



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

Response to Federation of Law Societies of Canada Advisory Committee on Conflicts of Interest Final Report

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Conflicts of Interest Task Force of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been approved as a public statement of the Canadian Bar Association.

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Response to Report of Advisory Committee on Conflicts of Interest

I. EXECUTIVE SUMMARY

- The CBA supports the harmonization of Codes of Professional Conduct across Canada. The CBA and the Advisory Committee on Conflicts of Interest (the “Advisory Committee”) share much common ground but we disagree on an issue of profound importance.
- The CBA recognizes the importance – and the difficulty – of the issues at stake in conflicts of interest. It is important for the public interest in the administration of justice and the interests of the legal profession across Canada that appropriately high professional standards be maintained.
- The CBA is concerned that a rule not be adopted that undermines the public interest by its over-breadth and negative impact on both choice of and access to counsel. Just as courts must avoid inflexible and immutable standards, so should the law societies.
- The central issue raised by the Final Report of the Advisory Committee is whether a new rule of professional conduct should be adopted which would always require current client consent even if there is no real or no substantial risk of impairment of client representation. Also at issue is whether a new rule of professional conduct should be created which relies on an interpretation of the common law that is not yet settled.
- The CBA is unable to support the Advisory Committee’s recommendation on current client conflicts for the reasons set out in this response. There are real and serious difficulties, for clients and lawyers alike, with the rule proposed by the Advisory Committee.
- We urge the Federation to engage in further consideration and consultation with a view to developing the best rule in the public interest.
- If further consideration and consultation is not possible, it would be preferable to allow the common law to continue to evolve, and not codify one interpretation of the current law into an even more inflexible rule of professional conduct.
- We also encourage the Federation to modify conflict rules that discourage the provision of pro bono legal services.
- The Advisory Committee’s recommendation to permit concurrent representation of two or more clients with competing interests requires greater elaboration to develop appropriate limits and safeguards.
- We recommend modifying Commentary 2.04(2), which appears to require all uninvolved lawyers in a firm to disclose personal interests in every new matter which a firm takes on.
- We propose a number of other drafting changes.

II. COMMENTARY

The Canadian Bar Association thanks the Federation of Law Societies of Canada for the opportunity to comment on the Final Report. The CBA strongly supports the Federation's initiatives to harmonize and update the Codes of Professional Conduct across the provinces and territories. The CBA is keenly aware of the public interests raised by conflicts of interest, and also the real difficulties encountered by lawyers across the country, in a variety of practices, both big and small.

The CBA formed a broad-based Task Force in 2007 to examine the issues of conflicts of interest. The Task Force consulted through an Interim Report, seeking input from clients and the Canadian legal profession. It held consultation meetings in every province and territory, with a broad cross-section of the profession. It received hundreds of responses. After this extensive and unparalleled consultation, its Report was adopted by the CBA Council in Québec City in August 2008.

The CBA recognizes and respects the roles and responsibilities of the law societies, and their coordinating body, the Federation of Law Societies of Canada. As Justice Sopinka, for the majority, held in *Macdonald Estate*:

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

We make the comments below because significant issues of principle are engaged, most notably, whether professional conduct codes should simply attempt to codify the common law as currently articulated in case law, or play a role in developing that law.

Unfortunately the Advisory Committee's Report is not as clear as it might have been on the factors which led it to its recommendations. Its analysis is largely conclusory and it does not appear to have engaged in consultation, beyond an early meeting with some CBA Task Force members. In this response, we discuss the other recommendations made by the Advisory Committee. However, because of its significance, we focus on the current client rule. The major concern is the over-breadth of the Advisory Committee's proposed current client rule.

The CBA Task Force recommended a 'Substantial Risk Principle', which was subsequently adopted in the CBA Code of Professional Conduct. The recommendation:

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

4. provided guidance by commentary that a conflicting interest may arise in the context of a conflict of duty with relationship, when a lawyer's duty to another person impairs client representation by materially impairing the lawyer's relationship with a client.

By contrast, the central recommendation of the Federation's Advisory Committee (the *Proposed Current Client Rule*) is:

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

In making this recommendation, the Advisory Committee argues:

- This Proposed Current Client Rule is consistent with the “bright line rule” from *Neil and Strother*. The Advisory Committee considered that the “bright line rule” was not *obiter* in *Neil* and that, in any event, it had been unambiguously reinforced by the majority in *Strother*.
- Adopting the current client rule in the CBA *Code of Professional Conduct*, (the CBA *Current Client Rule*) would be inconsistent with the Advisory Committee's understanding of the common law since it would permit a lawyer to act without disclosure and consent if a matter is “unrelated” and if there is no substantial risk of material and adverse effect on client representation.
- The Advisory Committee was not prepared to propose a current client rule that varied from its understanding of the common law. To do so might risk lawyers being disqualified by the courts despite complying with the law societies' rules which was said to be an untenable position.
- The Advisory Committee asserts that the CBA Current Client Rule does not take sufficient account of the fiduciary nature of the relationship between lawyer and client as the potential exists for a client to feel “betrayed” if, without disclosure and informed consent, the lawyer acts directly adverse to the immediate interests of the client.
- The Advisory Committee does not discuss any alternatives other than its interpretations of the common law and the CBA rule.

A. Analysis is Unclear

The Advisory Committee does not explain its view of *Neil* and *Strother*. Neither *Neil* nor *Strother* involved an unrelated matter. The court did not need to apply the “bright line rule” in either *Neil* or *Strother* because both cases found a conflicting interest. Indeed, in *Strother*, the majority held that the “bright line” had not been crossed, yet found a breach of fiduciary duty. The Advisory Committee does not mention that *Strother* was decided in a five-four decision with the Chief Justice, in dissent, interpreting the “bright line rule” as does the CBA.

The Advisory Committee does not mention other judicial interpretations of the “bright line rule”, including the recent decision of Justice Popescul of the Saskatchewan Court of Queen's Bench (2009 SKQB 369, now under appeal) in *Wallace v. Canadian National Railway* in which he concludes that the CBA Current Client Rule is premised on a proper interpretation of *Neil* and *Strother*.

Neither the Supreme Court of Canada nor any provincial or territorial appellate court has yet considered a case in which the “bright line” has been crossed in an unrelated matter or in which the “bright line” is crossed without substantial risk of material and adverse effect on client

representation. Indeed, it is not clear that any court has found a breach of fiduciary duty or disqualified a lawyer in any such case.

The Advisory Committee's recommendation rests on its understanding that the common law, as interpreted by the Advisory Committee, is settled law in Canada and that the CBA Current Client Rule, as understood by the Advisory Committee, is inconsistent with Canadian common law. This is asserted but not explained. Nor does the Advisory Committee indicate why codification of one interpretation of the common law would be desirable.

The Advisory Committee does not explain how adopting the CBA Current Client Rule would put client interests or professional values at risk. There is no consideration of the safeguards adopted by the CBA in the CBA Current Client Rule to guard against the risk of impairment by client feelings of betrayal.

Our view is that codification of this interpretation of the common law is unnecessary and would cause harm if implemented. In our view, it would be better that there be no reference to a current client rule than to codify a harmful rule. If the law societies implement the Proposed Current Client Rule, the courts will likely conclude that, since the law societies have considered the issue, the Advisory Committee's interpretation of the common law should be universally applied and the courts need not continue case-by-case development of the law. If it is necessary not to have a rule which permits that which the court might prohibit, the better route is not to codify any rule. If the law societies choose to defer to the courts, fearing inconsistency, it would be better to leave the matter entirely to the courts until the common law becomes settled.

Rather than adopting an overly-broad and rigid rule, the CBA encourages the Federation to take the leadership role set out in *MacDonald Estate* in assisting the courts to develop the common law in the public interest.

B. Focus Should be on Risk

The essential public policy problem with the Advisory Committee's Proposed Current Client Rule is that it is over-broad. The Proposed Current Client Rule would prohibit clients retaining the lawyer of their choice even if there is no risk of material and adverse effect on client representation. While it can be legitimately debated whether substantial risk should be tolerated, there can be no principled basis to establish a veto right of unreasonable refusal where there is no risk of prejudice. While sometimes there is a genuine risk of impairment of the client relationship because a client might feel "betrayed", this is not always the case. The Advisory Committee does not justify the over-breadth of their Proposed Current Client Rule. They do not address the fact, which the CBA Task Force found after extensive consultation, that the interpretation of the "bright line rule" understood by the Advisory Committee causes very real and unnecessary problems for clients and lawyers.

Justice Binnie's analysis of when a lawyer could be disqualified on grounds of conflicting loyalties did not end with the "bright line rule". A page later in *Neil*, he adopts the notion of a "conflict" in paragraph 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person". Subsequent courts have interpreted this as introducing two conditions which must be met before a lawyer can be removed due to a conflict of loyalty, namely that there is a substantial risk that the new client's representation will be adversely affected and that it will be affected in a material way. These important additional conditions are not reflected in the Advisory Committee's recommendations.

C. Problems Posed for Clients and Lawyers

The CBA Task Force experienced the depth and breadth of the concern with the proposed current client rule across Canada, in remote and urban areas, for solo practitioners, in small and large firms, in general and specialized practice areas, and on the part of individuals and large corporate clients alike. It surprised the Task Force to hear from in-house counsel about the problems that the “bright line rule” is creating for them in preventing them from continuing to work with counsel of their choice. These are concerns that clearly affect the public interest.

The CBA Task Force Report set out the practical problems posed both for clients and the legal profession by the Advisory Committee’s interpretation of the common law. For example:

- In practice areas where shortages of lawyers or concentrated talent exist, a rule that disqualifies lawyers without a proper assessment of risk may impair access to justice. The CBA Task Force was told about examples involving lawyers practicing in remote communities, with few lawyers, and especially in Canada’s territories.
- The interpretation appears to prevent lawyers from relying on an *institutional litigant* exception when dealing with governments, large financial institutions and other frequent litigators before the courts.
- Finally, permitting one client to veto another client’s choice of counsel, even where there is no relationship between the mandates and no risk of harm, encourages the very sorts of tactical and unprincipled disqualifications that the courts have criticized. Each such conflict denies another client choice of counsel.

D. Don’t Rush Change Without Consultation

The issues addressed by the Advisory Committee are too critical and controversial to be concluded on an apparently summary analysis without further consultation. The failure to consult puts harmonization of conflicts rules across Canada at risk. A decision to leave consultation to individual law societies will likely lead to the adoption of different rules in different jurisdictions. There is value in exposing these issues to broad comment within all sectors of the profession before adopting a model rule, if only to spur national discussion on an issue of significant importance.

The CBA strongly encourages the FLSC to engage in a formal consultation process and study before adopting a current client rule. Law Societies may also wish to engage in consultation before considering the options for action. We have identified four options and set out the advantages and disadvantages of each.

E. Options for Action

i. Proposed Current Client Rule

Recommended by Advisory Committee

Advantages

Brevity and simplicity.
 Represents one interpretation of the “bright line rule”.
 Lawyers who follow the rule would not be at risk of disqualification by the courts.
 Always requires disclosure and consent.

Disadvantages

Overly-broad and more rigid than the common law.
 Risks freezing one interpretation of the common law that is not settled law which creates significant difficulty and unnecessarily overrides clients’ right to counsel of choice. Codification of the Advisory Committee’s interpretation into a law society code may be viewed by courts as a basis to prefer that interpretation of the common law. The common law appears to be in evolution since *Neil and Strother*.
 Exacerbates shortage of lawyers, especially in rural and remote areas. Unworkable in certain practice areas. Does not take into account different kinds of lawyers and different kinds of clients.
 Restricts choice of counsel in situations where there is no real risk of material and adverse effect on client representation.

ii. Substantial Risk Principle

Recommended by CBA Task Force and adopted by CBA in amendments to the *Code of Professional Conduct*.

Advantages

Consistent with the alternate judicial understanding of the “bright line test” as expressed in the case law.
 Promotes choice of and access to counsel.
 Focuses attention on risks to clients.

Disadvantages

FLSC Advisory Committee asserts lawyers would be in an invidious position if they complied with law societies’ rules on risk, yet were disqualified by the courts.
 Client consent would not be required in matters with no substantial risk of impairment.

iii. Further FLSC Consultation to Develop Best Rule in the Public Interest

Recognizes that law societies should adopt a rule which best serves the public interest rather than selecting between two perceived alternatives.

Advantages

Consistent with the proper role of the governing bodies.

Would assist, rather than freeze, evolution of the common law.

Disadvantages

Could be inconsistent with one understanding of the common law.

iv. Allow Common Law to Develop

Recognizing the divergence between the CBA and the Advisory Committee, doing nothing would preserve the status quo. Professional codes would be silent on the issues.

Advantages

Permits the evolution of the common law.

Disadvantages

The CBA and law societies could be criticized for failing to take a principled position on this complex issue.

F. Other Recommendations

The bulk of the Advisory Committee's other recommendations are not controversial, and we support them. In many respects, they parallel the recommendations of the CBA Task Force. For example, while using different words to define conflict of interest, the two approaches will, in practice, not practically differ. The Advisory Committee would follow the CBA in the definition of the client, excluding related parties or non-clients, but there are drafting issues with the recommendations which merit consideration. These are summarized below. The Advisory Committee adapts the Ontario rule on acting for borrower and lender, and suggests its incorporation into the Federation's *Model Code*. We endorse these changes.

i. Concurrent Representation for Competing Interests

A more controversial proposed model rule (and one not recommended by the CBA Task Force) concerns concurrent representation, whereby a firm with client consent could have two teams working for clients with "competing interests", behind ethical screens. The concept of "competing interests" is neither defined nor explained. While the commentary to this change uses as an example competing bids in a corporate acquisition, the rule does not limit concurrent representation to those circumstances. While it may be perfectly acceptable for two competing bidders to consent to a law firm protecting their confidential information through the use of ethical screens, such concurrent representation could not extend to litigation in which the parties were directly adverse. It is unclear whether this proposed model rule would permit lawyers within a firm, separated by ethical screens, to act on opposite sides of a complex transaction. This proposed model rule needs to be clarified and, depending on the intended effect, narrowed or justified.

ii. Pro Bono Exception to Conflict Rules

Some Canadian jurisdictions (notably Ontario and Alberta) have recently amended their Codes of Professional Conduct to deal with conflict of interest where short-term limited legal services

are provided *pro bono*, through duty counsel or through legal aid programs. The CBA Task Force received submissions from pro bono groups and legal aid offices in a number of jurisdictions.

The CBA has a long history of encouraging lawyers to provide pro bono services, as a means to promote better access to justice for all. We believe the Federation should support pro bono initiatives by limiting to the greatest extent possible barriers in the *Model Code* for lawyers providing pro bono services. It will not be possible in an assignment court, a community clinic, or a pro bono office to run the sort of conflict of interest searches that would be possible in office practice during regular office hours. The rules across Canada should recognize this and not operate to disqualify every lawyer in a firm where a single lawyer or sub-group of a firm has been exposed to confidential information, or may have provided short-term limited advice to persons who turn out subsequently to be adverse to current clients.

The following appear to be drafting issues since they are not explained in the Advisory Committee Report:

iii. Extension to “Likely” Conflicting Interests

2.04(2) “A lawyer must not act or continue to act in a matter when there is, or is likely to be, a conflicting interest, unless, after disclosure, the client consents”.

The definition of “conflicting interest” in the proposed model rules is based on the existence of a “substantial risk”. Including the words “or is likely to be” is inappropriate. There is no basis upon which a lawyer could predict that a risk is likely to exist in the future where that risk is not yet perceived. If the change is intentional, distinguishing between likely future risks and current risks would unintentionally diminish the impact of the draft rule.

iv. Extension of Disqualifying Personal Interest to Others

Commentary to Rule 2.04(2)
“A lawyer should not act for a client if the lawyer’s duty to the client and the personal interests of the lawyer, a law partner or an associate are in conflict”.

This commentary suggests that the personal interests of all partners and associates in a firm are to be investigated and considered even if those lawyers are not involved in client representation. This is presumably unintended as personal interests of uninvolved lawyers could not impair client representation. Requiring all lawyers in a firm who are not involved in every new matter to understand the substance of the matter and to disclose any relevant personal interests is of concern.

v. Extension of Former Client Rule to Non-clients

2.04(5) “Unless the client consents, a lawyer must not act against a former client or against persons who were involved in or associated with a former client in a matter in which the lawyer represented

There is no explanation for the inclusion of non-clients (to whom no fiduciary duty or duty of lawyer-client confidentiality is owed) in the rule regulating adversity with former clients. While obligations (including ordinary duties of confidence) may be owed to non-clients, the elevation of such obligations to the same standard as clients is of concern.¹ If the concern is

¹ While there are cases in which lawyers have been disqualified on this basis, these are litigation cases in which it was concluded that confidence in the administration of justice was put at risk in the specific context at bar. However, this rule applies well beyond the context in which the courts have found it applicable. c.f. *Canadian Union of Public Employees, Local 569 v. Human Rights Commission*, (2009), 289 Nfld. & P.E.I.R. 283 (N.L. C.A.)

the former client ...”

to address possession of privileged information of non-clients, a better approach (as found in recent case law²) would be proper screening where relevant privileged information of a third party is possessed.

vi. Extension of Transferring Lawyer Rules to Non-clients

2.04(17) “Client”, in this subrule, bears the same meaning as in the Definitions chapter, and also includes anyone to whom a lawyer owes a duty of confidentiality, even if no solicitor-client relationship exists between them;

Rule 2.04(17) deals with transferring lawyers. The effect of the extended definition of “client” for the purpose of this rule is to require that a firm cease to act for an existing client, absent proper screening, where the transferring lawyer is possessed of relevant confidential information not as a result of a solicitor-client relationship. Other than privileged information, the basis for this imputation to the receiving firm of duties of confidence owed by transferring lawyers to non-clients and to protect non-clients is of concern. This elevates the interests of former non-clients of a transferring lawyer over the interests of the existing clients (and non-clients) of the new firm.

III. ANALYSIS OF PROPOSED CURRENT CLIENT RULE

A. The Central Question

It has long been well established law that fiduciaries, including lawyers, are not permitted to act or continue to act in matters when there is a conflict, unless, after disclosure, the client consents. The concept of a conflict has been described in various ways but the concept is of long standing. A fiduciary cannot, without proper consent, act with a potentially inconsistent duty or personal interest.

This concept of a conflict was clearly defined in the Supreme Court of Canada in *Neil* and *Strother* as meaning a:

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

What is at issue is a new common law rule for lawyers, sometimes called the “bright line rule”, which did not exist in Canadian law until 2002. The purpose of this new rule is to protect client representation.

It is not yet settled whether this development of the common law requires client consent even if there is no real or no substantial risk of impairment of client representation.

² *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189
Roadrunner Apparel Inc. et al. v. Gendis Inc. et al., [2007] 3 W.W.R. 459 (Man. C.A.)
Stewart v. Humber River Regional Hospital (2009), 95 O.R. (3d) 161, 248 O.A.C. 331 (Ont. C.A.)
Euclide Cormier Plumbing and Heating Inc. et al. v. Canada Post Corporation et al., (2008), 334 N.B.R. (2d) 211, 296 D.L.R. (4th) 738 (N.B. C.A.)

The central question is whether a corresponding new rule of professional conduct should be adopted which would invariably require current client consent even if there is no real or no substantial risk of impairment of client representation. At issue is also whether a new rule of professional conduct should be adopted on the theory that the proposed rule codifies the common law when the common law is not yet well settled.

This question arises because the effect of an overly-broad and rigid requirement is to deprive clients of the lawyer of their choice, and to prohibit lawyers from accepting a retainer. The proposed rule would apply even where there is no real risk of impairment of client representation, whether by harm to the lawyer-client relationship or otherwise, and consent can not be obtained.

B. Advisory Committee Approach

The Advisory Committee explains the rationale for its Proposed Current Client Rule in paragraphs 31 to 44 of its Final Report. Essentially, the Advisory Committee recommends codifying its reading of the common law.

Paragraph	Advisory Committee Report	Analysis
31 to 34	The Advisory Committee starts by contrasting its understanding of the <i>Neil</i> “bright line rule” with the current client rule adopted in the CBA Code of Professional Conduct (the CBA Current Client Rule).	<p>The CBA Current Client Rule is not correctly described. This impairs consideration of the CBA rule.</p> <p>The statement of the <i>Neil</i> “bright line rule” is one interpretation of that rule. The other interpretation requires an assessment of risk of impairment.</p>
35 to 37	The Advisory Committee argues that its recommendation is justified as consistent with the current client rule established in the case law whereas the CBA rule is inconsistent with the case law. It argues that the law societies should not adopt a current client rule which differs from the current client rule established by the courts (the “common law rule”).	This argument fails to recognize that that the common law has been interpreted in different ways and that the law is still developing. One interpretation in a small number of cases is compared with an incomplete understanding of the CBA rule.
38 to 40	The Advisory Committee asserts that the recommended rule is consistent with fiduciary law in its requirement for disclosure and consent. It further supports rejection of the CBA rule by asserting that (i) adoption of the CBA rule would “arguably” not uphold the public interest responsibilities of the law societies and (ii) the CBA rule does not take “sufficient account” of the fiduciary nature of the lawyer-client relationship.	The basis for these assertions is not explained in any depth.

41 to 44	It discusses the issue of implied consent for sophisticated clients and the propriety of clients retaining firms with minor work to create an artificial disqualification of the firm for strategic reasons, thus preventing the firm from acting for others on unrelated matters. It notes that the attempt to create conflicts for purely tactical reasons is contrary to the ethical requirement that lawyers act in good faith	This does not consider whether adopting its recommended current rule actually furthers the public interest.
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C. Issues with Advisory Committee Approach

There are several fundamental problems with the analysis in the Final Report. The failure to properly appreciate the CBA rule results in a flawed consideration of the CBA rule from both a public interest and fiduciary law perspective. Furthermore, the failure to recognize that there are alternative understandings of the common law results in a flawed comparison of the CBA rule with what is assumed to be a settled judicial rule. Recommending that the law societies codify the judicial rule is problematic when it is apparent that the judicial rule as developed by the courts differs from the recommended rule. Absent explicit and clear analysis of whether adoption of the recommended rule is in the public interest, choosing between the Advisory Committee's interpretations of the common law and the CBA rule, results in a flawed recommendation.

i. The Common Law (as it is currently evolving)

The Advisory Committee did not appear to have considered whether the common law rule actually applies where there was no substantial, or any, risk of material and adverse effect on client representation. This is assumed in their Final Report without analysis or explanation.

While this is one interpretation of *R. v. Neil*³ and *Strother v. 3464920 Canada Inc.*,⁴ there is another interpretation, which has received judicial support. As the CBA Task Force on Conflicts of Interest, after significant discussion,⁵ stated:

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

In *Wallace v. Canadian Pacific Railway*⁶, Justice Popescul accepted this interpretation of the *Neil* rule as the following excerpt from his reasons indicates:

³ [2002] 3 S.C.R. 631, 2002 SCC 70

⁴ [2007] 2 SCR 177

⁵ Final Report of the CBA Task Force on Conflicts of Interest at pp. 42 to 44

⁶ *Wallace v. Canadian Pacific Railway*, [2009] 12 W.W.R. 157 (Sask. Q.B.) appeal outstanding to Court of Appeal for Saskatchewan.

[30] Although a quick and superficial reading of the “bright line rule” could lead to an interpretation that there is virtually an absolute prohibition that prevents law firms from acting for two clients adverse in interest, even in unrelated matters, absent informed (or implied) consent by both clients – a more in-depth and contextual examination of the rule leads to a somewhat different conclusion.

[31] In my view, the appropriate interpretation of *Neil* is that, absent proper consent, a lawyer may not act directly adverse to the immediate interest of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer’s representation of the current client would be materially and adversely affected by the new unrelated matter. This interpretation of *Neil* is the same as that adopted by the CBA Task Force on Conflicts of Interest, “*Conflict of Interests: Final Report, Recommendations & Toolkit*”, August 2008, Canadian Bar Association, (the “CBA Task Force”). ...

In *Neil*, a page after Justice Binnie articulated the “bright line test”, he adopted the notion of a “conflict” in paragraph 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol 2, at pp. 244-45, as a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person”. Later cases have stated that the use of this definition adds two conditions which must be met before a lawyer can be disqualified due to a conflict of loyalty, namely: that there is a substantial risk that the new client’s representation will be adversely affected and that it will be affected in a material way.

In *Strother*, the application of the *Neil* rule was considered *inter alia* in paragraphs 54 and 55 of the majority reasons. In rejecting the applicability of the *Neil* rule to the conduct of Mr. Strother, the majority states that “Whether or not a real risk of impairment exists will be a question of fact. In my judgment, the risk did not exist here provided the necessary even-handed representation had not been skewed by Strother’s personal undisclosed financial interest.” It appears from this observation in the majority reasons that the *Neil* rule should not apply absent “real risk of impairment”.

This understanding is consistent with other recent case law in the lower courts. In *Belair v. McAllister*,⁷ Justice Hennessy concluded that the judicial rule requires a finding of risk of impairment noting that:

[31] In *Phillips v. Goldson*, Gordon J. interpreted *Neil* to include two conditions which must be met before a solicitor can be removed because of conflict of loyalty:

a substantial risk that the new client’s representation will be adversely affected and that it will be affected in a material way.

[32] In their article entitled “Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v. Gray* to *R. v. Neil*”⁸ Richard Devlin and Victoria Rees suggest that the *Neil* test is not sufficiently clear to impose a duty of loyalty without finding a material and adverse risk to one of the clients.

[33] The evidence on this case does not persuade me that either the moving parties or the plaintiffs are at material and adverse risk by having Mr. Doucet continue as counsel for the plaintiff.

⁷ *Belair v. McAllister*, 2008 Can LII 43577, per Hennessy, J. at paras. 30-32 (Ont. Sup. Ct. of Justice)

⁸ (2005) 84 Can. Bar Rev. 433

Similarly, in *Doucet v. Cousineau*⁹ Justice Kane reviewed the *Neil* case concluding that the definition of the duty of loyalty in *Neil*:

[26] ... introduces two conditions which must be met before a solicitor can be removed due to a conflict of loyalty, namely: that there is a substantial risk that the new client's representation will be adversely affected and that it will be affected in a material way.

Justices Gordon, Hennessy and Kane have each concluded, as has Justice Popescul, that the *Neil* rule does not apply absent some degree of risk of material and adverse effect on client representation.

In this context, it is useful to recall what the *Neil* and *Strother* cases actually decided.

The *Neil* case was a criminal case. The lawyer was not a party before the court. The issue was whether criminal prosecutions should be stayed on the basis that the lawyers for the accused were in a conflict of interest. Despite finding a conflicting interest (i.e. a duty to another client which created a substantial risk of material and adverse effect on representation), the court found this case manifestly not to be one of those clearest of cases where a stay of the jury's verdict is warranted. As the "bright line rule" (as defined by the Advisory Committee) was not actually applied in the result, a substantial risk of material and adverse effect on representation having been found, the *Neil* case does not provide clarity as to the proper application of a "bright line rule" where there is no substantial risk of material and adverse effect on client representation.

In *Strother*, the majority found that Strother's personal interest conflicted with his duty to his client because there was an ongoing retainer. The majority found that Strother's personal interest created a material and adverse effect on client representation. The minority found that the retainer was not ongoing. The majority also found that Strother's duty to his subsequent client was not directly adverse to the immediate interests of his current client. Again, the court was not addressing a situation in which there was a risk, or a substantial risk, of material and adverse effect on client representation.

Given that substantial risk of material and adverse effect on client representation was found in both *Neil* and *Strother*, it is difficult to understand the conclusion of the Advisory Committee that the *Neil* rule as understood by them would not be *obiter dictum* and could possibly be the *ratio decidendi* of either case. The Advisory Committee says that the "bright line rule" applies where there is no substantial risk. Yet, substantial risk was found to be present in both *Neil* and *Strother*.

The Supreme Court of Canada has not yet considered the proper application of a "bright line rule" in a case involving no substantial risk. Absent such risk, lower courts have interpreted the *Neil* decision differently than the Advisory Committee. No appellate court has yet considered this issue in a case not involving a finding of substantial (or any) risk.¹⁰

⁹ *Doucet v. Cousineau*, 2009 Can LII 1801, per Paul Kane, S.C.J. at para. 26 (Ont. Sup.Ct. of Justice)

¹⁰ The fact that conflicts are not actually being found in the case law absent findings of substantial risk suggests that the substantial risk threshold works. The courts have not found it appropriate in practice to apply the *Neil* rule as understood by the Advisory Committee. This suggests that there is no genuine need for an additional and controversial rule which did not exist before 2002 and which does not exist elsewhere other than in the United States. Even in the United States, the law is evolving away from the "bright line rule" as understood by the Advisory Committee. Indeed, the American Bar Association is reconsidering its model current client rule as part of the work of the ABA Commission on Ethics 20/20. Nowhere else in the

The Advisory Committee proceeds on the basis that it would be wrong for the law societies to adopt a current client rule which differs from the common law and that the “bright line rule” should therefore be adopted in the Model Code. However, this rationale falls away when it is recognized that the common law is unsettled and the “bright line rule” has not yet been applied, as understood by the Advisory Committee, in situations where there is no substantial risk at stake.

The conclusion of Advisory Committee is also premised, in part, on the unexplained proposition that lawyers would be placed in an untenable position if they could be disqualified by the courts from acting in a matter where so acting would not be a breach of the law society rules. This assertion is premised on two unstated assumptions. The first premise is that judicial disqualification only occurs as a result of lawyer misconduct. In fact, disqualification can occur without any suggestion of impropriety on the part of the lawyer. The second premise is that courts are disqualifying lawyers absent risk, or substantial risk, of material and adverse effect on client representation. The Advisory Committee does not suggest that this is actually the case, nor is it so. Indeed, in extra-judicial remarks¹¹, Justice Binnie has offered his view that disqualification should be reserved for cases where there is such a substantial risk.

On examination, the Advisory Committee’s basis for the recommended rule is founded on two false premises. Unless and until it can be said with confidence that the “bright line rule” applies absent substantial, or any, risk of material and adverse effect on client representation, the recommendation for codification of an uncertain interpretation of evolving law is not justified.

ii. The CBA Current Client Rule

The Advisory Committee did not fully appreciate the CBA rule. In the Final Report the Advisory Committee does not mention or examine paragraph 2(c) of the commentary to Chapter V of the CBA Code of Professional Conduct.

The CBA commentary explains that a conflicting interest may arise in the context of a “conflict of duty with relationship” which occurs “when a lawyer’s duty to another person impairs client representation by materially impairing the lawyer’s relationship with a client”. Where there is a substantial risk of such an impairment of relationship, disclosure and consent is required by the CBA rule.

We agree with the Advisory Committee’s observation that “the potential for the client to feel “betrayed” by his, her or its lawyer” would be of concern. However, the Advisory Committee has not considered the approach taken under the CBA Code of Professional Conduct to the protection of the lawyer-client relationship.

The basis for the CBA rule was carefully described in the Final Report of the CBA Task Force as follows after discussion and analysis¹² :

The point is that, where duties of performance do not conflict, a genuine analysis of the risk of material and adverse effect on representation in either retainer requires

common law world is a risk-free mandate the basis for disqualification or a claim for breach of fiduciary duty.

¹¹ “Sondage Après Sondage . . . A few Thoughts about Conflicts of Interest” by Justice Ian Binnie, edited version of remarks at a panel discussion at Les Journées Strasbourgeoises in Strasbourg, France, on July 4, 2008, at p. 6.

¹² Final Report of the CBA Task Force on Conflicts on Interest, pp. 67 to 69

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

In paragraphs 38 and 39 of its Final Report, the Advisory Committee rejects the CBA rule as "arguably" not upholding the public interest duty of the law societies and as not taking "sufficient" account of the fiduciary nature of the relationship between lawyer and client. These statements are not explained.

These assertions do not provide a sufficient basis for rejecting the CBA rule on policy grounds, especially given the significant deliberation, analysis and consultation by the CBA Task Force and the unanimous adoption of the CBA rule by the CBA Council. The apparent failure to appreciate the approach taken by the CBA rule to the protection of lawyer-client relationships undermines the analysis in the Final Report.

iii. The Advisory Committee Proposed Rule

The Final Report does not examine whether adoption of the Proposed Current Client Rule is in the public interest. Nor does it consider whether there is any other current client rule which would better advance the public interest. There is no examination of the practical application of any current client rule in legal practice. There is no suggestion that the substantial risk threshold found in the conflicting interests rule is not working in practice so that an additional, stricter rule is required. There is no consideration of the potential for unintended consequences.

The Final Report does not consider the over-breadth of its recommended rule. The public policy goals are not in dispute. Client representation should not be put at risk¹³, absent disclosure and client consent, whether by conflicting duty, conflicting interest or impairment of relationship. Choice of counsel should not be restricted absent good reason. While of lesser importance, it is arguable that it is also in the public interest that lawyer conduct not be prohibited by the law societies without proper justification.

Simply put, the problem with the recommended rule is that it requires client consent even where there is no real risk of impairment of client representation. There is no explanation in the Final Report justifying the requirement of consent absent risk of impairment. The recommended rule would deprive clients of their choice of counsel, even in cases where the courts would not consider it appropriate to disqualify their lawyer.

¹³ There is of course a legitimate debate as to whether any "real risk of impairment" should be tolerated as opposed to substantial risk. Justice Binnie makes the point, in his extra-judicial remarks cited above, that the fiduciary requirement of disclosure and consent does not apply only where there is substantial risk of impairment but also where there is a [real] risk of impairment. But there is no suggestion of any such requirement in fiduciary law where there is no risk. Fiduciaries are entitled to act without restriction absent risk of impairment of their duties to their beneficiaries.

There may be better formulations of a current client rule than the CBA rule. Unfortunately, the Advisory Committee does not appear to have considered any alternatives other than their interpretation of the common law and the CBA rule.

iv. The Public Interest and Conflicts of Interest

The proper public role of the law societies and the Federation, must be to carefully apply the public interest understanding of the realities of legal practice. This is the advantage which the law societies have over the courts. Judges can only develop the law based on the cases before them. These cases are almost invariably litigation cases which ordinarily raise different public policy issues than are raised by non-contentious cases. As Justice Sopinka said for the majority in *Macdonald Estate*:

.... The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.

The law societies are able to take a deeper and broader view of legal practice, always in the public interest. They are able to examine whether there is an actual problem to be addressed and weigh the policy implications. Assessing the nature and extent of the problem, if any, to be addressed, is crucial to the proper formulation of new rules. Especially when an overbroad rule is proposed, there is a need to carefully examine whether there is a real problem to be addressed and the extent of that problem, and what problems the proposed solution might create or exacerbate.

This work has not been done by the Advisory Committee on the unfortunate premise that the choice was either to recommend the common law rule or the CBA rule, both as understood by the Advisory Committee. The Advisory Committee did not consider whether the common law rule, as understood, was in the public interest, abandoning this work to the courts. The Advisory Committee did not consider whether there was any better current client rule than the common law rule, as understood, thereby failing to assist the courts. Absent this work, the better course would have been to do nothing and to let the courts continue to develop the common law on a case-by-case basis.

However, the best course continues to be for the law societies, through their Federation, to consider whether a current client rule is required in the public interest and, if so, to develop the best possible rule to be exposed to broad consideration and consultation prior to adoption.

The Canadian Bar Association stands ready to assist the law societies in whatever way the law societies would find useful and appropriate.