicting interests, to the terms of the joint retainer as they relate to conflicts and confidentiality.]

We believe that we will be able to provide competent and diligent representation to each of you in a joint retainer because [●].

Because we are jointly representing each of you under this engagement, under lawyer professional/ethical rules, no information received by us from any of you in connection with this matter can be treated as confidential insofar as each other is concerned. If a conflict develops among you that cannot be resolved, [we will be unable to act for all of you and may be required to withdraw completely] [you have agreed that we may continue to act for [●], including against [●] (which will seek other counsel to represent [it/them]).]

[We recommend that you each obtain independent legal advice before agreeing to this joint engagement.] [We understand that you *[have each obtained/each intend to obtain]* independent legal advice before agreeing to this joint engagement.]

To whom duties are owed. These conflicts and confidentiality duties are owed only to you and not to related corporations or individuals.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Please confirm the terms of the Retainer by signing this letter and returning a copy to my attention.

Yours truly,

[Signature]

We hereby acknowledge and agree to the terms of the Retainer, as set forth above.

By:

Name:

Title:

(Continued)

Model “I am not your lawyer” Letter

On occasion you will meet with people who are connected with a matter but not otherwise your client. For example, where you have met with several people during the creation of a business and will end up acting for the business but not for one or more of the individuals. Or, where you meet with the children of an elderly couple in the course of doing estate planning work. In these cases an “I am not your lawyer” letter can serve to make it crystal clear for which individuals you are and are not acting.

[Firm letterhead]

[Delivery method]

[Date]

[Non-client address]

Dear sir/madam:

Re: [Subject]

We are writing further to our meeting on [insert date]. We want to confirm that we will be representing [Name the party or parties the firm will represent] in connection with [Provide details regarding the nature of the firm’s mandate or the transaction].

We will not, however, be representing you personally. Although we understand your personal involvement in this matter and anticipate having much contact with you throughout our mandate, please understand that you, personally, are not our client. For this reason, we strongly recommend that you consult with your own lawyer regarding issues which have an impact on your personal interests in this matter.

We further confirm that we have not received any confidential information regarding your interests in the matter. **[Where communications with the non-client involved document or property exchange:** We return herewith those documents we reviewed regarding this matter and confirm that we are not in possession of any documents or property belonging to [non-client]]

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Please confirm your receipt of this letter by signing and returning a copy to my attention.

Thank you very much, and we look forward to working with you.

Yours truly,

[Lawyer signature]

I, _____ hereby acknowledge receipt of the above letter and my agreement with all that is stated in it.

[Signature]

[Date]

Source of document: Adapted by the Task Force from portions of a precedent letter by William Freivogel, an American expert on conflicts matters and precedent from the Law Society of British Columbia website.

Guidelines for Multiple Representations

Multiple client representation can involve interests which are either divergent from the outset or will become so at some stage. Whether or not the proceeding or matter is contentious, the fact that the interests are divergent means that you will not be able to commit your loyalty and judgment in favour of each of the interests as is required of you. The reality is that it may be difficult to show that each client received the best possible advice that he or she would have received if the lawyer was acting for that party alone and did not have any responsibility to the other client or clients with the divergent interest. In the end, one or more of the clients may complain.

Therefore, you should not act! If in doubt, consult with a colleague, your firm management or conflicts person/committee, outside counsel, or your Law Society's practice advice hotline.

Questions to help identify a multiple interest conflict:

- What are all of the interests that must be considered during the representation?
- Is there anyone else who has anything to do with the subject matter of the representation?
If so, what is his/her interest?
- Is more than one person relying on your advice? If so, for what advice?
- If someone attends with a relative or friend, does the relative or friend believe that you are representing his/her interests as well?
- Is someone other than the person affected by the subject matter of the representation paying your fees?
- Where people are contributing to create a business, are their contributions different? Are their rights and obligations different?
- Where people have a joint interest, are their bargaining positions unequal?
- To maximize the interest of one of the persons involved, will the interests of another person be compromised or negatively affected?
- Will you have to keep secret any information from one of the participants that is material to your representation of the other(s)?
- Is there real potential for the parties to have a falling out in the future?

Examples of multiple interest situations to avoid:

- Interests between spouses regarding:
 - family law matters e.g. marriage contracts, separation agreements, divorce, custody, property disputes, assets and obligations
 - financial obligations e.g. loan or line of credit guarantees, mortgage for other than a joint benefit
 - wills and estate planning matters e.g. imbalance in asset holdings or both are very wealthy or previous marriage and family relationships.
- Interests among family members regarding:
 - financial obligations e.g. loans, guarantees, security interests
 - motor vehicle accidents e.g. involving a combination of negligent driver, owner and passenger
 - estate and administrator
 - guardian and ward
 - trustee and beneficiary
 - shareholders of a closely held company
 - partners in a partnership.
- Commercial interests regarding:
 - trustee and beneficiary
 - landlord and tenant
 - partners in a partnership
 - the partnership and one or more partners
 - general partner and limited partner
 - securities issuer and underwriter
 - debtor and creditor e.g. mortgagor/mortgagee; assignor/assignee
 - buyer and seller
 - parties attempting to collect from one fund
 - shareholders of a closely held corporation
 - the corporation and one or more individuals with an interest in the corporation
 - individuals involved in a joint venture
 - competitors

Checklist for Client Waiver of Conflict

The need for informed consent

To elicit an informed consent to waive a conflict of interest, you are obliged to explain to the client, in plain language, the circumstances of the conflict. The explanation should include the following:

- ☐ a description of the subject matter of the service to be performed
- ☐ the nature of the conflict
- ☐ the factors that create the conflict
- ☐ the clients or other parties affected by the conflict
- ☐ whom you will represent and not represent
- ☐ the implications of the representation on each of the clients
- ☐ the reasons for proceeding with the representation notwithstanding the conflict
- ☐ the things you will do and not do
- ☐ the potential, if any, for the interests to diverge in the future
- ☐ if a confidentiality screen is used, explain the intended process and how it is intended to protect the confidential information.

Document the consent in writing

The consent should take the form of a clearly worded letter and should include the disclosure suggested above.

The letter should also include the following:

- ☐ an acknowledgment by each client that even though the representation may be potentially adverse, they are prepared to proceed with the representation;
- ☐ an outline of the process to be followed if the interests cannot be represented together in the future. Include whether your representation will continue for at least one of the parties in the future as well as your entitlement to retain fees and provision for the additional costs involved in the event that one of the clients has to seek alternative representation;
- ☐ a statement that the clients have been asked to obtain independent legal advice with respect to the waiver. If obtained, include a copy of the certificate; if not obtained, reference the client's election to proceed without independent legal advice.

Maintain file copies of the consent

Copies of the signed consent to waive should be kept by the person in the firm responsible for monitoring conflicts and in the file.

Model Letter Confirming Consent of Clients to Proceed Despite Possible Conflict

Where there is a potential conflict between two or more clients, this letter, jointly addressed to them, confirms their consent for the law firm to act.

[Date]

[Name and address of ABC]

Attention: [Name and Title]

[Name and address of XYZ]

Attention: [Name and title]

Re: [Subject]

[Salutation]:

This letter confirms our recent [add telephone conversation or e-mail exchange, if and as appropriate] when we advised you that [firm or we] have been asked to represent [ABC Inc.] and/or related entities [ABC] in connection with [insert description of ABC mandate] (the "Subject Matter"). We have advised [ABC] that our firm [Select one of: has acted in the past, or currently acts] and may in the future act for [XYZ Ltd.] and/or related entities [XYZ], and that as a result, various Firm lawyers may have acquired confidential information regarding [XYZ].

[Firm] has not, and will not be, representing [XYZ] in connection with Subject Matter [**and, where applicable, add:** and, to our knowledge, we have no confidential information from [XYZ] that is relevant to the Subject Matter.] Having said that, in acting for [ABC] in the Subject Matter, we may be required to act adverse to the interests of [XYZ]. That is why we sought your consent for us to act in connection with the Subject Matter.

We confirm that each of [ABC] and [XYZ] has consented to our firm acting for the other, and in particular, has waived any conflict of interest that could result from our firm acting as counsel to [ABC] in the Subject Matter.

(Continued)

You acknowledge and agree that all confidential information and any documents that either [ABC] or [XYZ] has provided, or may provide, to our firm relating to the Subject Matter will be treated by us as both confidential and privileged insofar as the other client is concerned. For greater certainty, any information which we may have as a result of our firm's representation of [XYZ] or [ABC] will not be disclosed to the other client or its representatives without prior authorization.

[ABC] and [XYZ] each acknowledges and confirms that our firm reserves the right to decline to continue to act for one or both of you if litigation or any other irresolvable contentious issues arise between you. Further, you each agree that if our firm exercises its right to decline to continue to act for one of you, the client for whom we have refused to continue to act will not challenge our firm's ability to continue to represent the other.

We ask that you kindly sign and return the attached duplicate copy of this letter. By doing so, you confirm your agreement of the terms set out above, and waive any claim that you might have against our firm relating to the conflict or potential conflict of interest that we have disclosed. You each also confirm that you have been advised by us to obtain independent legal advice before signing this letter, and have had a reasonable opportunity to do so.

This letter may be executed by facsimile and in counterparts, each of which so executed shall be deemed to be an original and all such counterparts together shall constitute one and the same letter.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Yours very truly,

[Firm]

Acknowledged and Agreed:

[Location], [Date]

[ABC INC.]

[XYZ LTD.]

Per: _____ Per: _____
Authorized Representative Authorized Representative

Name: _____ Name: _____

Title: _____ Title: _____

Guidelines for Giving Independent Legal Advice

A person seeking independent legal advice is as much your client as any other. Resist the temptation to rush or take shortcuts. A lower standard of service is not warranted just because your meeting is brief and you may not see the client again. Remember that a modest \$150 independent legal advice (ILA) consultation can leave you exposed to a significant malpractice claim.

Giving independent legal advice is never routine, not even if the person seeking advice has already made a decision and just wants it rubber stamped. Your consultation may be the client's only opportunity to consider objectively a transaction that exposes the client to significant liability or prejudice while primarily benefiting some other party. It is essential that you diligently interview the client, gather information, analyze the issues, and formulate your advice.

To ensure that the client receives adequate ILA, and that your advice is clearly understood and documented, follow these steps:

1. Give independent legal advice only if you are competent in the area of law in question.
2. Check the identification of the person for whom you are giving independent advice.
3. If the client needs an interpreter, have a neutral party interpret rather than a member of the family.
4. Gather enough information about the circumstances surrounding the transaction to be able to explain them to your client and predict problems. In particular, gather information on the client's age and level of experience, the client's motivation, the relationship of the parties, and their relative bargaining power. Find out enough about the client's financial situation to know the financial impact of the transaction.
5. Ensure that your client understands not only the nature and effect of the document, but also the client's underlying rights and entitlements.
6. Rather than ask clients if they understand the document in question, have them explain in their own words their understanding of the transaction.
7. Ensure clients are exercising their own freewill. Be especially diligent if a guarantor is a relative of the borrower, subservient to the borrower, or an unsophisticated party.
8. Be sure the document is complete in all respects before you or the client sign.

Independent Legal Advice Checklist – Generic

Record the following information:

- Date, start time and finish time
- Client's name
- Client's address
- Telephone
- Client ID checked
- Referred by
- Other parties to the agreement, transaction or course of action
- Background facts and circumstances and why independent legal advice is necessary
- List the documents reviewed:
- List everyone present at the meeting:

If language or understanding the client is an issue:

- Client's spoken languages
- Written languages
- The client has limited facility with English, so I obtained an interpreter whose name was:

Part A - The Client

- ☐ I reviewed the current state of the client's relevant personal/health/family/business circumstances.
- ☐ I reviewed the background facts and circumstances for the subject agreement, transaction or course of action.
- ☐ The client said that the reason for his or her consent to this agreement, transaction or course of action was [●].
- ☐ I satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents or proceeding with the planned course of action freely and voluntarily.
- ☐ I accepted payment from the client only, and not from anyone adverse in interest to the client.

Part B - If the independent legal advice relates to a contract or agreement

- ☐ I obtained relevant disclosure (personal, financial, other) from both my client and the other side.
- ☐ I determined that documents were sufficiently well-drafted to accomplish my client's objectives.
- ☐ I ensured that the terms of the agreement were both certain and enforceable.
- ☐ I explained the final nature of the agreement.
- ☐ I reviewed the risks and consequences of the agreement.
- ☐ I carefully explained all the clauses of the agreement and the client indicated that he or she understood same.

Part C - When client signs or proceeds contrary to advice

- ☐ I advised the client against signing the documents or pursuing the intended course of action, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was [•].
- ☐ The client signed an acknowledgement, in the presence of this witness, that he or she was signing the documents or proceeding against my advice.

Part D - File management

- ☐ I opened a file.
- ☐ I placed this form, a copy of the document and my notes in the general independent legal advice file.
- ☐ I took notes of my meeting(s) with the client and retained these.
- ☐ I docketed the time spent advising the client.
- ☐ I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account.
- ☐ My advice was verbal only and I sent no reporting letter.

Source of document: Adapted by the CBA Task Force on Conflicts of Interest from an ILA Checklist prepared by Philip Epstein, a specialist in family law practicing in Ontario, for the Lawyers' Professional Indemnity Company

Independent Legal Advice Checklist – Family Law Matter

Record the following information:

- Date, start time and finish time
- Client's name
- Client's address
- Telephone
- Client's spoken languages
- Written languages
- Family status
- Age
- Referred by
- Reason for independent legal advice
- Client's net worth
- Spouse's net worth
- Security requested by lending institution
- The client has limited facility with English, so I obtained an interpreter whose name was:
- Also present during our meeting was:
- I reviewed the following documents:

Part A - I explained the following to the client

- ☐ The nature and consequences of a mortgage
- ☐ The nature and consequences of a guarantee
- ☐ The effect of power and sale/judicial sale and foreclosure
- ☐ The effect of an action on the covenant and the liability for any insufficiency

- ☐ The consequences of his or her spouse's default
- ☐ The possible consequences of failure to honour the financial obligations (loss of his or her house, business and all other property)
- ☐ The possibility of obtaining security for the financial obligations
- ☐ That an indemnity will be worthless if the spouse declares bankruptcy
- ☐ The risks to the client if there is a breakdown of the marriage

Part B - The Client

- ☐ I reviewed the current state of the client's marriage.
- ☐ I reviewed the current state of the client's health.
- ☐ I asked about domestic violence and was told [•].
- ☐ The client said that the reason for his or her consent to this transaction or agreement was [•].
- ☐ I satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents freely and voluntarily.
- ☐ I accepted payment from the client only, and not from anyone adverse in interest to the client.

Part C - If the independent legal advice relates to a domestic contract

- ☐ I obtained complete financial disclosure from both my client and the other side.
- ☐ I determined that the document was sufficiently well-drafted to accomplish my client's objectives.
- ☐ I ensured that the terms of the agreement were both certain and enforceable.
- ☐ I ensured that, if the agreement is to be filed against property or as an order of the court, the statutory requirements for filing have been met.
- ☐ I explained the final nature of the agreement.

(Continued)

- ☐ I reviewed the risks and consequences of the agreement.
- ☐ I discussed the effect of the agreement upon the client if his or her spouse dies first.
- ☐ I carefully explained all the clauses of the agreement and the client indicated that he or she understood same.

Part D - When client signs contrary to advice

- ☐ I advised the client against signing the documents, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was [●].
- ☐ The client signed an acknowledgement, in the presence of this witness, that he or she was signing the documents against my advice.

Part E - File management

- ☐ I opened a file.
- ☐ I placed this form, a copy of the document and my notes in the general independent legal advice file.
- ☐ I took notes of my meeting(s) with the client and retained these.
- ☐ I docketed the time spent advising the client.
- ☐ I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account.
- ☐ My advice was verbal only and I sent no reporting letter.

Source of document: This ILA Checklist was prepared by Philip Epstein, a specialist in family law practicing in Ontario, for the Lawyer's Professional Indemnity Company.

Hints on the Construction of Confidentiality Screens

As the CBA 1993 Task Force Final Report noted, “a proper screen is not a rote set of procedures and affidavits, but rather a ‘specific set of institutional mechanisms’ designed to prevent inadvertent disclosure of client confidences.” The case law shows that in order to survive judicial scrutiny, a confidentiality screen must be unimpeachable in two respects: “its components” and “its implementation.” Case law in Canada, England and elsewhere suggests many practical hints for sound confidentiality screen construction (*Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 27 O.R. (3d) 181 (Gen. Div.), and *Prince Jefri Bolkiah v. KPMG* [1992] 1 All E.R. 517 (H.L.)), including the following:

1. Do not wait until conflicts arise. To be effective, the confidentiality screen must be part of the firm’s institutional fabric. Management should circulate among all firm members (not just lawyers) a general memorandum reminding firm members of their ethical obligations concerning screens and revise it regularly.
2. When you face a potential conflict, start planning early. Do not wait until work has actually started on a retainer to construct the confidentiality screen. More importantly, do not wait until confidential information has been exchanged. As soon as you have any indication that you might need a screen, examine the structural requirements.
3. Have an independent firm member assess the conflict, and design and construct the confidentiality screen. The independent lawyer, outside the immediate client service team, must be available to monitor the screen’s effectiveness and address any difficulties.
4. Identify the nature, sources and current location of confidential information.
5. Consider obtaining well-worded client consents. Although the law does not clearly state whether such consents are always effective, they do not hurt. Any consent should be clear, freely given and ideally confirmed by independent legal advice.
6. Ensure that the confidentiality screen and other screening mechanisms are universal and respected firm-wide.
7. Segregate all files whose access is limited to authorized team members.
8. Extend file precautions to computer systems. Precautions must cover word processing files, e-mail, spreadsheets, databases and transcript archives. Although a separate computer network offers the best protection, using network security to partition access also provides significant protection.

(Continued)

9. If files must be deleted from computer systems, ensure that back-up copies and archives are also deleted using a file-wiping software program. For fail-safe security, place one back-up on CD-ROM or USB flash drive in escrow, to be released only with the opposing party's authorization.
10. If the confidentiality screen is likely to be challenged, consider selecting an independent systems auditor to ensure that all computer systems comply with the screen. It might be prudent to ensure that the other party finds the auditor acceptable.
11. Ensure that authorized team members do not discuss the case with anyone outside the team.
12. Ensure that no disclosure of confidential client information or the team's working documents is made to anyone outside the confidentiality screen.
13. If the firm has different offices or multiple floors, consider locating the screened members of the firm physically apart from team members.
14. Ensure that all members involved affirm the protective measures under oath by executing appropriate affidavits or acknowledgements.
15. Remind firm members that the firm will enforce compliance through sanctions.
16. Develop procedures to deal with Court-approved practices. For example, in Ontario, the success of Davies Ward Beck in defending their screens before the Ontario Court of Appeal in *Davies, Ward & Beck v. Baker and McKenzie*, (1998), 40 O.R. (3d) 257; (1998), 164 D.L.R. (4th) 423; (1998), 111 O.A.C. 352 led many Bay Street firms to construct barriers using their barriers as models or templates.
17. File and retain any undertakings, waivers and affidavits. Fully document the confidentiality screen.
18. Institute a regular mandatory review of existing confidentiality screens and their effectiveness. This might involve an objective audit.
19. Be prepared for the worst – and the unexpected. Experience shows that confidentiality screens will be challenged and may have to be dismantled.

Model Confidentiality Screen Memorandum to Team Members

Memorandum

[Date]

To: [Client A Team members]

and

[Client B Team members]

From: [Sender]

Re: [[Client A]] Re: [Describe [Client A's] Matter]
[File no.]

and

[[Client B]] Re: [Describe [Client B's] Matter]
[File no.]

The firm has been retained by [Client A] in a matter involving [describe retainer].

The firm also acts for [Client B] in a matter involving [describe retainer and, if not obvious, the nature of the conflict].

In order to protect the interests and with the consent of both clients, a confidentiality screen is hereby established as set out below:

1. Legal and other staff involved in representing [Client A] in connection with [Client A's] Matter will not discuss their representation of [Client A] in respect of [Client A's] Matter with anyone who is not a member of the [Client A] Team including, without limitation, members of the [Client B] Team as hereinafter defined. The following staff (the "[Client A] Team") have been identified as being involved in representing [Client A] in connection with [Client A's] Matter:

[List staff and lawyers involved]

(Continued)

2. Legal and other staff involved in representing [Client B] in connection with the [Client B's] Matter will not discuss their representation of [Client B] in respect of [Client B's] Matter with anyone who is not a member of the [Client B] Team including, without limitation, members of the [Client A] Team. The following staff (the "[Client B] Team") have been identified as being involved in representing [Client B] in connection with [Client B's] Matter:

[List staff and lawyers involved]

3. While this screen is in effect, no one may be a member of both the [Client A] Team and the [Client B] Team.

In order to provide complete protection for each client's confidential information, we have decided to erect this information barrier in accordance with the provisions of **[insert as required: the Code of Ethics of Advocates, in the Province of Quebec, and the Rules of Professional Conduct of the respective law societies in the other Provinces or Territories]** and to take all actions necessary to ensure that no confidential information concerning either matter is disclosed, directly or indirectly, to any lawyer, articling student, summer student, paralegal or assistant who is not specifically mentioned in this memorandum.

To implement the measures necessary to ensure that no confidential information concerning either the [Client A] Team or the [Client B] Team files is disclosed either directly or indirectly between the members of the [Client A] Team and the [Client B] Team, the following measures will be taken immediately:

1. There will be no direct or indirect communication about the respective matters between the members of the [Client A] Team and the [Client B] Team, including their respective assistants.
2. Hard copy documents concerning the [Client A] files shall be distributed among the members of the [Client A] Team only.
3. Hard copy documents concerning the [Client B] files shall be distributed among the members of the [Client B] Group only.
4. Those working with the [Client A] Team files shall take appropriate measures to protect the confidentiality of [Client A] documents.
5. Those working with the [Client B] Team files shall take appropriate measures to protect the confidentiality of [Client B] documents.

6. No electronic information concerning either the [Client A] Team files or the [Client B] team files shall be kept on the Firms' computer network unless protected by strong passwords or confidential access codes.
7. All electronic storage media containing information about the [Client A] Team files or the [Client B] Team files shall be kept locked in a secure location.
8. All hard copy documentation concerning the [Client A] Team files and the [Client B] Team files, including memoranda, opinions, exhibits, correspondence, proceedings and other documents shall be placed, when no longer needed, in the shredding containers designed to receive confidential documents identified for destruction, once the Firm's partner in charge of professional liability insurance matters has given approval.
9. All information about the [Client A] Team files and the [Client B] Team files contained on electronic storage media shall be destroyed once the information is no longer needed to provide legal services or to protect the Firm's rights.
10. There shall be no substantive discussion about matters subject to confidentiality screens at any practice group meeting, any committee meeting, any partners meeting or any general retreat meeting.

All members of the [Client A] Team and the [Client B] Team must acknowledge they have read and accepted the measures set out above.

If a person needs to be added to a particular group, the principal lawyer for such group shall advise the [Coordinator of the Conflicts Committee] and obtain clearance from [a member of the Conflicts Committee] before any confidential information is given to the new member of the group and before any work is performed by this new member. The new member must also confirm to the Conflicts Committee that he or she has read this memorandum and accepts the measures set out above.

The procedures outlined above are, of course, in addition to the obligation which all personnel have to maintain the confidentiality of client information for all clients. As far as lawyers are concerned, these procedures are in addition to the professional obligation respecting confidentiality of client information. Any violation of the above policy should be immediately reported to [lawyer].

Please note that the measures implemented to safeguard the confidentiality of a matter may carry sanctions in the case of a breach. All facts, circumstances or complaints regarding a possible breach of such measures must be reported immediately to [lawyer, conflicts partner/committee or managing partner] who must enquire into the matter and

decide on the appropriate sanctions, in accordance with this memorandum. Depending on the seriousness of the breach, the sanctions may include dismissal or, in the case of a partner, expulsion from the partnership in accordance with the Firm's rules on governance.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Team A

We are all members of Team A and acknowledge having read and accepted the measures set out above.

[Members to sign memorandum and return it to the conflicts committee]

Team B

We are all members of Team B and acknowledge having read and accepted the measures set out above.

[Members to sign memorandum and return it to the conflicts committee]

Model Memorandum

Re: Potential Conflict Arising from Former Mandate

Memorandum

[Date]

To: [Persons who will be working on the mandate for [Client X]]

[Persons who worked on the former mandate for [Client Y]]

From: [Sender]

Re: **Confidentiality Screen Procedures: Potential conflict between [Client X] and [Client Y]**

[The firm] has recently accepted a mandate to act on behalf of [Client X] in a matter involving [describe the retainer (the "Matter")].

There exists a potential conflict of interest between [Client X] and [Client Y]. We have acted in the past and may currently be acting for [Client Y], but not in the Matter. The potential conflict arises because we have acted for [Client Y] in respect of [•] and may have received confidential information potentially relevant to the Matter.

Because of this potential conflict, it is appropriate to put into force immediately a confidentiality screen to ensure that the information disclosed to us by [Client Y] and relevant to the Matter remains confidential and is not disclosed to the members of the firm working on the Matter.

Accordingly, the following measures will be taken immediately:

1. Any person who worked for [Client Y] in respect of [•] (as identified in Schedule A and referred to herein as the [Y Team]) must not participate in any manner in the Matter for [Client X].
2. (a) Any person working on the mandate for [Client X] or who has any confidential information relating to [Client X] (as identified in Schedule B and referred to herein as the [X Team]) must not disclose any confidential information with respect to [Client X] to any person not on Schedule B, and in particular shall not disclose any such information to any person on the [Y Team].

(Continued)

(b) Any person on the [Y Team] must not disclose any confidential information with respect to [Client Y] to any person not on Schedule A, and in particular shall not disclose any such information to any person on the [X Team].

3. Any person on the [Y Team] should not share an assistant with any person on the [X Team].
4. (a) All files relating to the mandate for [Client X] shall be labelled “RESTRICTED CLIENT FILE – THE ONLY PERSONS PERMITTED TO HAVE ACCESS TO THIS FILE ARE THOSE PERSONS WORKING ON THIS MATTER FOR [CLIENT X]” and kept in a secured cabinet. No person shall give access to any such file to anyone on the [Y Team].

(b) All files relating to the mandate for [Client Y] in respect of [•] shall be boxed and sent off site or kept in a secured cabinet on site. Each box on file shall be labelled “RESTRICTED CLIENT FILE –THE ONLY PERSONS PERMITTED TO HAVE ACCESS TO THIS FILE ARE THOSE PERSONS WORKING ON THIS MATTER FOR [CLIENT Y].” No person shall give access to any such file to anyone on the [X Team].

5. (a) Access to all documents in the computer system relating to the mandate for [Client X] shall be limited to the author of the document, his or her assistant, and any other person that [the lawyer responsible for the matter] may authorize. No person shall give access to any such document to anyone on the [Y Team].

(b) Access to all documents in the computer system relating to the mandate for [Client Y] in respect of [•] shall be limited to the author of the document, his or her assistant, and any other person that the lawyer responsible for the matter may authorize. No person shall give access to any such document to anyone on the [X Team].

Each person currently on the [X team] or [Y team] is required to sign a copy of this memo and to return it to [person responsible]. If a person needs to be added to either team, [principal lawyer for Client X matter] or [principal lawyer for Client Y matter] shall advise [person responsible] and obtain clearance before any confidential information is given to the new member of the team and before any work is performed by this new member. Furthermore, each person who, in the future, works on the mandate for [Client X] or [Client Y] shall be given a copy of this memo and shall be asked to sign and return it with a copy to [person responsible].

The procedures outlined above are in addition to the obligation on all personnel respecting maintenance of confidentiality of client information for all clients. As far as lawyers are concerned, these procedures are in addition to the professional obligation respecting confidentiality of client information. Any violation of the above policy should be immediately reported to [lawyer].

Please note that the measures implemented to safeguard the confidentiality of a matter may carry sanctions in the case of a breach. All facts, circumstances or complaints regarding a possible breach of such measures must be reported immediately to [person responsible] who shall enquire into the matter and decide on the appropriate sanctions, in accordance with this memorandum. Depending on the seriousness of the breach, the sanctions may include dismissal or, in the case of a partner, expulsion from the partnership in accordance with the Firm’s rules on governance.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d’entente a été rédigée en anglais à la demande expresse des parties.]

I acknowledge having read and accepted the measures set out above.

Signed at [place] this [date].

Model Litigation “Beauty Contest” Pre-meeting Letter

[Firm letterhead]

[Date]

[Potential client address]

Re: Proposed Action against [party or parties on other side of litigation].

Dear [Contact of potential client]:

This is to confirm that you will visit this firm on [date]. You wish to hire a law firm to [bring an action against / defend an action by] [party or parties on other side of litigation] with respect to [brief description of matter]. The purpose of your visit will be to evaluate the ability of this firm to handle this matter for you. We understand that you will be interviewing other firms, as well.

On the telephone, we discussed the possibility that if you do not hire us, [party or parties on other side of litigation] or some other party in the action may seek to hire us to represent them in this dispute. We have agreed that at our meeting on [date] you will not reveal any confidential information to us. We have further agreed that nothing that is said or revealed at the meeting will form the basis for an objection on your part to our representing one or more of the other parties in the action.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Thank you very much, and we look forward to our meeting.

Yours very truly,

[Signature]

Model Pre-RFP Meeting and Review Letter

[Firm letterhead]

[Date]

[Potential client address]

Re: Meeting to review Request for Proposals for Legal Services

[briefly describe nature of the mandate]

Dear [Contact of potential client]:

This is to confirm that you will visit this firm on [date] with respect to your Request for Proposals for Legal Services. You wish to hire a law firm to [describe nature of the mandate], and the purpose of your visit will be to review the RFP and discuss the ability of this firm to handle this matter for you. We understand that you will be interviewing other firms, as well.

On the telephone, we discussed the possibility that you may not hire us. We have agreed that you will not reveal any confidential information to us in your Request for Proposal for Legal Services or at our meeting on [date]. We further agreed that nothing said or revealed at the meeting or in your RFP will form the basis for an objection on your part to our firm acting for any other current or future client.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Thank you very much, and we look forward to our meeting.

Yours very truly,

[Signature]

Model RFP Response Letter

[Firm letterhead]

[Date]

[Potential client address]

Re: Request for Proposals for Legal Services [*describe nature of the mandate*]

Dear [Contact of potential client]:

We are responding to your request for proposals for legal services. We understand that you wish to hire a law firm to [*describe general nature of the mandate or transaction for which the firm is solicited*] (the “Retainer”).

We do not believe that we have any conflicts of interest which would prevent us from accepting the Retainer or fully representing your interests. However, we would like to note that, similar to virtually all other law firms, we often represent [*describe the industry/sector in which the firm is involved with other clients which may have adverse interests to those of the potential client*]. We also act for a variety of clients on matters in which their interests may be adverse to those of [*potential client*]. As best as we can ascertain at this time, we believe that none of these others matters concerns [*potential client*], or any other matter which would be material to the present RFP.

Consistent with our professional obligations, we cannot abandon our representation of such other clients on [*describe matters in which the firm is involved which may conflict with the RFP and the potential client*]. Accordingly, we wish to confirm that the [*current clients which would have adverse interests to those of the potential client*] would be prepared to accept the firm’s proposal to act for [*potential client*] on the understanding that such representation will not interfere with our obligations to these other clients.

We confirm that we do not believe that our firm is in receipt of any confidential information relevant to the matter contemplated by the RFP. In addition, the firm undertakes that it will take all appropriate measures to protect the [*current clients which would have adverse interests to those of the potential client*] confidential information.

We also wish to confirm that we do not believe that the firm’s other mandates in any way affect or diminish our ability to fully represent [*potential client*].

Finally, we wish to confirm that prior to reviewing and responding to your RFP, we discussed the possibility that you may not hire us. We confirm that, as initially agreed, you did not reveal any confidential information to us in your RFP. We further agree that nothing that has been said or revealed in the process of us reviewing and responding to your RFP will form the basis for an objection on your part to our firm acting for any other current or future client.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Thank you, and we look forward to working with you, should we be selected.

Yours very truly,

[Signature]

bcc: *[Chair, Firm Conflicts Committee]*

Checklist for Interviewing Transferring Lawyer

Lateral hires of partners or associates occur at firms of every size. In addition to reviewing the transferring lawyer's credentials, firms will need to identify and deal with potential conflicts that may arise with respect to clients at the transferring lawyer's previous firm, and in particular, clients for whom the transferring lawyer worked.

The hiring firm must have sufficient information to complete an internal conflicts check, while at the same time making sure that no confidential client information is disclosed by either the transferring lawyer or the hiring firm.

Take these steps to identify potential conflicts of interest when dealing with a lateral hire:

- Ask for a current curriculum vitae so that you can review the background of the transferring lawyer. You will want to look back at least 5 years, or to the time of articling if this was less than 5 years ago.
- Check with the lawyers in your firm, or search within your conflicts system if it has the data to identify any matters on which the transferring lawyer's previous firm was on the other side.
- Ask the transferring lawyer for list of major clients and the matters he or she worked on (but not any confidential information, including the identity of clients if that is confidential) and have your firm's conflicts person run these names through your firm's conflicts database.
- In an interview (not in writing) ask the transferring lawyer if he or she is aware of any potential conflicts due to work done while at his or her previous firm.
- Ask the transferring lawyer if he or she sat on any boards, and if so, have your firm's conflicts person run this information through your firm's conflicts database (including the name of the entity, the directors and officers).

It is critical that both the firm and the transferring lawyer take an honest and critical look at any potential conflicts situations.

A strong desire to hire a transferring lawyer should not lessen the need to identify and fully assess potential conflicts, and to take appropriate steps to deal with them if necessary. This may include erecting confidentiality screens or seeking client consents. In some cases, it may mean that the transferring lawyer cannot be hired or that the hiring firm may have to send existing clients to another firm.

Resist any temptation to overlook or ignore any real conflicts that arise when a lawyer transfers firms. A failure to deal appropriately with these conflicts only delays the inevitable: in all likelihood the firm will have to refer any clients with a conflict to another firm.

Model Lateral Hire Memorandum

Memorandum

[Date]

To: All lawyers, articling students, students, paralegals, and law clerks

c.c.: [Partner in charge of file]

[Lateral hire]

From: [Person responsible for the screen]

Re: Confidentiality Screen Procedures Concerning [Lateral Hire and [Client X]]

[Lateral hire], formerly a lawyer with [law firm], will join [the Firm (office location)] on [date]. [Lateral hire's] former firm is acting for [Client Y] in a matter where [The firm] is acting for [Client X].

In light of the fact that [Client X] and [Client Y] have adverse interests, it is appropriate for [the firm] to put into place immediately a confidentiality screen in accordance with the provisions of [insert as required: the Code of Ethics of Advocates, in the Province of Quebec, and the Rules of Professional Conduct of the respective law societies in the Provinces or Territories] to ensure that there is no disclosure by [lateral hire] of any confidential information which [he/she] has and no appearance of any disclosure of confidential information which [he/she] has or may be presumed to have. These procedures will remain in force until the matter involving [Client X] and [Client Y] is finally resolved.

To implement the measures necessary to ensure that [lateral hire] does not disclose confidential information concerning [Client Y], either directly or indirectly, to members of [the firm], the following measures will be taken immediately:

1. [Lateral hire] must not participate in any manner in [the firm's] representation of [Client X].
2. (a) [Lateral hire] must not disclose any confidential information with respect to [Client Y] to any person, and in particular shall not disclose any such information to any person working on the mandate for [Client X]. At present, the following persons are considered to be working on the mandate for [Client X]:

[List persons involved in Client X file]

(Continued)

- (b) [Lateral hire] must not discuss the matter involving [Client X] and [Client Y] or any question of fact or law related directly or indirectly to the matter involving [Client X] and [Client Y] with or in the presence of any person, and in particular any person working on the mandate for [Client X].
3. The persons working on the mandate for [Client X] must not discuss the matter involving [Client X] and [Client Y] or any question of fact or of law related directly or indirectly to the matter involving [Client X] and [Client Y] with [lateral hire] or in the presence of [lateral hire].
4. [Lateral hire] will not share an assistant with anyone working on the mandate for [Client X].
5. All files relating to [Client X] in respect of [●] should be labelled “RESTRICTED CLIENT FILE – THE ONLY PERSONS PERMITTED TO HAVE ACCESS TO THIS FILE ARE THOSE PERSONS WORKING ON THIS MATTER” and kept in a secured cabinet. No person shall give access to any such file to [lateral hire].
6. Access to all documents in the firm’s network relating to [Client X] in respect to [describe matter] shall be limited to the author of the document, his or her assistant, and any other person that the lawyer responsible for the matter may authorize. No person shall give access to any such document to [lateral hire].
7. [Lateral hire] must not bring with [him/her] to [the firm] any file or document relating to [Client Y].
8. All electronic storage media containing information about [Client X] or [Client Y] shall be kept locked at the desk of an assistant to a group manager.

[Lateral hire] and each person currently working on the mandate for [Client X] are required to sign a copy of this memo and to return it to [person responsible]. If a person needs to be added to a confidentiality screen, [lateral hire] or [principal lawyer for Client X matter] shall advise [person responsible] and obtain clearance from the firm’s conflicts person before any confidential information is given to the new member of the group and before any work is performed by this new member. Furthermore, each person who, in the future, works on the mandate for [Client X] shall be given a copy of this memo and shall be asked to sign and return it with a copy to [person responsible].

The procedures outlined above are, of course, in addition to the obligation on all personnel respecting maintenance of confidentiality of client information for all clients. As far as lawyers are concerned, these procedures are in addition to the professional obligation respecting confidentiality of client information. Any violation of the above policy should be immediately reported to [lawyer].

Please note that the measures implemented to safeguard the confidentiality of a matter may carry sanctions in the case of a breach. All facts, circumstances or complaints regarding a possible breach of such measures must be reported immediately to *[person responsible]* who must enquire into the matter and decide on the appropriate sanctions, in accordance with this memorandum. Depending on the seriousness of the breach, the sanctions may include dismissal or, in the case of a partner, expulsion from the partnership in accordance with the Firm's rules on governance.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

I acknowledge having read and accepted the measures set out above.

Signed at *[place]* this *[date]*.

Guidelines to Identify Conflicts Involving Lawyer's Personal Interest

Lawyers who act for clients in any situation where there is a personal interest, financial (other than fees) or otherwise, are in a conflict of interest. The exposure to a malpractice claim is inevitable if the client becomes unhappy about any aspect of the transaction. Even with a written waiver from the client in hand, the burden of proof regarding adequacy of disclosure and demonstrating exercise of good judgment will be most challenging.

Therefore, in situations where there is a real or likely personal conflict of interest, you should not act! If in doubt, consult with a colleague, your firm management or conflicts person/committee, outside counsel or your Law Society's practice advice hotline.

Questions to help you identify whether you have a personal interest conflict:

- What is the client's interest?
- What is your interest?
- Will maximizing your interest negatively affect the client's interest? If so, you should not act.
- Will you always be able to place the interests of your client first? If not, you should not act.
- Is there potential for a falling out between the client and you in connection with the matter? If so, you should not act.

Examples of personal interest situations to avoid at all costs:

- Participating in a business transaction with a client;
- Having a personal or business relationship with another party interested in the representation or transaction;
- Acquiring an ownership or other interest in a matter adverse to a client;
- Purchasing real estate from a client;
- Taking a financial interest in a client matter other than reasonable fees;
- Creating a legal document wherein the lawyer is entitled to a beneficial interest e.g. being a beneficiary under a client's will which you have drafted;
- Having a personal, social or political interest in a client matter; or
- Borrowing money from a client at the same time as providing legal advice and drafting documentation evidencing the loan and security therefrom.

Serving as a Director of a Client Corporation

Over the last several years there have been increasing concerns about the potential liabilities to partners and firms as a result of lawyers serving as directors and/or officers of corporate clients. Conflict of interest concerns also arise where the lawyer is involved as a director, officer and/or shareholder in a client company. Many firms carry outside director and officer's liability insurance and require an indemnity from the client. However, there may be situations where the insurance will not cover the partner or the firm, and the indemnity will be of little value. Many firms have implemented policies that limit their lawyers from serving as directors or officers for clients, and the trend is that more and more firms are preventing their lawyers from doing so.

There can be situations where there are positive benefits to a firm and/or the community in having its professionals serve as directors or officers. To properly assess and minimize the risk, firms should implement controls to ensure that directorships are taken on only in situations where there is a positive benefit to the firm, and where there are safeguards in place to ensure that exposure to liability is minimized.

The following information can help a firm evaluate risks and benefits of having a lawyer serve as a director or officer of a client corporation:

1. Name of Corporation
2. Jurisdiction of Incorporation
3. Address
4. Principal Contact
5. Office to be held by the firm's lawyer
6. Brief description of business
7. Description of involvement of firm's lawyer
8. Publicly traded, private or not-for-profit
9. Fees billed to company by the firm annually (estimate)
10. Will any benefits or remuneration come from the office other than legal fees?
11. What is the benefit to the firm in holding this position?
12. Attach a copy of the last financial statements received

13. Are annual meetings held or annual resolutions passed in writing?
14. Do we maintain the minute book?
15. If the corporation has employees or an active business, how is it confirmed that there are no arrears in the filing of tax returns or the remittance of required taxes or payroll withholdings?
16. Is the company involved in any environmental issues?
17. What director's and officers liability insurance does the firm have and will it cover the lawyer serving this client?
18. What general or other liability insurance does the client have and is there an indemnity from the client?

The above information should be obtained prior to approving any request to serve as a director or officer, and it should be updated and reviewed annually.

Ongoing Assessment of Conflicts

Lawyers need to be aware that conflicts can develop during an engagement, and that they need to assess situations for conflicts throughout the representation. Because these conflicts are outside the initial screening process, they often appear unexpectedly. Some, however, are foreseeable at the outset of the retainer.

Unexpected Conflicts

Subsequent conflicts typically arise unexpectedly. Common triggers are the addition of a new party to a transaction or lawsuit, or a lateral hire who has acted for a party opposed in interest to the current client.

These types of conflicts should be managed in the same way as suggested for initial conflicts.

Previously Foreseeable Conflicts

In some instances, subsequent conflicts were foreseeable. Typically, this type of conflict was identified prior to the engagement but did not involve a contentious matter; the conflict was managed with documented disclosure to the clients and their written waiver based on informed consent. Later, the conflict materializes and requires further management. The typical situation involves previously aligned interests diverging, such as the individual interests of partners in a partnership.

Depending on just how contentious the matter has become, continued representation of some or all of the clients affected may or may not be possible. The Checklist for Managing a Subsequent and Previously Foreseeable Conflict may be helpful.

Checklist for Managing a Subsequent and Previously Foreseeable Conflict

The approach suggested for managing conflicts identified before the representation begins is equally appropriate for conflicts which arise unexpectedly and subsequent to the commencement of an engagement. However, when managing a previously foreseeable conflict consider these additional questions:

- Review the disclosure document and written consent which was prepared in light of the acknowledged potential for conflict; it may be that you already determined a plan of action that you will now implement.
- Consider whether the matter has become contentious, making representation impossible at least for some of the parties affected.
- Discuss with all clients and parties affected that the possible conflict previously identified has now materialized; review the nature, extent and implications of this conflict.
- If it is still appropriate to continue the representation, prepare a new consent in writing which outlines your disclosure and have it executed by all affected parties.
- If representation becomes limited to only one or two of the parties, prepare non-representation letters for those who are no longer being represented and direct them to obtain independent representation for the remaining portion of the matter.
- Suggest that the parties obtain independent legal advice with respect to the consent being executed.
- Be alert to future signs that the representation of one or all of the parties is no longer appropriate.
- Re-examine conflicts policies and procedures and incorporate any changes that might have become apparent as being necessary to avoid subsequent conflicts.

Action Plan to Manage a Conflicts Situation

The failure to identify and manage a conflict when it arises whether initially, prior to the start of the engagement, or subsequently, can result in a conflicts situation that must be addressed. These situations include:

- You find yourself representing more than one interest;
- At least some of the interests have or are about to become adverse and even contentious;
- At least one of the clients' interests is being preferred or is perceived as being preferred by another of the clients.

It can be even more of a problem when one (or more) of the clients is not aware of these circumstances. At this point it is likely too late to manage the conflict through the disclosure and consent approach.

If you find yourself in this situation, your reaction may be to try to fix it yourself, or alternatively, to simply ignore the problem. Stop – doing this will most likely create an even greater problem. Instead, follow these three steps:

- **Recognize it is not too late to react.** Recognize that although adverse effects may already be in play, you may be able to minimize them. The earlier you address the situation, the better.
- **Consult with someone.** Recognize that the independent objectivity of another lawyer is essential to understanding the circumstances you are in and the proper course of action to follow. Review the situation with a colleague, your firm management or conflicts person/committee, outside counsel or your Law Society's practice advice hotline. Carefully listen to, and follow, the advice you receive.
- **Do not continue to act.** Finally, recognize that you cannot continue to act. It is a huge mistake to try to deal with the conflict yourself. No matter how good your intentions or how objective you think you are, you will be challenged by the competing interests inherent in the conflict itself. Once people become adverse in interest, you will very quickly find yourself in a contentious and possibly acrimonious situation.

It is almost a certainty that at least one of the clients will blame his or her loss on your conflict of interest and an alleged failure to safeguard their interest. You should inform all of the affected clients of the conflict, that it may affect your ability to act in their interests, and that they each should seek their own independent counsel. By doing these things, the clients will get the independent advice and direction they need and you have done something to contain the damage.

