



**The Law Society  
of Manitoba**

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# CONFLICTS OF INTEREST

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Practice Management

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# A. CONFLICTS OF INTEREST

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When a solicitor-client relationship is created, you enter into a fiduciary position of trust with your client which continues indefinitely. Your duty of loyalty to your client is based on that trust. When you represent a client you must put the interests of that client first.

The fundamental rule relating to conflicts is contained in the *Code of Professional Conduct* ("Code"). It states:

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

Outlined below are some considerations that will assist you in determining whether there is a conflict of interest and how to deal with conflicts appropriately.

## 1. What is a Conflict of Interest?

A conflict of interest is the substantial risk that your loyalty to or representation of a client would be materially and adversely affected by your own interest or your duties to another client, a former client or a third person. **(Code Rule 1.1)**

A substantial risk "...must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer." **(Code Rule 3.4-1 Commentary [2])**

## 2. "Client" Defined

"Client" is defined very broadly to include not only the person you undertake to represent, but also any person who has consulted you and reasonably concludes that you agreed to render legal services to them. **(Code Rule 1.1-1)**

"Client" includes all clients of the law firm where you work whether or not you personally handle the client's work. Clients retain the firm and its lawyers provide the legal services.

A conflict can arise even if the information was acquired otherwise than through a formal solicitor-client relationship. Confidential information may be received from a prospective client. Whether confidential information has been received will be a question of fact. It is not dependent on the signing of an engagement letter or the receipt of a retainer.

### 3. Identify the Client

Sometimes it can be challenging to accurately determine “who is my client?” In certain situations, it can become easy to blur the lines or forget to whom your primary duties are owed. In most cases, the client is the person from whom you take instructions and it is only that client’s interests you are to protect. The duty of loyalty is owed to the client, and not to some other person who may pay your legal fees and disbursements. For example, if a parent comes with their child who is charged as a young offender, be clear that you represent the child and not the parent. If you act for an estate be clear in your communications that you do not act for the beneficiaries. If you are retained as a corporation’s lawyer, set out in writing that you act for the corporation and not for the individual directors, although you will need to obtain instructions from someone authorized to provide them on behalf of the corporation.

### 4. Perform a Conflicts Search

A conflicts searching system is a mandatory mechanism and procedure used to identify both potential conflicts of interest before you agree to represent a person and potential or actual conflicts that may arise during your representation of your clients. There are many different kinds of conflicts which you must consider.

Run the name of the potential client through your conflicts searching system to see if there are any matches.

You do not need to conduct a conflicts search if you are providing short-term summary legal services under the auspices of a pro bono service provider such as when you are acting as duty counsel for Legal Aid Manitoba or providing summary legal services through a pro bono clinic, where there is no expectation of continuing service. However, you may not provide short-term summary legal services if you have actual knowledge of a conflict. **(Code Rules 3.4-2A to 3.4-2D)**

Open a separate new file for every client matter. Always enter in your conflicts searching system the names and all versions of names of individual clients and their current and past spouses/partners and any businesses in which they have an interest, the names of client businesses and related entities, and names of your staff and their immediate family members.

## 5. Consider Your Overarching Duty of Loyalty

The duty of loyalty owed to every client includes the duty of commitment to the client's cause, the duty of candour, and the duty of confidentiality.

### a) Duty of Commitment to the Client's Cause

When you accept a retainer to act for a client, you owe the client your undivided loyalty and are committing yourself to protect and advance that client's interests in the matter to the best of your ability to the end of the retainer. **(Code Rule 3.4-1 Commentaries [4] and [5])**

This means, for example, that you are not permitted to avoid a conflict of interest that you discover between your current clients by summarily and unexpectedly dropping a client to circumvent conflict of interest rules. **(Code Rule 3.4-1 Commentary [7])**

### b) Duty of Candour

You are required to inform your client of all matters relevant to the retainer. **(Code Rule 3.4-1 Commentary [8])**

You must tell your clients whenever you are in a conflict of interest, without disclosing the details about why there is a conflict. Disclosure that a conflict of interests exists often means that you will be required to withdraw from representing the clients.

In some situations where a conflict of interests exists, you may be permitted to continue to represent the clients with their consent, but your duty of candour requires you to make full disclosure and explain the nature of the conflicting interest and its consequences to each of the clients. Before disclosing any information about your clients and their legal matters, you must first obtain the consents of all affected clients. If making such disclosure might harm the interests of one of the clients, you cannot make the disclosure and you will be unable to act. In that scenario, you would simply communicate that a conflict has been identified and that you cannot act.

### c) Duty of Confidentiality

You have a duty to preserve the confidentiality of your client's information and this duty is owed to both current and former clients. **(Code Rule 3.4-1 Commentary [6])**

You must hold all the information you acquire about the "business and affairs of the client" in strict confidence. You may disclose that information only if you have the client's consent, or the Code permits it, or the law, the court, or the Law Society requires such disclosure. **(Code Rule 3.3-1)**

Generally, you should not even disclose having been retained or consulted by a person about a particular matter whether or not the lawyer-client relationship has been established. **(Code Rule 3.3-1 Commentary [5])**

You owe a duty of confidentiality to anyone seeking advice or assistance on a matter involving your professional knowledge. Therefore, you should be cautious in accepting confidential information on an informal or preliminary basis since possession of the information may prevent you from subsequently acting for another party in the same or a related matter **(Code Rule 3.3-1 Commentary [4])**

## 6. Are You Being Asked to Act for Opposing Parties in a Dispute?

Obviously, it is impossible to act for opposing parties in a dispute. To attempt to do so breaches every duty of loyalty. Even informed consent from the clients will not permit you to act in this situation. **(Code Rule 3.4-3 Commentary [1])**

## 7. Are You Being Asked to Act Against a Current Client? The Bright Line Rule

**The bright line rule** prohibits a lawyer from representing a client whose legal interests are **directly adverse** to the immediate legal interests of another client even if the matters are unrelated, unless the clients consent. **(Code Rule 3.4-1 Commentary [1])**

However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer will not act against it in unrelated matters. **(Code Rule 3.4-1 Commentary [1])**

**The bright line rule does not apply** where the interests of the clients are **not directly adverse** or where the conflicting interests are **not legal interests**.

**If the bright line rule is inapplicable**, you will **still** be prevented from acting if there would be a substantial risk that your representation of the client would be materially and adversely affected by your own interests or by your duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. **(Code Rule 3.4-1 Commentary [2])**

## 8. Can Different Lawyers in the Same Firm Concurrently Represent Clients with Competing Interests?

Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests, and may treat information received from each client as confidential and not disclose it to the other clients provided that:

- (a) disclosure of the risks of the lawyers so acting has been made to each client;
- (b) the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation;
- (c) the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation;
- (d) each client is represented by a different lawyer in the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

**(Code Rule 3.4-4)**

## 9. Can You Accept a Joint Retainer?

### a) Acting for Parties Jointly

When considering whether you may act for more than one client on a joint retainer, be aware that you must follow **Code Rules 3.4-5 to 3.4-9**. **Each client's consent is required to enter into a joint retainer.** That consent is required in writing or you need to record the consent in a separate written communication to each client. **(Code Rule 3.4-7)**

Prior to obtaining the required consents, you must inform each client that:

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

**(Code Rule 3.4-5)**



Except as provided by **Code Rule 3.4-9**, if a contentious issue arises between clients who have consented to a joint retainer, you must not advise them on the contentious issue. You must refer them to other lawyers or, provided that no legal advice is required and the clients are sophisticated, advise them of their option to settle the issue themselves by direct negotiation in which you do not participate. If the contentious issue cannot be resolved, you must withdraw from the joint representation. **(Code Rule 3.4-8)**

Joint clients may also provide informed, written consent that in the event of a contentious issue, you may withdraw from the joint retainer, continue to advise one party and refer the others to new counsel. When entering into a joint retainer, you should stipulate that if a contentious issue develops, you will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not (at that time) be in possession of all relevant information. **(Code Rule 3.4-9 and related commentaries)**

Even if all of the parties consent to you acting on a joint retainer, avoid acting for more than one client when it is likely that a contentious issue will arise between them, or their interests, rights or obligations will diverge as the matter progresses. **(Code Rule 3.4-7 Commentary [1])**

## **b) Long-term Clients and Joint Retainers**

Before you accept a joint retainer from a long-term continuing client and another client in a matter, you must advise the other client of the continuing relationship. You must recommend that the client obtain independent legal advice about entering into the joint retainer with your long-term client. **(Code Rule 3.4-6)**

## **c) Spouses/Partners and Joint Retainers**

Spouses/partners may retain you on a joint retainer to draft wills for them based on their shared understanding of the contents of their wills. You must inform them of the lack of confidentiality between them and that you might have to withdraw if any conflict arises between them during the joint retainer. **(Code Rule 3.4-5)**

When acting on a joint retainer for spouses/partners, at the outset you should add to the usual disclosure that if only one of them subsequently contacts you with new instructions, such as to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer, and not as part of the joint retainer;

- (b) you would be required to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) you could not accept the new retainer, unless:
- i. the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship;
  - ii. the other spouse or partner had died; or
  - iii. the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

**(Code Rule 3.4-5 Commentary [2])**

#### **d) Acting for Borrowers and Lenders and Joint Retainers**

Generally, you may not act for both the lender and the borrower in a mortgage or loan transaction. **(Code Rule 3.4-12)**

However, provided that you comply with the related rules and in particular, the “joint retainer rules” **(Code Rules 3.4-5 to 3.4-9)**, you may act for both a lender and borrower in any of the following situations:

- the lender is a “lending client” (as defined in **Code Rule 3.4-13**);
- the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- you practise in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or
- the lender and borrower are not “arm’s length” as defined in the *Income Tax Act* (Canada).

**(Code Rule 3.4-14)**

When you are acting for both the borrower and the lender you must disclose to each of them, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction. **(Code Rule 3.4-15 and Commentary [1])**

## 10. Are You Being Asked to Act Against a Former Client?

### a) Do You Have Relevant Confidential Information?

Unless the former client consents, you must not act against a former client in the same matter, any related matter or any other matter if you have relevant confidential information arising from the representation of the former client that may prejudice them. **(Code Rule 3.4-10)**

In rare cases, when you have acted for a former client and obtained confidential information relevant to a new matter, another lawyer in your firm may act against your former client in a new matter, but only if the former client consents to the other lawyer acting, or the firm has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to anyone dealing with the new matter, and if requested, has advised the former client of the measures taken. **(Code Rule 3.4-11)**

"Reasonable measures" may differ, depending on the situation. The Commentary to **Code Rules 3.4-17 to 3.4-23** regarding conflicts arising from transfers between law firms provide guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in your firm to act against your former client. **(Code Rule 3.4-11, Commentary [1])**

### b) Is This a Fresh and Independent Matter?

You may act against a former client in a fresh and independent matter wholly unrelated to any work you have previously done for them if the previously obtained confidential information is irrelevant to the new matter. **(Code Rule 3.4-10 Commentary [1])**

## 11. Are You Personally Involved in a Transaction with a Client?

A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client. **(Code Rule 3.4-28)**

"**Lawyer**" includes an associate or partner of the lawyer, related persons as defined by the *Income Tax Act* (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity. **(Code Rule 3.4-27)**

Subject to **Code Rules 3.4-30 to 3.4-36**, where a transaction involves: lending or borrowing money, buying or selling property or services having other than a nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, you must:

- disclose the nature of any conflicting interest or how a conflict might develop later;

- consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and
- obtain the client's consent to the transaction after the client receives such disclosure and legal advice. **(Code Rule 3.4.29)**

Keep in mind that there are special rules about borrowing from clients. It is generally prohibited, subject to certain conditions. **(Code Rules 3.4-31, 3.4-32)**. Also, a lawyer must not lend money to a client unless certain conditions are met. **(Code Rule 3.4-33)**. Other rules govern when and under what circumstances a lawyer may give a personal guarantee. **(Code Rules 3.4-34 and 3.4-35)**

## 12. Do You Have a Conflict Due to a Personal Relationship?

It would be a personal conflict to act for someone with whom you have a close personal or sexual relationship. Another lawyer in your firm may represent them. **(Code Rule 3.4-1 Commentary [10](d))**

You may act as a surety for the Judicial Interim Release of an accused family member, but cannot represent them. Another lawyer in your firm may act for them. **(Code Rules 3.4-40 and 3.4-41)**

## 13. Do You Have a Conflict Due to an Outside Interest?

If you maintain another business, occupation or profession while practicing law, you must not allow that other interest to interfere with or jeopardize your professional integrity, independence or competence. **(Code Rule 7.3-1)**

Having an outside interest may also create a conflict, either by virtue of a conflict between your own interest and that of the client, or because the outside interest occupies too much time, impairing your ability to look after the client's interests. **(Code Rule 7.3-2)**

## 14. Two Parts to the Rule: Consent to Acting When There is a Conflict is Not Enough

The first paragraph of **Code Rule 3.4-2** consists of **two** parts and lawyers sometimes forget to consider the second part. The Rule states that a lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients **and** the lawyer reasonably believes they are able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client. Carefully consider whether you reasonably believe you can act, in the face of the conflict, as the Code Rule requires.

If you reasonably believe your representation of the client will not be impaired, you may act, provided you obtain the client's consent. **(Code Rule 3.4-2)**

## 15. Can You Obtain Appropriate Consent from All Affected Clients?

### a) Consent and Disclosure

“**Consent**” means fully informed and voluntary written consent from each party after disclosure. Consent may also be oral, provided you confirm it in writing to each client separately. A group email is not acceptable. **(Code Rules 1.1-1)**

Consider recommending that your client obtain independent legal advice before providing consent, particularly if the client is vulnerable or less sophisticated. **(Code Rule 3.4-2 Commentary [2A])**

**A bright-line conflict can not be overcome by consent.**

**Full disclosure** of a conflict of interest means informing your clients of the reasonably foreseeable ways that the conflict could adversely affect their individual interests and includes:

- full and fair disclosure of all information relevant to the person’s decision;
- disclosing all the information in sufficient time for the person to make a genuine and independent decision;
- taking reasonable steps to ensure the person understands the disclosure;
- disclosing the relevant circumstances;
- disclosing the reasonably foreseeable ways that the conflict of interest could adversely affect the client’s interests;
- disclosing any relations you have to the parties in the matter;
- disclosing any interest in or connections with the matter.

**(Code Rule 3.4-2 Commentaries [1] and [2])**

Because of your duty to keep client information confidential, before you can disclose to clients that there is a conflict – such as the fact that you act for one or the other – you must have your client’s permission to disclose that confidential fact.

Do not seek permission to disclose confidential client information for any purpose if the disclosure of the confidential information might harm the client or is not in the client’s best interests.

Where it is not possible to provide a client with adequate disclosure because of the confidentiality of the information of another client, you must decline to act. **(Code Rule 3.4-2 Commentary [1])**

## **b) Advance Consent**

You may be able to request that a client consent in advance to conflicts that might arise in the future.

The effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and their reasonably foreseeable adverse consequences, the greater the likelihood that the client will have the requisite understanding. **(Code Rule 3.4-2 Commentary [4])**

A general, open-ended advance consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved.

## **c) Inferred Consent**

In limited circumstances, consent of the client may be inferred where **all** of the following apply:

- i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
- ii. the matters are unrelated;
- iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
- iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

**(Code Rule 3.4-2 (b) i. - iv.)**

If **all** of those facts apply, you may infer that your client has consented to you acting against it in the unrelated matter and you need not confirm their consent in writing, although you may do so.

Governments, chartered banks and similar entities may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that consent can be implied, but the mere nature of the client is not sufficient to make that inference. **(Code Rule 3.4-2 Commentary [6])**

## 16. Have You Decided to Act?

A conflict may also arise during your representation of current clients even if the initial conflicts search did not disclose a conflict. Do another conflict search if the interests in a matter suddenly change, or a new party or lawyer becomes involved in a matter.

If you are going to act for the person, have a written retainer agreement setting out the terms of your retainer. You should have a written retainer on every new legal matter you undertake, even if you act regularly for the client or have acted for the client in the past.

If you are not going to act for the person, send a non-engagement letter to confirm in writing that you will not provide any legal services.

## B. OTHER RESOURCES

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### 1. **Canadian Bar Association**

(available to members of the CBA)

*Conflicts of Interest Toolkit*

### 2. **Law Society of Ontario**

*Selecting a Conflict Checking System*

*Conflicts of Interest*

*Steps for Dealing with Conflicts of Interest Rules*

### 3. **LawPro**

*Tips to Avoid Conflict of Interest Claims*

### **Still Wondering?**

Never hesitate to check if you are unsure about whether you can act or what you can do about a conflict of interest. Call the Law Society for an informal discussion about whether a conflict of interest exists and what options might be available.