The Law Society of Manitoba

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CONFLICTS OF INTEREST

Practice Management

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A. INTRODUCTION

When the solicitor-client relationship is created, you enter into a fiduciary position of trust with your client which continues after the end of the retainer, no matter how the relationship ends.

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, and you must **not act** if there is a substantial risk that any competing interests will adversely affect your representation.

> 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 of Professional Conduct* (Code) Rule 3.4-1)**

This rule is based in the duty of loyalty, grounded in the law governing fiduciaries. Respecting the duty of loyalty is essential in maintaining public confidence in the integrity of the legal profession and the administration of justice.

B. THE UNDERLYING LEGAL AND ETHICAL PRINCIPLES

As a lawyer, you owe a duty of loyalty to every client. But when does a person become a client?

1. Creation of the Solicitor-Client Relationship

A solicitor-client relationship exists is "*whether a reasonable person, in the position of a party with knowledge of all the facts, could reasonably form the belief that the lawyer was acting for a particular party.*" (See *Zimak v. 4244354 Manitoba Ltd. et al* 2015 MBCA 58).

> **Code Rule 1.1-1** defines "client" 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.

"Client" includes all clients of the law firm where you work whether or not you personally handle the client's work.

> It is crucial to recognize that 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 this has taken place will be a question of fact. It is not dependent on the signing of an engagement letter or the receipt of a retainer.

If you do not want the lawyer-client relationship imposed on you, be very clear in your communication with any person who contacts you and wants you to help them.

If you are not sure if you will represent the person after you have been consulted, be very clear that you are not their lawyer and that you will not perform any legal services unless and until you have agreed to represent them. It is wise to confirm this in writing.

If you have decided you will not act, you should always confirm in writing to the person that you are not their lawyer and you will not provide any legal services to them. Send an email or letter immediately so they don't assume you are their lawyer just because they consulted you.

If you are going to act for the person, as soon as possible prepare a written retainer for your client to sign or send the client a written record of the agreement reached between you relating to the 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.

More detail about the content of retainer letters and non-engagement letters can be found in the *Retainers* module.

The identity of your client is important when determining if you face a conflict of interests. Be very clear about who you represent and who you do not.

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 the bills. 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 that you do not act for the beneficiaries. If you are retained as a corporation's lawyer, be clear in writing that you act for the corporation and not the individual directors. (For example, see *MacCharles v. iS5 Communications Inc.*, 2020 ONSC 525 (CanLII)).

2. Overarching Duty of Loyalty

As soon as the relationship of solicitor-client is created, you and your law firm owe a duty of loyalty that transcends the contractual arrangement of the retainer agreement and survives the end of the legal matter.

The duty of loyalty owed to every client includes:

a) a duty to be committed to your client's cause;
b) a duty of candour to your client;
c) a duty to keep your client's information confidential; and
d) a duty to avoid conflicting interests.

a) Duty of Commitment to the Client's Cause

> You and your law firm owe a duty of commitment to the client's cause. 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 Commentary [5]**)

Because of your duty of commitment to your client's cause, you cannot withdraw from representing your client except as permitted under the Code.

This obligation is significant in the context of avoiding conflicts of interest, because you are not permitted to avoid a conflict 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]).** (See *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII)).

> For more detail see the module on *Withdrawal of Legal Services.*

b) Duty of Candour

The duty of candour means that you are required to inform your client of all matters relevant to the retainer. In short, your knowledge should be the client's knowledge. **(Code Rule 3.4-1 Commentary [8])**

> Your duty of candour requires that you tell your clients whenever you are in a conflict of interest. Because you also have a duty to avoid conflicting interests, disclosure that a conflict exists often means that you will be required to withdraw from representing the clients.

c) Duty of Confidentiality

The duty of loyalty includes your duty to preserve the confidentiality of your client's and former client's information. (**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)**

The rule takes a broad view of what is confidential. 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])

Be wary of accepting confidential information from anyone on an informal basis because you owe a duty of confidentiality to anyone seeking advice or assistance on a matter involving your professional knowledge. This may prevent you from later acting for another party in the same or a related matter because of the conflict rules.
(Code Rule 3.3-1 Commentary [4])

Solicitor-client Privilege

Your obligation of confidentiality survives the existence of the solicitor-client relationship and continues indefinitely.

The privilege attaches to the communication without regard to the nature or source of the information or the fact that others may share the knowledge.

Unless you have your client's or former client's consent, you cannot use or disclose their confidential information to their disadvantage or for your own benefit or the benefit of a third person. **(Code Rule 3.3-2)**

If a solicitor client relationship exists, there is a presumption that relevant confidential information has been shared with you. There is also a strong inference that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed.

You can rebut the presumption if you can satisfy the court that you do not have any relevant confidential information. You may be disqualified from acting unless you can prove that a reasonably informed person would be satisfied that no use of confidential information will occur in the situation. A bare affidavit from you will not meet that test. This is the **public perception test** which illustrates how your duty of confidentiality can be intertwined with the duty to avoid conflicting interests. (See *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC).

d) Duty to Avoid Conflicting Interests

Identifying a conflict of interest is easy if you have confidential information from one client that is relevant to another client's matter and you know that disclosure could harm the first client's interests. You cannot be fully committed to both clients, or be fully candid with both clients. This is a classic conflict of interest and you must withdraw from representing both clients.

Even if there is no risk of disclosure or misuse of your client's confidential information you may be in a conflict of interest when some other interest adversely affects your duty of loyalty to your client.

i. What is a Conflict of Interest?

Chapter 3.4 of the Code sets out your duty not to act or continue to act for a client where there is a conflict of interests.

> A conflict of interest is a 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)**

See **Code Rule 3.4-1 Commentary [10] (a) – (f)** for several examples of areas where conflicts of interest may occur.

C. AVOIDING CONFLICTING INTERESTS

1. Identifying Conflicts of Interest

a) Determining Whether There is a Conflict

There are a number of factors to consider in determining whether a conflict of interest exists:

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

(Code Rule 3.4-1 Commentary [9])

(a) The immediacy of the legal interests

If the immediate legal interests of your clients are currently adverse, a conflict of interest likely exists. If their legal interests are not immediately adverse (such as when there is only a possibility that the clients' legal interests might become adverse) you likely do not have a conflict yet and one may never develop. In that situation, check regularly for any signs that the legal interests have become adverse.

(b) Whether the legal interests are directly adverse

Clients who are on opposite sides of a legal dispute obviously have legal interests that are directly adverse, creating a conflict of interest.

Note that:

> *…a party adverse in interest' is not necessarily limited to a party with whom an issue is to be adjudicated upon by the Court in the action. There are cases … where, although no issue is stated between defendants, their interests are as adverse as if they were upon opposite sides of the record. In my opinion, therefore, under our Rules a party to a cause or matter may be said to be adverse in interest to another party if he has a direct pecuniary or other substantial legal interest adverse to the legal interest of the other party, even although they may be upon the same side of the record and there is no issue on the record that the Court will be called upon to adjudicate between them. (Rose and Laflamme Ltd. v. Campbell, Wilson and Strathdee Ltd.*, 1923 CanLII 92 (SKCA)).

(c) Whether the issue is substantive or procedural

(d) The temporal relationship between the matters

Time is another important consideration when deciding if the facts raise a conflicts issue.

If your file is closed and the matter was concluded long ago, information you may have received might no longer be relevant to a new matter due to the passage of time. Whether there is a conflict might depend on how long ago your file was closed, and whether you reasonably believe you are able to represent the new client without having a material adverse effect upon the representation of or loyalty to either client. **(Code Rule 3.4-2)**

Delay in bringing an application to disqualify a lawyer can be another factor that will affect whether the application is successful. If your client alleges the other lawyer has a conflict, do not delay in filing a motion to disqualify them.

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

If the conflict of the legal interests and the issues are significant to the parties or serious harm is likely, the lawyer might be disqualified even if the other side delayed in objecting to the representation.

> *11 The degree of apparent conflict of interest here, and the likely harm, are of course relevant when weighing prejudice under the doctrine of delay (under procedural principles or as equitable laches). If the conflict were large, or serious harm were likely, we would likely disqualify the firm despite the time interval. Or we might disqualify the firm on condition that the party complaining pay costs to remedy its delay. Of course, we do not have that discretion when the case fits squarely within Martin v. Gray, supra, and the complaint of the conflict is made promptly. Then we must disqualify the law firm even if the conflict or likely harm is small.* (*J.T. Miller Construction Ltd. v. South Calgary Properties Ltd*., 1995 ABCA 213 (CanLII)).

(f) The clients' reasonable expectations in retaining you for the particular matter or representation

Some clients (such as a national bank) are aware at the time they retain you that you may act against them in unrelated matters in future.

In such a situation, it would be wise to draw attention to that fact up front. You could explicitly discuss the possibility of acting against the client in a future unrelated matter where the client's confidential information is not relevant.

If the client agrees, you can confirm that in the retainer agreement as evidence that the client's reasonable expectations were that you may act against them in unrelated matters in future. Advance consent is further discussed below.

2. The Bright Line Rule – Current Clients

Code Chapter 3.4. and **Code Rule 3.4-1 Commentary [1]** incorporate the "bright line rule" set out by the SCC which applies to conflicts of interest among current clients' legal matters.

> *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.*
> (*R. v. Neil*, 2002 SCC 70 (CanLII)).

> *…The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related and unrelated matters. However, the rule is limited in scope. It applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting. It applies only to legal — as opposed to commercial or strategic — interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected (Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII).

The bright line rule does not apply:

- where the interests of the clients are **not directly** adverse;
- where the conflicting interests are **not legal** interests;
- where a client is **using the rule as a tactic to remove counsel**; or

- in the exceptional cases where it is unreasonable for the client (usually an entity such as a government, a financial institution or a national corporation) to expect that you or your firm will not act against it in unrelated matters.

When there is a conflict of interest and the lawyer reasonably believes they can represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client, all affected clients must give express or implied consent.

In some situations, you should recommend that a client obtain independent legal advice about the conflict of interest, to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

(Code Rules 3.4-1 and 3.4-2)

3. Substantial Risk of Impairing Your Representation of Your Clients

Where the bright line rule is inapplicable, you and your firm will be prevented from acting if representation of the client would create a substantial risk that the representation would be materially and adversely affected by your own interests, or by your duties to another client, a former client or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. **(Code Rule 3.4-1 and Commentaries [2] and [3])**

4. Obtaining Client Consent

Generally, you are prohibited from acting where there are conflicts of interest unless all of your affected clients give their informed consent.

> *"**Consent**" means fully informed and voluntary consent after disclosure:*
> *(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or*
> *(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable.*
>
> **(Code Rule 1.1-1)**

If you do not have **all** the necessary consents, you must withdraw from representation of all of the clients.

a) Disclosure of Conflict

i. Disclosure

> Disclosure is an essential requirement to obtaining a client's consent to allow you to act for another whose interests are adverse.

Full disclosure of a conflict of interest means informing your clients of the reasonably foreseeable ways that the conflict of interest 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])

> If you reasonably believe that you can represent all clients without other interests, obligations or duties materially and adversely affecting your representation, and you have made authorized disclosure of the nature of the conflicting interests and its effects to all affected persons, only then can you seek the individual consents to your representation or continued representation.

ii. Confidential Information – Solicitor-Client Privilege

The obligation to make full disclosure of a conflicting interest before asking for consent doesn't absolve you from your duty to keep your client's information confidential. Therefore, before you can even disclose to either client 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 the disclosure is not in their best interests.

Without permission from all affected clients to give full disclosure, you cannot seek their consents to act in the potential conflicts of interest situation.

In such situations you must refuse the retainer (or withdraw) from representing all of them without making any disclosure of confidential information. **(Code Rule 3.4-2 Commentary [1])**

b) Express Consent

Express consent means the individual written consents of all affected persons. The consent must be a separate, written document from each client, or you must confirm consent given orally in writing as soon as practical by sending a separate, written communication to each person consenting.

A group email confirming the consents of all persons will not suffice.

Consider whether you should recommend that your client get independent legal advice before providing consent. This is especially important if the client is vulnerable or less sophisticated. **(Code Rule 3.4-2 Commentary [2A])**

c) Implied Consent

In limited circumstances, your client's consent to you acting against them may be implied, rather than expressly granted.

Consent of the client may be inferred and does not need to be confirmed in writing only where **all** of the following facts 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. you have 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 the client's consent in writing, although you may do so.

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

You should always get an express written consent from the client if you are unsure whether all the provisions in **Code Rule 3.4-2 (b) i – iv** exist in the situation.

d) Consent in Advance

You may request that a client provide a written consent in advance of a conflict to permit you to act against it in future in unrelated matters where confidential information is not relevant or at risk of disclosure.

The effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences, 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 to act against the client in future will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved.

If the client is an experienced user of the legal services involved and is reasonably informed about the risk that a conflict may arise, such consent is more likely to be effective particularly if the client receives independent legal advice and the consent is limited to future conflicts unrelated to the subject of the representation.

A common example is the commercial lawyer being hired by a bank to close its loans who asks the bank to allow them to also represent borrowers negotiating loans with the bank. That often leads to an advance consent, limited only by the bank's requirement that its lawyer not sue the bank.

e) Might a Client Consent to You Acting for Another Whose Interests are Adverse?

Sometimes clients do decide it is in their best interest to consent to your representation despite the conflict.

> *[3] As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.* **(Code Rule 3.4-2 Commentary [3])**

5. Consequences of Breaching the Conflict Rules

If you act where there is a conflict of interest you may face:

- a complaint investigation from the Law Society;
- discipline by the Law Society;
- disqualification and removal by the court;
- costs awards against you personally;
- inability to collect fees for work performed.

An application for disqualification can be brought by current or former clients, a third party, or the other side. A court has inherent jurisdiction to remove lawyers and law firms from representing a party in pending litigation as part of the court's exercise of their supervisory jurisdiction over the administration of justice.

a) Disqualification of You and/or Your Firm

Generally speaking, disqualification will be required to:

1. avoid the use of confidential information;
2. avoid the risk of impaired representation; and
3. maintain the repute of the administration of justice.

i. Acting 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 and Code Rule 3.4-3. Even informed consent from the clients will not be enough to permit you to act in this situation. **(Code Rule 3.4-3 Commentary [1])**

ii. Concurrent Representation for Current Clients with Competing Interests

Where there is no dispute among clients about the matter that is the subject of the proposed representation, two or more lawyers in a 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 firm withdraw from the representation of all clients in respect of the matter if a dispute develops among the clients that cannot be resolved.

(Code Rule 3.4-4)

Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other. **(Code Rule 3.4-4, Commentary [3])**

iii. Acting Against a Former Client When You Have Confidential Information

Unless the former client consents, a lawyer must not act against a former client in:
(a) the same matter;
(b) any related matter; or
(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

(Code Rule 3.4-10)

(See *Bellan v. Curtis*, 2006 MBQB 18 (CanLII) for a detailed discussion).

Even insights gained in acting for a former client about aspects of their character relevant to the conduct of litigation, including temperament and personality, attitude toward litigation risk, planning strategy and tactics may create a conflict that will preclude acting against them in a later unrelated matter. (See *Skjerpen v. Johnson*, 2007 BCSC 1290 (CanLII)).

iv. Law Firm Acting Against a Former Client in a New Matter When You Have Confidential Information

It will be the rare situation where it is appropriate for another lawyer in your firm to accept a retainer to act against your former client where you have relevant confidential information that would prejudice the former client if disclosed. **(Code Rule 3.4-11, Commentary [1])**

In such a case, another lawyer in your office may act in the new matter against your former client, but only if certain conditions are met before the retainer is accepted.

> ***Acting Against Former Clients***
> ***3.4-11*** *When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:*
> *(a) the former client consents to the other lawyer acting; or*
> *(b) the law firm has:*
> *i. taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and*
> *ii. advised the lawyer's former client, if requested by the client, of the measures taken.*

You must exercise your professional judgment to determine what "reasonable measures" require in the particular situation. **Code Rules 3.4-17 to 3.4-23** regarding conflicts from transfers between law firms set out guidelines for the protection of confidential information, which can provide some assistance in the rare case when it is possible for a firm to act against a former client.

Reasonable measures might include a comprehensive confidentiality screen protecting the former client's confidential information if it is set up **before** any work is done on the new matter. Screens must include provisions to ensure that no lawyer or staff member in the firm who has had actual access to confidential information from the former client has any interaction with those working on the new matter.

v. Acting Against a Former Client in a Fresh and Independent Matter

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

You do not need your former client's consent if:

- the new representation is on a matter that is <u>not the same or related</u> to the matter on which you represented your former client; and
- the new representation will <u>not involve attacking or undermining</u> the legal work which you did for the former client; and
- the new representation will not put you in a position where you are effectively changing sides by taking an adversarial position against your former client with respect to a matter that was central to the previous retainer; and
- none of the former client's confidential information is relevant to the new matter; and
- there is no risk of you or your firm using or disclosing any of the former client's confidential information.

vi. Factors Militating Against Automatic Disqualification

[I]n circumstances where the lawyer-client relationship has been terminated and there is no risk of misuse of confidential information, there is generally no longer a concern of ongoing prejudice to the complaining party. In light of this reality, courts faced with a motion for disqualification on this third ground should consider certain factors that may point the other way. Such factors may include: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for

disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions. (*Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII)).

a. Delay

Timing of an application to disqualify a lawyer for a conflict of interest can be important.

A long delay may make it too late for the client to seek the removal of counsel. (See *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1954 (CanLII)).

b. Litigation Tactics

Courts may also be disinclined to remove counsel where the motivation to have counsel removed amounts to a tactical abuse. **(Code Rule 3.4-1 Commentary [1])**

c. Significant Prejudice to the New Client's Interest in Retaining Counsel

Prejudice must be demonstrated, not just suggested. (See *Skii km Lax Ha v. Malii*, 2021 BCCA 140 (CanLII)).

b) A Conflict May Affect Fees

Lawyers who continue to act while in a conflict of interest may be disentitled to collect legal fees for work performed after the conflict of interest arose. However, it may not create an absolute bar, depending on the nature and circumstances of the conflict. (See *Serniak v. Teitel*, 2004 CanLII 9130 (ON CA)).

c) Sanction by the Law Society

Even if a court declines to order disqualification, you may still face sanction by the Law Society if you breach the rules on conflicts of interest.

The Role of the Court and Law Societies

These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court dealing with the case may decline to order disqualification as a remedy. ***(Code Rule 3.4-1 Commentary [11])***

Whenever you have a question about whether a conflict of interest exists, consult the Code and/or contact the Practice, Ethics and Equity Advisor for an informal discussion and advice.

D. CONFLICTS OF INTEREST SEARCHING SYSTEM

A conflicts of interest searching system is a mechanism and procedure set in place and consistently used to identify both potential conflicts of interest before you agree to act and potential or actual conflicts that may arise during your representation of your clients.

Without such a system it is difficult for anyone to remember every client's name and matter. If you have partners or associates, it would be impossible to be aware of every client being represented by your firm.

If you practice through a Civil Society Organization, you also must search for conflicts of interest of the organization. **(Code Rule 3.4-16.1.1).** A "civil society organization" is a registered charity under the *Income Tax Act* (Canada), a not-for-profit corporation incorporated under the laws of Manitoba, or a not-for-profit corporation permitted under the laws of Manitoba to operate in the province. **(Code Rule 1.1-1)**

1. Essential Elements of a Conflicts Searching System

A basic conflicts of interest searching system is a manual or electronic searchable database containing the names of:

- all your current and former individual clients and their spouses/partners;
- all businesses in which any of the above have an interest;
- all your current client entities and subsidiaries;
- your current lawyers and staff and their immediate family members (so that you don't inadvertently accept legal matters that are adverse in interest to anyone connected with your law firm).

The database should include other names used by those entities or persons (birth names, prior married names, business operating names, *also known as* names, possible alternate spellings of the names, middle names) so that in a search of the database you don't miss a conflict because a different name used by a client was entered.

The nature of your practice may require that your conflicts database include more than just the names of the relevant persons involved in the matter. For example, you may want to enter the names of:

- major witnesses for a client's matter;
- co-accused parties;

- adverse parties;
- persons who sought advice or assistance on a matter where you learned confidential information but you did not agree to represent them or you acted but did not render an account;
- a client's current and past spouses/partners;
- the past spouses/partners of a client's current spouse/partner;
- a corporate client's directors and/or current and past operating businesses.

Depending upon the nature of your practice you might also include an indication of the subject matter to assist you in deciding whether there is a potential conflict of interest.

A computerized database for your conflicts searching system is not mandatory. A manual database system is permitted and some solo or small firms may still use a card system if the practice is very small.

> Your main concerns should be that you have a robust system in place for conflicts searching and that you and your staff use it properly.

Your conflicts searching system should:

- be a mandatory step that must be completed before a file can be opened;
- require that the lawyer responsible for the file confirm that the conflicts search has been completed and is clear before a file is formally opened;
- create a documentary record of the search that is stored in the file.

2. When to Conduct a Conflicts Search

Before you have an initial interview and before the potential client discloses any confidential information, a conflicts search should be done.

A new conflict search should also be done before:

- a lawyer, an articling student or a non-lawyer staff member transfers to your firm from another law firm;
- if any new lawyer becomes involved.

Be mindful of the risk of a conflicting interest arising during your representation of current clients even if the initial conflicts search did not disclose any potential conflicting interest. If the interests in a matter suddenly change, or a new party or lawyer becomes involved in a matter, current clients who had no conflicting interests may suddenly develop conflicting interests that need to be addressed before you can proceed any further with representation. Do a new conflict search if any of these circumstances arise.

3. A Match in the Conflicts Search

If you use a computerized system, the conflicts search in the law firm's main database is conducted by entering the names of the relevant persons involved in the potential new matter. The system searches for matches anywhere in the database.

If you use a manual system, compare the relevant names in the new matter with the names of all of your former and current clients and others as mentioned above.

While a staff member may do the initial conflicts search, you as the lawyer are responsible for any conflicting interests if you fail to avoid them.

If there are any matches, determine whether your representation will conflict with the duty of loyalty obligations you and your firm owe to all current and former clients.

If a conflict is identified before you agree to represent the client on a new matter, it must be determined if disclosure and consents might be appropriate to permit you to act or if the retainer must be refused.

In conflicts of interest situations that arise during your concurrent representation of current clients, it must be determined whether disclosure and consent are appropriate steps to take to permit you to continue to act for both, for only one, or whether you must withdraw from representation of all.

4. Conflicts in Short-Term Summary Legal Services

Short-term summary legal services are provided to clients under the auspices of a pro bono or not-for-profit legal services provider (i.e. the Legal Help Centre or duty counsel) where you and the client understand that you will not provide continuing legal services in the matter. (**Code Rule 3.4-2A**)

a) Conflict Searches vs. Actual Knowledge of a Conflict

A requirement to conduct conflict searches could be an impediment to lawyers providing short-term summary legal services. **(Code Rules 3.4-2A to 3.4-2D)**

Code Rule 3.4-2B

A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest.

However, you are disqualified from acting for a client receiving short-term summary legal services if you have actual knowledge of a conflict of interest:

- between the client receiving short-term summary legal services and an existing client;
- between the client receiving short-term summary legal services and an existing client of the *pro bono* or not-for-profit legal services provider; or
- between you and the client receiving short-term summary legal services.

(Code Rule 3.4-2A –3.4-2D, Commentary [2])

b) Confidentiality Considerations

Knowledge of confidential information that you receive while providing short-term summary services is not imputed to the other lawyers in your law firm. Therefore, other lawyers in your firm may act for any client adverse in interest to the client who receives your short-term summary legal services.
(Code Rule 3.4-2D Commentary [3])

Because of that possibility, you must take reasonable measures to be sure that no confidential information from that client is disclosed to any other lawyer in your firm.
(Code Rule 3.4-2D)

E. OTHER COMMON CONFLICTS SITUATIONS

1. Confidential Information Given to Legal Assistants

A lawyer must ensure that non-lawyer staff comply with the rules and with the duty not to disclose confidences of clients any firm in which the person works or has worked. Unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. **(Code Rule 3.4-23 [1] and [2])**

2. Attacking Your Own Work/Undermining a Former Client's Position

Unless your former client consents, you are not permitted to attack the legal work done during a previous retainer, and you are not permitted to undermine that former client's position on a matter that was central to the previous retainer. **(Code Rule 3.4-10 and Commentary [1])**

(For examples, see *Boston-Cloutier v. Boston,* 2015 ONSC 2510 (CanLII) and *Harder v. Sartorio*, 2020 ABQB 404 (CanLII)).

3. Imputed Knowledge

In situations where another lawyer in your law firm is representing a client, knowledge of that client's confidential information is imputed to you as a member of the same firm even if you have never worked on the file.

4. Joint Retainers

a) Overview

The rules about joint retainers apply whenever more than one client asks you to represent them on the same matter or transaction.

Representing multiple parties can be dangerous because the parties' individual interests may diverge even if they are initially aligned.

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

Prior to obtaining the clients' consents to enter into a joint retainer, you must inform the clients, preferably in writing, that you have been asked to act for all of them on a joint retainer and explain what the joint retainer requires.
(Code Rules 3.4-5 to 3.4-9)

b) Confidentiality in Joint Retainers

Clients must be told that in a joint retainer, 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.

They must also be told that if a conflict develops that cannot be resolved, the lawyer cannot continue to act for all of them and may have to withdraw completely. (**Code Rule 3.4-5**)

c) Conflicts or Contentious Issues in a Joint Retainer

If a contentious issue arises between clients who have consented to a joint retainer, you must not advise them on the contentious issue and must:

i) refer the clients to other lawyers; or

ii) advise them of their option to settle the contentious issue by direct negotiation, in which you do not participate, provided that:
   A. no legal advice is required; and
   B. the clients are sophisticated.

If the contentious issue is not resolved, you must withdraw from the representation.
(Code Rule 3.4-8)

If a contentious issue arises between clients who have consented to a joint retainer, the lawyer is not necessarily precluded from advising them on non-contentious matters.

The rule does not prevent a lawyer from arbitrating or settling a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. **(Code Rule 3.4-8 Commentary [1])**

d) Representation of Only One of Joint Retainer Clients

If clients consent to a joint retainer and also provide informed, written consent that you may continue to advise one of them if a contentious issue arises, you must withdraw from the joint retainer and refer the other(s) to new counsel. Only then can

you give legal advice to the one remaining client about the contentious matter. **(Code Rule 3.4-9)**

In this circumstance, while you can give legal advice to the sole remaining client about the contentious issue, if a dispute develops where you would be required to act against any of the formerly joint clients, you cannot act against them unless you have a new informed, written consent from each of them first.

Advance consent from your joint clients to permit you to act for only one of them on any contentious issue may be ineffective, because the clients granting the advance consent will not have all relevant information until the contentious issue develops. **(Code Rule 3.4-9 Commentary [2])**

e) Long Term Client on a Joint Retainer

> Before you accept a joint retainer from a regular, continuing client and another client in a matter or transaction, 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 regular, continuing client. **(Code Rule 3.4-6)**

If you have advised the clients as provided under **Code Rules 3.4-6 and 3.4-5**, and the parties still want to enter into the joint retainer, you must obtain the consent of each of them in writing or send a separate written communication to each of the proposed joint clients to record their consent. Only then may you act on the joint retainer.

f) Acting for Spouses or Partners on a Joint Retainer

Spouses or partners may retain you on a joint retainer to draft wills based on their shared understanding of the contents of their wills. You must follow the rules about a joint retainer and inform the spouses or partners of the lack of confidentiality between them and the risk that you might have to withdraw if any conflict arises between them during the joint retainer.
(Code Rule 3.4-5 Commentaries [2] and [3])

Preparing wills for spouses or partners on a joint retainer has a special commentary because of the risk that one of the spouses or partners might return to you some time after the wills are signed and ask you to change or revoke the will. That would normally be a new retainer, but because you acted for both on a joint retainer to draft the wills, you might be seen as acting against one party if you now change one will without their knowledge.

Before you act on a joint retainer for spouses or partners you should add to the usual disclosure that if only one of them later contacts you with different instructions than those given during the joint retainer, you will not disclose that fact to the other partner or spouse but you must not accept the request to act on new instructions.

There are some exceptions to this prohibition. You may act if:

i. the spouses or partners are divorced or have permanently ended their relationship;

ii. the other spouse or partner has died; or

iii. the other spouse or partner has been advised and agrees that you may act on the new instructions.

(Code Rule 3.4-5 Commentary [2] (c) i – iii)

See the Appendix for resources for a sample joint retainer and a sample written consent.

See the module on *Withdrawal of Legal Services* for information about how to withdraw and what is required under the Code.

g) Acting for Borrowers and Lenders

i. Generally, You Must Not Act for Both the Lender and the Borrower in a Mortgage or Loan Transaction

They are considered to be on opposite sides of the transaction and their interests are not the same.

> *Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.*
> **(Code Rule 3.4-12)**

ii. Exceptions to the Prohibition – Written Instructions

A "lending client" is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

Where you are jointly retained by a borrower and a lending client and you receive written instructions from the lending client to represent it as the

mortgagee or lender, those instructions are implied consent from the lending client to the joint retainer, unless the lending client specifically requires that its consent be reduced to writing. **(Code Rules 3.4-13 and 3.4-16 Commentary [1])**

Lawyers may also act for both lenders and borrowers where the lender is selling real property to the borrower and the mortgage which is the subject of the transaction is part of the purchase price, or the lawyer is practicing in a remote location where there aren't other lawyers that a party could conveniently retain, or if the lender and borrower are not at arm's length. **(Code Rule 3.4-14)**

iii. Disclosure to Borrower and Lender

When you are acting for both the borrower and the lender you must disclose to both all material information that is relevant to the transaction. These are facts that would be perceived objectively as relevant by any reasonable lender or borrower. The duty to disclose arises even if the lender or the borrower does not ask for the specific information. **(Code Rule 3.4-15 and Commentary [1])**

For example, if the borrower has a private loan separate from the loan or mortgage arranged with the lender in the transaction, you would be bound to disclose that to the lender and could not keep that confidential for the borrower. It might have an impact on whether the lender proceeds with the loan.

Another example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price.

5. Lawyers Transferring Between Law Firms

In any of the circumstances where a lawyer transfers to a new law firm or firms merge, there may be conflicts of interest between the clients of the old and new firms, bearing in mind that imputed knowledge may lead to a conflict of interest.

If the transferring lawyer has or may have confidential information relevant to any of the new firm's client matters, the transferring lawyer and the new law firm must review and comply with all the transfer rules set out in **Code Rules 3.4-17 to 3.4-23**.

a) Who is Affected by this Rule

"Law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. It includes as one law firm the various legal services units of a government, a corporation with separate regional

legal departments and an interjurisdictional law firm. **(Code Rule 3.4-18 Commentary [3])**

Disqualification rules are set out in **Code Rules 3.4-20-3.4-22**. The disqualification rules do not apply to lawyers employed by the government who transfer to another department, ministry or agency but continue to be employed by the same government. Neither do they apply to any internal transfers in which the lawyer continues to have the same employer as before.
(Code Rule 3.4-19 Commentary [1])

A "matter" does not include general "know-how" or, for government lawyers, providing general policy advice unless the advice relates to a particular client representation. **(Code Rule 3.4-17)**

b) Before a Transfer Takes Place

Before the transfer of a lawyer or an articled student from another law firm takes place, the new law firm and the transferring lawyer/student must determine whether any conflicts of interest exist. **(Code Rule 3.4-20 Commentaries [4] and [5]**)

> The new law firm will be disqualified from representing a client where the transferring lawyer/student actually has confidential information about the client matter which, if disclosed, may prejudice the former client of the old law firm, unless the client consents or reasonable measures are taken to prevent disclosure of the confidential information known by the transferring lawyer.

Note that the concept of imputed knowledge does not give rise to disqualification but the inference that lawyers working together in the same firm will share confidences on the matters on which they are working is enough so that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in **Code Rule 3.4-20**, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member(s) of the new firm. **(Code Rule 3.4-18 and Commentary [1])**

i. Limited Disclosure

To determine if the transferring lawyer/student actually has confidential information, the new law firm and the transferring lawyer/student may share confidential information about their clients to the extent reasonably necessary to detect and resolve conflicts of interest. The information disclosed must not compromise solicitor-client privilege or prejudice either client. **(Code Rule 3.3-7)**

In such circumstances, clients are presumed to give permission to the disclosure of only enough information (such as the very existence of the client which would otherwise be confidential) in order to check for conflicting interests. This is a special exception to the requirement that you must have your client's express permission to disclosing confidential information that is relevant to dealing with conflicts of interest. Such disclosure should only take place once substantive discussions regarding the potential transfer of firms or merger have occurred.

Code Rule 3.3-7 Commentary [6] contains a caution:

> *In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).*

The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer at the new firm, such as a designated conflicts lawyer.

ii. Obtain an Undertaking from the New Law Firm

The disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established. **(Code Rule 3.3-7 Commentary [5])**

The new firm will run the list through its conflict checking system to identify matches and comply with its undertakings about the access and use of the information.

iii. Reasonable Measures/The Confidentiality Screen

Disqualification of the new law firm may be avoided if the former client at the old law firm consents to the new law firm's continued representation or if the

new law firm has taken reasonable measures to ensure that the transferring lawyer will not disclose any of the former client's confidential information and has advised them of those measures.

The reasonable measures to be taken will depend upon the case. Generally, properly constructed confidentiality screens that are set up before the transferring lawyer moves to the new law firm are a minimal requirement.

A review of the **Code Rules 3.4-20 to 3.4-22** about disqualification and the guidelines about screening is essential in order to properly obtain consents from affected clients or otherwise take steps to prevent disqualification.

Code Rule 3.4-20 Commentary [3]

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: How to Screen/Measures to be Taken

1. *The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.*
2. *The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.*
3. *No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.*
4. *The firm should take steps to preclude the screened lawyer from having access to any part of the file.*
5. *The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.*
6. *These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.*

There is a specific obligation in **Code Rule 3.4-23** to ensure that transferring non-lawyer staff or others who have been retained by the lawyer or law firm comply with the transfer rules and do not disclose confidential information.

6. Acting for an Organization or Corporation

An organization or a corporation gives you instructions through a representative.

> The organization or corporation is your client, not the individual giving the instructions. You must work to serve and protect the interests of the organization or corporation.

A common situation where the risk of a conflict arises is where the shareholders and directors of the corporation are all from one family and the corporate instructions have always come from one family member to you. When an internal dispute among the shareholders or directors arises, beware. You must remember who you are representing and recommend that all the other parties to the dispute retain other lawyers to represent their own interests. **(Code Rule 3.2-3)**

It may be hard to send long-standing clients out of the law firm, but there is an inherent conflict if you try to represent the corporation's interests and the interests of a faction of the individual directors or shareholders. Your obligation to the corporation means you must treat all the directors and shareholders equally and cannot favour the interests of one faction over another in a dispute. (For example, see *Rice v. Smith et al.*, 2013 ONSC 1200 (CanLII) and *Zimak v. 4244354 Manitoba Ltd. et al.*, 2015 MBCA 58 (CanLII)).

That does not preclude you from accepting a joint retainer between the organization and a person associated with the organization where there is no conflict inherent in the retainer. **(Code Rule 3.2-3 Commentary [2])**. For example, a lawyer may advise an officer of an organization about liability insurance.

7. Conflicts of Interest for In-House Counsel

The basic principles dealing with conflicts of interest are the same whether dealing with in-house corporate counsel or counsel in private practice.

As an in-house lawyer, you may find conflicts of interest when employees of the corporation want to consult you for legal advice. Usually, the terms of your employment should set out whether and when you can provide any legal services other than the legal services you provide to the corporation or entity.

If you transfer from the corporation to private practice, you are subject to the transfer rules of the Code. You must also review the rules related to acting against your former client. You may find that the nature of the confidential information you have is largely related to the general operation of the corporation and that, in itself, will not likely be enough to disqualify you from acting against your former employer in unrelated matters.

…There is a distinction between possessing information that is relevant to the matter at issue and having an understanding of the corporate philosophy of a previous employer. This first scenario can bring about a disqualification because of conflict; the second does not. (Canadian Pacific Railway Company v. Thorvaldson, 1998 CanLII 5073 (MB CA)).

(For an example, see *Winnipeg (City of) v. The Neighbourhood Bookstore and Café Ltd.*, 2019 MBCA 3).

8. Conflicts of Interest When Sharing Space

Lawyers who share office space and/or certain common expenses, but otherwise practice law as independent practitioners with separate trust accounts, are not included in the definition of "law firm" in the Code despite the phrase "two or more lawyers practicing together" and may represent clients who are adverse in interest to the other lawyer's clients on related or unrelated matters. However, caution is required.

> Your duties of loyalty to your clients remain. When sharing space, be mindful of the risks of inadvertent disclosure of confidential information. **(Code Rule 3.3-1 Commentary [7])**

The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively.
(Code Rule 3.4-1 Commentary [10])

a) Duty of Confidentiality

You must keep confidential the information of anyone seeking your professional advice or assistance. You should not disclose having been consulted or retained by a person about a particular matter. You owe that obligation whether you agree to act or not. **(Code Rule 3.3-1 Commentary [5])**

> When deciding to share space with another lawyer, think about confidentiality issues in advance and plan the necessary steps to preserve your respective clients' confidentiality.

Think about the set-up of the office and how staff will handle receipt of client information.

You cannot share an assistant or a fax machine. You won't be able to share a server or a computer system without strong firewalls and passwords to protect against inadvertent disclosures of client information.

You may decide that you cannot share a common receptionist.

Where you share a common reception area, your clients may be seen by others seeking legal advice from the other lawyer. You might address this by advising your potential client of your shared reception area, such that they may see someone represented by the other lawyer including persons who might be adverse in interest to them. Ask for their consent and include it in your standard retainer agreement as a reminder and confirmation that they are consenting to that kind of disclosure.

b) Your Own Interest

The fact that you share space and expenses with the lawyer who may be acting on the other side of your client's matter may give rise to conflicts of interest. It might appear to your client that there is a risk of a conflict between your interest in continuing your good relationship with the other lawyer and fighting vigorously to protect your client's interests.

c) Screening for Conflicts

If you and the other lawyer agree that you will not act for clients who are adverse in interest you will need to screen for conflicts of interest before accepting clients.

In this circumstance, you must disclose to your potential clients the name of the other lawyer, that you are sharing space and that you have agreed that you will not act for clients who are adverse in interest with each other on a matter.

You will need your potential client's permission to disclose their name and those of related persons in the matter so that you and the lawyer with whom you share space can run the names through your conflicts search systems.

F. CONFLICTS OF INTEREST WITH CLIENTS

1. General Rules for Business Transactions

Code Rules 3.4-27 to 3.4-41 set out obligations that apply directly to you if you are involved in any business transactions with a person who is also your client, and should be followed scrupulously.

Code Rule 3.4-27 contains an expanded definition of "lawyer" and a special definition of "related persons" in relation to all transactions between you and a person who is also your client.

> ***Code Rule 3.4-27***
>
> *"**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.*
>
> *"**related persons**" means related persons as defined in the Income Tax Act (Canada).*

(See *Income Tax Folio S1-F5-C1*, Related Persons and Dealing at Arm's Length for the definition of "related person").

A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client, except as permitted under the Code. That requires disclosure of the conflict, and informed consent from the client after receiving independent legal advice. **(Code Rules 3.4-28 and 3.4-29)**

2. Doing Business with a Client

a) Independent Legal Advice

If you are personally entering into a transaction with a client who is represented by you in another legal matter or will be represented by you in the transaction, you **must** send the client for independent legal advice (and in some circumstances independent legal representation) before the client can consent to you acting on the transaction. **(Code Rule 3.4-29)**

Legal advice from an independent lawyer protects the client and protects you because it makes it easier to prove that the client's consent to your representation, despite your personal interest in the matter, is informed, genuine and not coerced.

Generally, you cannot enter into a transaction with your client unless:

- the transaction is fair and reasonable to the client **(Code Rule 3.4-28)**; and
- the client has been advised of the conflict or the potential for conflict; and
- the client has independent legal representation, or independent legal advice **(Code Rule 3.4-27)**; and
- the client consents to the transaction.

The lawyer who provides independent legal advice in these circumstances, must meet all the obligations in **Code Rule 3.4-30 Commentary [5]**.

b) Inherent Conflict of Interest

Generally, it is not a good idea for you to enter into a transaction with your client and also accept a retainer to provide the legal services for the transaction because of the inherent conflict of interest.

You cannot put your own interests ahead of the client's interests when doing the transaction if you are also acting for the client. If there is any contentious issue it will have to be resolved in favour of the best interests of the client. **(Code Rule 3.4-30 and commentaries)**

3. Borrowing From or Lending Money to a Client

a) Overview

When the transaction with your client involves lending or borrowing money, buying or selling property or services having other than 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, before the client can consent to enter into the transaction, the steps set out in **Code Rule 3.4-29** must be followed in sequence:

(a) ***disclose*** *the nature of any conflicting interest or how a conflict might develop later;*

(b) ***consider*** *whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and*

(c) ***obtain*** *the client's consent to the transaction after the client receives such disclosure and legal advice.*

The steps in **Code Rule 3.4-29** do not apply where a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest; or where the lawyer borrows money from a client that is a bank or other entity that lends money in the ordinary course of business. **(Code Rule 3.4-30)**

b) Borrowing

i. Borrowing from a Lending Institution

You may borrow from a client if the client is in the business of lending money to the public. You may borrow from a bank or credit union, even if you also act for the bank or credit union. **(Code Rule 3.4-31 (a))**

ii. Borrowing from a Related Person

You may borrow from your parent or your spouse for example, even if you also act as lawyer for them because the **Code Rule 3.4-31 (b)** permits you to borrow from a "*related person"* as defined by the *Income Tax Act* (Canada).

However, if you are borrowing from a related person who is also your client, you must also:

- disclose that you are in a conflict of interest by being both the borrower and the lawyer and explain the nature of the conflicting interest to the client; and
- require that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation before lending you the money.

iii. Borrowing from a Client Through an Entity in which You and/or Your Spouse have a Direct or Indirect Substantial Interest

You can only borrow money from a client if the client is in the business of lending money or if you borrow from a related person.

If you are borrowing the money from one of these two types of permitted client but you are borrowing through a corporation, syndicate, or partnership in which you and/or your spouse have a direct or indirect substantial interest, it might not be readily apparent to the client who is lending the money that you, as the lawyer, have a conflicting interest.

Therefore, if you are borrowing the money from a client through such an entity, **you must**:

(a) disclose the nature of the conflicting interest to the client who is lending the money to the entity; and

(b) require that the client obtain independent legal representation. You cannot act for the lender client on that transaction.

(Code Rule 3.4-32)

iv. Lender/Investor Looking to You for Guidance

You may owe obligations to someone who is lending you money or investing in something where you have an interest that are the same as the obligations that you owe to a client.

You may not have considered that person as a client but if the lender/investor who is lending you money or investing in you is doing so under circumstances where it is reasonable that the lender/investor looks to you for guidance or advice about the loan or investment, you are bound by the same fiduciary duties that attach to you when dealing with a client. Whether that person is considered a client is determined having regard to all circumstances.
(Code Rule 3.4-32 Commentary [1])

c) Lending

In addition to the general rules for borrowing and lending noted above, when you lend money to your client, before you make the loan, you must disclose to the client the nature of the conflicting interest and require that the client receive independent legal representation (or independent legal advice if the client is a related person as defined by the *Income Tax Act* (Canada)). You then must obtain the client's consent. **(Code Rule 3.4-33)**

You are permitted to pay for necessary disbursements in a legal matter you are handling for a client and then bill those disbursements to the client.

4. Acting as a Guarantor or Surety

Guarantees by a lawyer are permitted only in limited circumstances.

You may not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is the borrower or lender. **(Code Rule 3.4-34)**

There are limited exceptions to this rule. You may give a personal guarantee if:

(a) the lender is a bank or similar entity that lends money in the ordinary course of business, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;
(b) the transaction is for a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution; or
(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:
i. the lawyer has complied with rules 3.4-28 to 3.4-35; and

ii. the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

(Code Rule 3.4-35)

A lawyer may act as Surety for the Judicial Interim Release for an accused when the lawyer is in a family relationship with the accused and the lawyer's partner or associate is representing the accused. The lawyer cannot act for their family member in this circumstance. **(Code Rules 3.4-40 and 3.4-41)**

5. Gifts and Testamentary Instruments

You must not accept a gift that is more than nominal, or testamentary gifts from your client unless the client receives independent legal advice before the gift is given or the client is also your family member. **(Code Rule 3.4-37 and 3.4-39)**

You cannot include a clause in your client's will that directs the executor to retain your legal services when it comes time for the client's estate to be administered**.**
(Code Rule 3.4-38)

6. Sexual or Close Personal Relationships with a Client

This is a personal conflicting interest that is not imputed to your firm so another lawyer in your firm who is not involved in the relationship may handle the client's work.
(**Code Rule 3.4-1 Commentary [10]**)

> For a further discussion, see the article "*Can a Lawyer Represent a Family Member*" in the November 5, 2021 edition of Canadian Lawyer Magazine.

7. Property as Payment for Legal Services

Payment for Legal Services by transferring property is permitted**.**

When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a nonmaterial interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.
(Code Rule 3.4-36)

Commentary
[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

G. CONFLICTING ROLES

1. The Lawyer as Witness

A lawyer acting for a client should not be a witness in that matter, unless the matter is purely formal or uncontroverted. The lawyer should not act as an unsworn witness or put the lawyer's own credibility in issue. If the lawyer must be a witness, another lawyer should have conduct of the case. **(Code Rules 5.2-1 and 5.2-2)**

2. Lawyer as Mediator

When a lawyer acts as a mediator, neither the lawyer nor any partner or associate should provide legal advice. The lawyer may provide legal information, including the consequences if the mediation fails.

The mediator should encourage each of the parties to obtain independent legal advice before and during the mediation, and should expressly advise that they obtain independent legal advice if the mediator has prepared a draft contract based on any agreement reached. Communications in mediation will not be covered by solicitor-client privilege, but may be covered by privilege, such as without prejudice communications**. (Code Rule 5.7)**

3. Miscellaneous Conflicts

a) Outside Interests and the Practice of Law

A lawyer who maintains another business, occupation or profession while practicing law must not allow that other interest to interfere with or jeopardize their professional integrity, independence or competence. **(Code Rule 7.3-1)**

The lawyer's other interest may also create conflicts in their representation of clients, either by virtue of a conflict between their own interest and that of the client, or because the outside interest occupies too much of their time, impairing their ability to look after the client's interests. **(Code Rule 7.3-2)**

b) Holding Public Office

The standard of the lawyer's conduct in their public role must be as high as the standard required of a practicing lawyer. The lawyer must also be mindful of conflicts. **(Code Rule 7.4)**

c) A Personal or Business Relationship with a Judicial Officer

A lawyer should not act where they, their associate or the client have a personal or business relationship with the judicial officer/decision maker. Such a relationship may give rise to the appearance of partiality by the decision maker.
(Code Rule 5.1-2)

H. PRACTICAL TIPS

1. Do a conflicts search

Always do a conflict search before accepting a new legal matter, even from a regular client. Get only enough information from a potential client to run the names through your conflict search system which will determine whether you can meet with the person on the merits of the matter.

2. Conflicts can be complicated to identify – consult

Decisions about conflicts can be very complicated. If you can, talk it over with another lawyer in your firm who is familiar with the nuances of conflict situations. Consider designating one or more lawyers to be responsible for making objective decisions in every situation of a potential conflict of interest.

> Never hesitate to check if you are unsure about a conflict of interest. Call the Practice, Ethics and Equity Advisor at the Law Society for an informal discussion about whether a conflict of interest exists and what options might be available.

3. Do not lump several clients or client matters in one General or Miscellaneous file

If you decide to act for a client, even if you do not plan to charge any fees, open a file for each client matter. Opening a separate new file for every client matter ensures that the client and all names relevant to the client matter are entered into your conflict search system for the future.

4. Circulate lists of new clients

You might circulate a list of new firm clients as an extra reminder for everyone to be aware of any potential for conflicts. You might also circulate the names of potential clients as part of your conflicts search.

5. Don’t delay making a decision about a new matter

Make decisions about potential clients or new matters quickly. If there is a conflict of interest, tell the potential client as soon as possible that you must decline the retainer and send out a non-engagement letter. Be clear that you are not in a solicitor-client relationship, you are not representing that person’s interests in any way and you have not obtained any confidential information from them.

6. Close files promptly once completed

Closing a file when you are done turns a current client into a former client for the purpose of conflicts of interest in future. Delay in closing a file might compromise a conflict search by allowing a long-finished matter to raise a conflicts problem because on the record, the client matter is reflected as being a current matter.

7. Consider other interests

Think about all other interests that might affect your representation of the client and ensure there is no serious risk that some other interest will have a material adverse effect on your representation.

8. Do conflict searches at key points in the file and when new lawyers or staff join the firm

Conflicts of interest can arise during the conduct of a file. Do searches for potential conflicts, whenever there are changes in instructions, new parties or lawyers become involved or before new lawyers or staff transfer to your firm.

9. Do not act for more than one client on a legal matter

Make this your default policy. Even if all the clients consent, you should avoid acting for more than one client when it is likely that a contentious issue will arise between them or that their interests, rights or obligations will diverge as the matter progresses.

10. Joint retainers

If more than one client wants to retain you on a single legal matter, review the rules about joint retainers and enter into a joint retainer with them, if appropriate.

11. Conflicts and acting with consents of all parties

Before accepting a retainer, if you think there is potential for a conflict of interest to arise with a former or current client, review the rules and:

a) make full disclosure to all affected persons without breaching your duty of confidentiality;

b) obtain every affected client's written consent, which must be an informed, genuine and not coerced consent;

c) if any client is vulnerable or not sophisticated, consider referring them for independent legal advice before seeking any consents.

I. APPENDIX – OTHER RESOURCES

1. Canadian Bar Association (available to CBA members)

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