Proposed New Standard:

CONFLICTS OF INTEREST STANDARD

STANDARD

A lawyer must not act or continue to act for a client where there is a conflict of interest.[1]

COMMENTARY

1. 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 third person.[2] The duty to avoid conflicting interests is a central dimension of the duty of undivided loyalty.[3] The principle that an accused who is represented by counsel at trial is entitled to the undivided loyalty of the counsel is an important aspect of the right to effective counsel and is vital not only for the client, but is also essential to the integrity of the justice system and the confidence of the public in it.[4]

2. The Supreme Court of Canada set out the "bright line" rule or "bright line" test for cases where a lawyer is not permitted to act for adverse clients unless both parties provide their informed consent. The Court articulated the rule as follows:

> 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.[5]

3. There are two types of conflicts of interest that may disqualify a law firm from acting in a given matter. First, there are cases that fall into the "bright line" rule, where the direct legal and immediate interests for the two parties are adverse. Second, where a situation falls outside the scope of the bright line rule, the question becomes whether there is a "substantial risk" that the lawyers' representation of the client would be materially and adversely affected by the dual representation.[6] In that instance, the Court should employ a contextual analysis and balancing of factors.[7]

4. The conflict arising from the possession of confidential information obtained from a former client has been stated in the following manner:

> Either the lawyer will use the information, and violate his duty of confidentiality to the former client, or the lawyer will not use the information and violate his duty of zealous advocacy to his new client.[8]

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[1] Counsel must be familiar with Rule 3.4 of the Nova Scotia Barristers' Society Code of Professional Conduct, which addresses conflicts of interest. There are exceptions to this rule, which are set out both in Rule 3.4 and in the Commentary below.

[2] *R. v. Neil*, [2002] 3 S.C.R. 631 The Supreme Court of Canada confirmed that the duty of loyalty to a current client is a broad one that includes not only avoiding using or abusing confidential information, but also the avoidance of conflicts of interest in which confidential information may or may not play a role. The duty of loyalty includes a number of aspects, including: issues of confidentiality; the duty to avoid conflicting interests; a duty of commitment to the clients' cause; and a duty of candour with the client on matters relevant to the retainer. Although the Supreme Court of Canada found the law firm to be in a conflict of interest and held that the firm acted in a way that breached the firm's duty of loyalty owed to the accused, the Court declined to grant the accused a stay of proceedings; also see Commentary [3] of Chapter 3.4-1 of the Code of Professional Conduct

[3] *R. v. M.Q.*, [2012] O.J. No. 1584 (C.A.) In a case where trial counsel for the accused had previously met with the complainant (the accused's former wife) about incidents giving rise to the criminal charges, the accused's appeal of his convictions and sentence was dismissed. The Court of Appeal confirmed that there was an obvious conflict of interest but held that the steps taken by the trial judge were entirely appropriate and the accused's waiver was both informed and voluntary and was, in effect, an affirmation of his constitutional right to counsel of choice.

[4] *R. v. Widdifield* (1996), 25 O.R. (3d) 161 (C.A.) The two appellants were husband and wife who were convicted following trial of sexual assault and related offences against the husband's niece. The two parties were represented by the same counsel at trial. On appeal, the Court of Appeal confirmed that, in the context of joint representation of co-accused, an actual conflict of interest exists where a course of conduct dictated by the best interests of one accused would, if followed, be inconsistent with the best interests of the co-accused. However, the Court further held that it is incumbent on an appellant to point to a specific instance or instances where the appellant's interests and those of the co-accused diverged, requiring counsel to choose between them – simply pointing out different strategies or tactics that might have been employed if the parties had been represented by separate counsel at trial or trial counsel giving less consideration to different defence strategies than might have been given by counsel acting only for one party are not sufficient to succeed on appeal. Also see *Neil*, supra, where the Court held, at paragraphs 12 and 13: "It [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… 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… 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." Also see Commentary [4] of Chapter 3.4-1 of the Code of Professional Conduct

[5] *R. v. Neil*, supra, at paragraph 29. See also Chapter 3.4-2 of the Code of Professional Conduct generally on the subject of consent.

[6] *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 S.C.R. 649 and *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 The latter case involved a class action against General Motors of Canada Limited ("GMCL"). A law firm was alleged to have breached its contractual and fiduciary duties by accepting a retainer from number of the class members despite having already agreed to act for the Federal Government in relation to any proceeding of this nature involving GMCL. Damages in the amount of $45 million dollars were awarded against the law firm. The decision confirmed the Court's earlier decision in Canadian National Railway, supra, that both conflicts of interest that fall into the bright line rule and those where there is a "substantial risk" that the representation of the client would be materially and adversely affected by the dual representation may disqualify a law firm from acting on a given matter. The Court further stated, with regard to the bright line rule, that the key terms are "directly adverse" and "immediate interests" (at paragraph 496); and see Commentary [1] and [2] of Chapter 3.4-1 of the Code of Professional Conduct.

[7] *Lappin v. Bauer*, 2015 NSSC 108 In allowing an application to remove the lawyer for the Respondents, the Court was satisfied the motion for removal was not brought for a tactical advantage, it was early in the process, and although it was an inconvenience to seek new counsel, that inconvenience did not supercede the interests of the Applicant or the [original law firm's] duty of loyalty to the Applicant.

5. Conflicts of interest which may result in counsel ordered to be removed from a proceeding can arise where there is a breach of a duty of confidentiality; where there is a breach of the duty of loyalty; where there is a risk of trial unfairness; where the integrity of the justice system is at risk; or where there is a public perception that the administration of justice would be brought into disrepute.[9]

CHARTER IMPLICATIONS

6. Aside from the issue of retaining counsel of choice, conflicts of interest in criminal cases have additional implications arising under the Canadian Charter of Rights and Freedoms:

> In criminal cases, the justification for prohibiting counsel from representing an accused while labouring under a conflict takes on constitutional dimensions. By definition where counsel for the accused has an actual conflict of interest, the client suffers through representation by an advocate whose loyalty is suspect. In such circumstances, and no matter how competent the conflicted lawyer, the accused has not been provided with effective counsel, which is itself a denial of fundamental justice and a violation of the Canadian Charter of Rights and Freedoms.[10]

WAIVER

7. A court is not obligated to respect a waiver of the right to undivided loyalty of counsel. Rather, a court must be guided by the interests of justice and the need for public confidence in trial fairness.[11] Although the court is not obligated to respect the waiver, it must be considered

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[8] Understanding Lawyers' Ethics in Canada – Professor Alice Woolley (Markham: LexisNexis, 2011)

[9] *R. v. Clarke*, [2012] N.S.J. No. 616 (N.S.S.C.) A motion by the Crown to remove the solicitor for one of the accused (Colpitts) in the Knowledge House Inc. criminal proceeding was dismissed. The motion was brought on the basis that the father of the solicitor for Colpitts represented National Bank Financial Limited, one of the victims in the criminal matter. The Court confirmed that an accused's right to counsel of choice must be balanced against the potential or reality of a conflict of interest, which requires an evidentiary foundation. The possibility of the father becoming involved in the criminal proceeding was speculative at best.

[10] Ethics and Canadian Criminal Law – Michel Proulx and David Layton (Toronto: Irwin Law, 2011)

[11] *R. v. Robillard* (1986), 28 C.C.C. (3d) 22 (Ont. C.A.); *R. v. Parsons*, [1992] N.J. No. 97 (C.A.) In the latter case, the accused was charged with first degree murder in relation to the death of his mother. Counsel for the accused, Robert Simmonds, had previously represented the accused's father in relation to a dispute over maintenance payments claimed by the accused's mother. Crown counsel made the motion to remove Mr. Simmonds as counsel for the accused on the basis that the accused's father was to be called as a Crown witness and there existed the possibility that Mr. Simmonds had confidential information from his prior representation of the accused's father that could be used to the advantage of the defence in the present case. Although the Court of Appeal dealt with the Crown's appeal of that decision on a procedural basis (concluding that this was not a proper case for certiorari), the Court went on to comment on the substantive issue of the appropriateness of Mr. Simmonds continuing to act as counsel for the accused. The Court confirmed that, while conflict of interest concerns arise

a factor in terms of whether or not there is some unfairness which may operate with respect to the clients, and in terms of the context of the greater issue of public confidence.[12] Even a waiver which claims to be irrevocable may be insufficient.[13] Although consent to waive a conflict of interest may be implied in some circumstances, a client cannot be taken to have consented to conflicts of interest of which it is ignorant.[14]

JOINT REPRESENTATION OF CO-ACCUSED

8. In spite of the fact that there is not an absolute prohibition against the joint representation of co-accused, undertaking joint representation puts counsel's obligation of undivided loyalty to each client at risk.[15] In the event that counsel does undertake joint representation of two or more co-accused, counsel must ensure that they are not placed in a position of representing interests which are or may be in conflict.[16] Failure to do so will result in the court ordering counsel removed from the record.[17] There is a heavy onus on the defence to ensure that there is no conflict arising from the joint representation of co-accused.[18] This obviously has implications with respect to an accused's right to retain counsel of choice – however, it has been held that, although the right to retain counsel of choice is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to

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from possibilities, rather than probabilities, there has to be some reasonable basis upon which the possibility is constructed.

[12] *R. v. Con-Drain Co. (1983)*, [2008] O.J. No. 1012 (Ont. Ct. of Justice)

[13] *R. v. Cocks*, [2012] B.C.J. No 1858 (BCSC) The Crown motion for an order disqualifying two lawyers, partners in the same law firm, who represented a father and son (who were two of seven accused charged with second degree murder) was granted. Even though there had already been a sharing of confidential information between the two lawyers and the two accused had both signed a document entitled "Irrevocable Waiver" (after receiving independent legal advice), the trial judge was satisfied that there was a substantial risk that the two accused might change their minds in the future, and that possibility was sufficient to grant the application. The Crown was able to point to some of the anticipated evidence to support the argument that the two accused might change their minds about wanting to cooperate with each other and pursue a joint defence strategy.

[14] *Strother v. 3464920 Canada Inc.*, [2007] S.C.J. No. 24 A lawyer was alleged to have put his own financial interest in one client (Sentinel) ahead of his duty to a second client (Monarch). The lawyer failed to advise Monarch of a favourable tax ruling that he obtained for Sentinel, after he had agreed to pursue the tax ruling on behalf of Sentinel in exchange for an interest in the profits should the ruling be granted. The Court state, at paragraph 67: "The difficulty is not that Sentinel and Monarch were potential competitors. The difficulty is that Strother [the lawyer] aligned his personal financial interest in one client (Sentinel) seeking to enter a very restricted market related to film production services in which another client (Monarch) previously had a major presence, Stother put his personal financial interest into conflict with his duty to Monarch. The conflict comprised Strother's duty to 'zealously' represent Monarch's interest, a delinquency compounded by his lack of 'candour' with Monarch 'on matters relevant to the retainer', i.e. his own financial interest...". The Court stated, at paragraph 55: "The client cannot be taken to have consented to conflicts of which it is ignorant. The prudent practice for the lawyer is to obtain informed consent."

[15] *R. v. Silvini* (1991), 68 C.C.C. (3d) 251 (C.A.)

[16] See Chapters 3.4-5 through 3.4-9 of the Code of Professional Conduct and the accompanying Commentary.

[17] *R. v. W.(W.)* (1995), 100 C.C.C. (3d) 225 (C.A.)

[18] *R. v. W.(W.)*, supra

reasonable limitations.[19] An individual's right to counsel of choice, while not absolute, should not be interfered with by a court absent compelling reasons to do so. There needs to be an evidentiary foundation to support a realistic prospect of a conflict of interest that currently exists or that could arise at trial.[20]

APPEAL

9. An appeal of a court order removing counsel from a proceeding is to be heard after the trial through the normal appeal process set out by the Criminal Code of Canada.[21]

10. When the issue of a conflict of interest based on joint representation of co-accused is raised for the first time on appeal, the concern is whether the appellant has demonstrated, on a review of the trial record and/or fresh evidence, that the appellant's joint representation resulted in a miscarriage of justice.[22] One of the remedies available to an appellant in such a situation is the setting aside of a guilty plea.[23]

COURTS AND CODES OF ETHICS

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[19] *R. v. Speid*, [1983] O.J. No. 3198 (Ont. C.A.) The Crown successfully applied to have the accused's lawyer removed as solicitor of record on the first day set for trial on a charge of second degree murder. This ruling was appealed on the basis that it constituted a denial of counsel of choice for the accused. The principal Crown witness was the mother (Miss Nugent) of the infant victim. She had pled guilty to manslaughter after originally having been charged with murder. The mother had initially retained a lawyer, Mr. Lockyer, who was a partner of the lawyer, Mr. Pinkofsky, who was eventually retained by the accused. Although the Court of Appeal acknowledged that the right to counsel of choice had long been recognized at common law as a fundamental right, the Court held that it is not an absolute right and it is subject to reasonable limitations. The Court stated, at paragraphs 15 and 16: "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 in relation 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. Mr. Speid has a right to counsel. He has a right to professional advice, but he has no right to counsel, who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so acts, the client is denied professional services."; *R. v. Robillard*, supra; *R. v. Hendrickson*, [2002] O.J. No. 1982 (S.C.J.)

[20] *R. v. Clarke*, supra

[21] *R. v. Druken*, [1998] 1 S.C.R. 978

[22] *R. v. W.(W.)*, supra

[23] *R. v. Kim*, [2007] B.C.J. No. 62 (B.C.C.A.) The accused's appeal was allowed after he had initially entered a guilty plea to a charge of possession of cocaine for the purpose of trafficking. He had been represented by a lawyer (Johnson) retained by persons unknown and the same lawyer had represented another person (Choi) charged in relation to the same incident. The accused claimed that Choi had threatened both he and his family to compel his participation and he continued to feel threatened by Choi after the arrest and felt he had to plead guilty so that the charges against Choi would be dropped. The Crown had eventually entered a stay of proceedings against Choi. The Court of Appeal held that Johnson's representation of both parties resulted in a miscarriage of justice and the only available remedy was to set aside the guilty plea and send the matter back for election. Also, see *R. v. Stork* (1975), 24 C.C.C. (2d) 210 (B.C.C.A.)

11. The courts are not bound to apply a code of ethics, as they have inherent jurisdiction to remove from the record solicitors who have a conflict of interest. The jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction.[24]

"POSSIBILITY OF MISCHIEF"

12. In cases where the client does not consent to, but is objecting to, the retainer which gives rise to the alleged conflict, the Supreme Court of Canada has held that the "possibility of mischief" approach (where mischief refers to the misuse of confidential information by a lawyer against a former client) is to be applied[25], although there is Canadian case law which supports the "probability of mischief" approach as being the appropriate test. The "possibility of mischief" approach is based on the precept that justice must not only be done but must manifestly be seen to be done, and, therefore, if it reasonably appears that disclosure might occur, the test for determining the presence of a disqualifying conflict of interest is satisfied.[26]

TIMING OF APPLICATION

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[24] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 An application to disqualify the law firm representing the respondent from continuing to act in the matter was granted on the basis that a junior lawyer who had worked for the firm representing the appellant later joined the law firm representing the respondent. The junior lawyer was actively engaged in the case and was privy to confidential information disclosed by the appellant to his solicitor. This decision was reversed on appeal to the Manitoba Court of Appeal, but was reinstated by the Supreme Court of Canada.

[25] *MacDonald Estate v. Martin*, supra - The SCC discussed three competing values in deciding the matter: the concern to maintain the high standards of the legal profession and the integrity of our system of justice; the right of a litigant not to be deprived of counsel of choice without good cause; and the desirability of permitting reasonable mobility in the legal profession (at paragraph 13). The Court confirmed that the "probability of mischief" test to determine the existence of a conflict of interest is not a sufficiently high standard, but held that, in cases where a client objects to the retainer that gives rise to the alleged conflict, there are typically two questions that must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to prejudice a client? In answering the first question, the Court held that, in cases where a client has shown that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, there is a rebuttable presumption that the confidential information which could be relevant was imparted. The burden is a heavy one and requires the solicitor to satisfy the court such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed AND the burden must be discharged without revealing the specifics of the privileged communication. In answering the second question, the Court concluded that a lawyer who has relevant confidential information cannot act against a client or former client and disqualification from acting is automatic. In cases of partners or associates acting in such cases, the Court held that an absolute prohibition was not warranted. Rather, the Court concluded that a court should draw an inference that the relevant confidential information was shared with partners or associates unless it is satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken (which might include institutional mechanisms such as Chinese Walls and cones of silence) 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.

[26] *MacDonald Estate v. Martin*, supra

14. While an application to have the court disqualify counsel for conflict can be made at any time, the conflict should be "raised at the earliest practicable stage".[27] When the prosecution has notice of sufficient facts to found the application, the disqualification motion should be brought on notice "well before the start of the trial".[28] Excessive delay in raising a conflict may result in the dismissal of a motion to disqualify counsel.[29] Even where there is no motion for disqualification before the court, the court may have a positive obligation to inquire into the possibility of a conflict,[30] and the court does have the inherent jurisdiction to require counsel to withdraw from proceedings.[31]

CONFIDENCES OF THE PAST CLIENT AND PRESENT CONFLICT

15. The duty of confidence to a client persists after the retainer is at an end.[32] Defence counsel who has represented a Crown witness in the past is not necessarily in a position of conflict of interest in cross-examining the witness at a later date. Whether or not counsel would be precluded from continuing to act would depend on the particular facts of the case.[33] The duty of loyalty to a former client is not limited to parties who are charged on the Information and can extend to unindicted co-conspirators.[34] Generally speaking, a Crown

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[27] *R. v. Neil*, supra

[28] *R. v. Bilmez*, [1995] O.J. No. 2479 (Ont. C.A.); *R. v. Edkins*, [2002] N.W.T.J. No. 8 (N.W.T.S.C.); *R. v. Chen*, [2001] O.J. No. 589 (Ont. Sup. Ct. of Justice)

[29] *Johnson v. Rudolph*, 2013 NSSC 210.

[30] *Widdifield*, supra and *Robillard*, supra

[31] *R. v. Dix*, [1998] A.J. No. 291 (Q.B.) The accused was charged with two counts of first degree murder. There was late disclosure that advised that a jailhouse informant would be called as a witness by the Crown. Counsel for the accused had represented the informant six years previously on a parole violation and counsel's partners had represented the informant about four years prior. The Crown application to require the accused's counsel to withdraw from the case was dismissed. The trial judge did accept the proposal of defence counsel that independent counsel cross-examine the informant. In addition, the trial judge directed that elaborate procedures be implemented to ensure that no disclosure of confidential information would or could occur by the "tainted" lawyer to the lawyer conducting the cross-examination of the informant. The Court did hold that even where there is no motion for disqualification before the Court, the Court has the inherent jurisdiction to require counsel to withdraw from proceedings (at paragraph 33).

[32] *R. v. Brissett*, [2005] O. J. No. 343 (Ont. Sup. Ct. of Justice) The Crown application to remove the two solicitors (who practiced in the same small law firm) representing the accused was granted. The accused was charged with murder and attempted murder. The complainant on the attempted murder charge was also a witness to the murder and was a principal Crown witness. The complainant had been represented in 2002 by one of the two solicitors in relation to charges of assault and uttering threats. The possibility of counsel independent of the law firm being appointed/retained to cross-examine the single witness was considered and rejected as being an unsatisfactory solution; *R. v. Speid*, supra. Also, see Chapter 3.4-10 and 3.4-11 of the Code of Professional Conduct and the accompanying Commentary.

[33] *R. v. Robillard*, supra; *R. v. Brissett*, supra.

[34] *R. v. Caines*, [2011] A.J. No. 166 (Q.B.) There were multiple parties charged with both drug-related offences and conspiracy to traffic controlled substances, as well as a criminal organization offence. The accused and two co-accused made an application for a stay of proceedings on the basis of unreasonable delay. One of the issues that

prosecutor who previously represented an accused as defence counsel is in a conflict situation, although it does not automatically follow that the entire Crown office would be in conflict.[35] This is so regardless of what information may have been retained by the Crown Prosecutor and the lack of similarity or nexus between the prior matter and the current one.[36] The general rule that a lawyer cannot be both counsel and witness in the same hearing has been held to apply to individual Crown prosecutors, but there is no general rule that compels the Crown to retain outside counsel every time a Crown prosecutor is required to give evidence on a defence motion.[37] It has been held that a pending civil suit against a Crown prosecutor is not sufficient, in and of itself, to give rise to a prima facie case of bias or conflict of interest. It must first be determined if the civil suit is frivolous and bona fide before any further analysis is undertaken.[38]

SOLICITOR/CLIENT RELATIONSHIP

16. An initial call or conversation, including a free first consultation, can create a client relationship even if no retainer is perfected.[39] However, a lawyer providing short-term summary legal services is not obligated to take steps to determine whether there is a conflict of interest. When the lawyer has actual knowledge of or becomes aware of a conflict of interest,

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resulted in delay involved the withdrawal of one of the defence counsel as a result of a conflict of interest. The facts of the case were such that the Court determined it was appropriate to comment on unindicted co-conspirators and the conflict issue. The Court determined, in cases such as this, where one counsel represents certain of the co-conspirators and has, or does represent certain alleged unindicted co-conspirators, there are at least two broad bases of conflict that must be examined: first is the potential that the unindicted co-conspirators may become witnesses and second is the duty of loyalty owed to the other clients or former clients, which creates the potential for a breach of confidentiality (unless informed consents based on full disclosure were obtained).

[35] *R. v. Standingwater*, [2007] S.J. No. 676 (Q.B.)

[36] *R. v. Standingwater*, supra and *R. v. Lindskog*, [1997] S.J. No. 449 (Q.B.)

[37] *R. v. Henderson*, [2012] M.J. No. 344 (Man. C.A.) The appellant was convicted of first degree murder. One of the grounds of appeal was that the trial judge erred in failing to require that outside counsel be ordered to argue the conflict of interest motion brought by the accused and in failing to order a mistrial and refusing to order outside counsel after finding that a Crown attorney was in conflict. In dismissing this ground of appeal, the Court of Appeal confirmed that, just because a particular Crown attorney was found to be in conflict, it does not result in the entire Justice Department being disqualified from participating in the prosecution of the case. The Court of Appeal also confirmed that the rule that a lawyer cannot be both counsel and witness in the same hearing is applicable to individual Crowns, but there is no general rule that requires the Crown to retain outside counsel every time a Crown attorney is required to give evidence on a defence motion.

[38] *R. v. W.(D.C.)*, [1997] O.J. No. 4831 (Ont. Ct. (Gen. Div.)) The accused was charged with offences involving both drugs and weapons. In addition, he had been charged with conspiracy to traffic in narcotics and, although that charge was later withdrawn, his name remained on the Information as an unindicted co-conspirator. While incarcerated awaiting trial, a Crown prosecutor sent a letter to the accused's counsel, as well as counsel for several of the persons charged in the conspiracy. Several of these individuals were incarcerated in the same jail as the accused. The accused was attacked in jail and called an informer by other inmates. The accused sued the Crown Prosecutor for damages arising out of the assault. The court stated: "Merely launching a civil suit against a Crown counsel clearly cannot give rise, by itself, to even a prima facie case of bias or conflict of interest. To accept such a proposition could have the effect of grinding the administration of criminal justice to a virtual halt."

[39] *Descoteaux v. Mierzwinski*, 1982 CanLII 22 (SCC); *Sauter v. Sauter*, 2003 CanLII 349 (Sask QB); *Popowich v. Saskatchewan*, 1995 Can LII 5956 (Sask QB).

the lawyer must not provide or cease to provide short-term summary legal service except with the consent of the clients. If the lawyer does provide short-term summary legal service, reasonable measures must be taken to ensure that the client's confidential information is not disclosed to another lawyer in the lawyer's firm.[40]

DOING BUSINESS WITH A CLIENT

17. A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client.[41] It is also a conflict to practice law with a lawyer who holds investment or other financial relationships with the firm's clients.[42]

COMMUNICATING CONFLICT TO CLIENT

18. When counsel determines that they are unable to represent an individual as the result of a conflict of interest, particularly an individual from an equity deserving background, they should articulate the reason for the refusal and facilitate access to other counsel where appropriate (i.e. make a referral).[43]

CLIENTS WITH DISABILITIES

19. Lawyers for clients with disabilities must be even more vigilant about potential conflicts of interest. Ableist assumptions infuse their representation and analysis of material issues.[44] Where clients with disabilities might have impaired capacities in terms of analytical skills, literacy, emotional stability, any purported waiver must be accorded more rigorous

[40] See Chapter 3.4-2A through Chapter 3.4-2D of the Code of Professional Conduct, which includes a definition of short-term summary legal services, plus accompanying Commentary.

[41] Chapter 3.4-28 of the Code of Professional Conduct. Also, see Chapters 3.4-27 and 3.4-29 – 3.4-41 which address transactions with clients, borrowing from clients, lending to clients, guarantees by a lawyer, payment for legal services, gifts and testamentary instruments and judicial interim release.

[42] *NSBS v. Whitehead*, 2014 NSBS 1 (CanLII)

[43] Even when it is the right thing to do, declining to represent an individual amounts to a barrier for that individual. Those who are unfamiliar with the criminal justice system may perceive the refusal as related to the strengths of their case or as being discriminatory, if care is not taken to ensure that they understand why the lawyer they have approached is required to decline to act for them.

[44] For example, in terms of the "breach of the duty of loyalty," consider the position of counsel for a client with alleged mental health problems. The client has a legitimate expectation of "zealous advocacy," but the lawyer's perception of how that is to be carried out might be conflicted. The lawyer might be concerned that the client is not making decisions in his or her best interests or that their choices are obtunded by mental illness. This might cause some compromise in the lawyer's fidelity to the client's instructions, which could amount to a breach of the duty of loyalty.

scrutiny.[45] Conflicts may also arise in the context of Criminal Code Review Board proceedings and civil proceedings.[46]

[45] The standard for waiver of statutory procedural guarantees from *R v Korponay*, [1982] 1 SCR 41 at 49, is especially apposite here. Any waiver "…is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process." Examples would include clients with intellectual disabilities, who may need additional "plain language" assistance or the participation of a supporter.
[46] For example, the later use of statements obtained under Part XX.1 of the *Code*.