



Practical difficulties with today's conflict of interest rules

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A consultation paper prepared by the

CBA Task Force on Conflicts of Interest

October 2007

A CANADIAN BAR ASSOCIATION TASK FORCE REPORT

Practical Difficulties with Today's Conflict of Interest Rules

A Consultation Paper prepared by the CBA Task Force on Conflicts of Interest

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Letter from the Chair

Our current conflict of interest rules impose a heavy burden on lawyers, law firms, the courts and, unexpectedly, on clients. There is a growing concern that these rules are out of step with the modern practice of law and in need of review.

In response to the Supreme Court of Canada decisions in *Macdonald Estate v. Martin* (1990) and *R. v. Neil* (2002), and lower court decisions applying their broad principles, lawyers have had to adopt increasingly complex procedures to meet their duties of confidentiality and loyalty to clients. At the same time, developments in the practice of law itself have resulted in changes in the ways in which legal services are retained and provided, which make meeting the conflict duties more challenging. Current requirements are cumbersome, time-consuming, and an impediment to the efficient delivery of legal services. We believe that the existing conflict rules are not protecting clients or serving the public interest as well as they might.

For these reasons, in March 2007, the Canadian Bar Association established a Task Force on Conflicts of Interest to consider a more practical approach to managing conflicts for clients and the profession and to develop useful model materials for lawyers. Our long-term goal is to develop a CBA consensus on changes to the rules that may be considered by the law societies and incorporated into their existing codes of conduct.

As a first step, the Task Force is asking members of the legal profession across Canada to take time to read this Consultation Paper and respond to the questions it asks. You can also download a more detailed Background Paper from the CBA website at www.cba.org/conflicts.

We seek your views on issues raised by the current rules, including whether:

- loyalty requirements are being interpreted appropriately,
- presumptions of information-sharing within a law firm should be rebuttable,
- retainer letters should be encouraged or required, and
- the rules pose problematic challenges for particular practice areas, and rural and remote communities.

There are fifteen questions inviting specific responses. We begin most of our questions by stating our preliminary thinking, not to unduly influence the outcome of this process, but to bring an immediate focus to the issues.

Conflict of interest rules go to the heart of our duties as lawyers. Please take this opportunity to offer your views on proposed changes to the conflict rules. We will consider all the comments we receive by November 29, 2007 before we prepare our final recommendations to the CBA.

We encourage you to get in touch with members of the Task Force, to speak to your colleagues, and to tell the CBA what you think. We need to hear from you by November 29, 2007.

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This Consultation Paper addresses an important and challenging topic for all Canadian lawyers: are conflict of interest rules working effectively and, if not, how should they be changed? There is growing evidence that the rules are having serious – and perhaps unintended – consequences for clients and their lawyers. Concerns about the adequacy and impact of the current rules prompted the Canadian Bar Association to establish this Task Force on Conflicts of Interest.

Since March 2007, members of the Task Force have been conducting research, developing a Background Paper and discussing ideas for model materials and for improvements to the rules. We now want to hear from you. We need to know more about how the rules are directly affecting you and your clients before we submit our final recommendations to the Canadian Bar Association for member approval. We are looking forward to your feedback.

The Consultation Paper asks 15 questions, which are imbedded in the Paper and are also listed together at the end. You can send us a paper copy of your answers by mail, fax, or e-mail, or you can visit the CBA web site at www.cba.org/conflicts, and complete the electronic version.

Please send your comments by November 29, 2007 to:

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I. First principles

Conflict of interest rules underpin our justice system and embody values that go to the heart of the practice of law.

The risk in a conflict situation is that the lawyer's judgment could be impaired, that confidential client information could be disclosed, or that representation of the client could be compromised. Rules in codes of professional conduct govern a lawyer's ability to act for a client when there is a potential conflict of interest.

Lawyers must follow these conflict rules, interpret the decisions in the case law, assess the potential for a finding of conflict, and act accordingly. The consequences of an error in judgment about the application of the rules are significant for lawyers, law firms, and clients. An error could lead to damaged client relationships, costs and delays for the client, lawsuits, and disciplinary action against the lawyer.

Duty of confidentiality

Protecting the confidentiality of information that a client provides to his or her lawyer is a cornerstone principle in the practice of law. It is critical to the client-lawyer relationship, since, as noted in *MacDonald Estate v. Martin*:

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

The duty of confidentiality extends beyond the end of the retainer.

Duty of loyalty

Coupled with the duty to keep a client's information confidential is the duty to maintain an undivided loyalty to the client. Lawyers must not only serve their client's best interests by providing 'zealous representation' but must never let the interests of others affect or conflict with their ability to effectively represent their client's interests. This commitment is fundamental to a lawyer's professional role and to the public interest.

Core values

MacDonald Estate v. Martin identifies three values that must govern any recommendations we make. They are to:

- maintain the high standards of the legal profession and the integrity of the justice system
- provide clients with their choice of counsel unless there is reason not to, and
- preserve reasonable mobility in the legal profession.

2. Key Supreme Court of Canada decisions

In the course of this Consultation Paper, we refer to three Supreme Court of Canada cases dealing with conflicts of interest. Here is a very brief summary of these cases:

- *MacDonald Estate v. Martin* considered the adequacy of measures to prevent the disclosure of confidential client information when a lawyer changed firms.
- *R. v. Neil* involved a motion to stay a prosecution because the accused's lawyer had breached his duty of loyalty by letting an associate act for an adverse party involved in the proceeding. Following *Neil*, lawyers must get consent from clients before they act "directly contrary to the immediate interests of a current client", even in unrelated matters. The decision is seen as extending the duty of loyalty lawyers owe current clients.

- In *Strother v. 3464920 Canada Inc.*, the court required a lawyer to disgorge his personal benefits when he let his personal stake in a business, which was in competition with a client's business, conflict with his duty to tell the client that his earlier advice (regarding changes in tax law which effectively closed the client's business) might no longer be accurate. The Supreme Court decision was split 5-4, and the case is significant in underscoring the importance of retainer letters.

In this Consultation Paper, we cite these cases as *MacDonald Estate*, *Neil*, and *Strother*.

3. Changes in the legal landscape

Over the last thirty years, the delivery of legal services has changed dramatically for clients and for lawyers. Both individual and business clients often seek advice from a number of different lawyers and law firms, no longer looking to one lawyer to meet all their needs. Laws and regulations in many areas of practice have become significantly more complex over this period; indeed, entirely new areas have emerged as areas of specialized practice (for example, *Charter of Rights* litigation, privacy, electronic commerce, and environmental law).

Although lawyers often practice on their own or in small firms, many lawyers are working in larger firms. Changing client needs for specialization and broader regional capacity have led to the evolution of multi-office firms, operating in several jurisdictions with numerous lawyers and areas of practice.

A growing number of lawyers work within corporations, and within government, providing legal services internally and marshalling advice provided by outside counsel.

In smaller communities, clients may find it difficult to even find a lawyer.

Mobility has also had a significant impact on the profession, with lawyers regularly moving between law firms, corporations, and government positions.

While the core ethical imperatives of a legal practice remain the same, to be useful and effective, codes of conduct must address the evolving realities of practice in Canada today.

4. The CBA's role

In *MacDonald Estate*, the Supreme Court of Canada invited the governing bodies of the legal profession to articulate guidelines for mechanisms that would serve to rebut the presumption that confidential information is shared within a law firm. Recently, in *Strother*, Chief Justice McLachlin noted that those bodies "are better attuned than the courts to the modern realities of legal practice and to the needs of clients."

While the regulation of the legal profession is the responsibility of the provincial and territorial law soci-

eties, for almost a century, the Canadian Bar Association has played a major role in defining professional ethics. It drafted the first comprehensive set of professional conduct rules in Canada. The CBA's work to devise guidelines for ethical screens, in response to the judicial invitation in *MacDonald Estate*, was largely adopted across Canada.

The CBA brings together lawyers from a wide range of practice settings, and from every corner of the country. By supporting a national discussion, it can ensure that any new consensus is informed with the experience of all types and locations of practice.

The Task Force's plan is to consult with legal professionals and others from across the country and then bring forward recommendations for policy and practice models to the CBA's National Council, at the annual meeting of Council in August 2008. We anticipate that the resulting CBA policy will be considered by the Federation of Law Societies of Canada and the individual law societies as part of their regulatory responsibilities. We are committed to working closely with them throughout this project. Ultimately, the law societies must decide if the CBA proposals serve the public interest and should be enshrined in professional conduct rules.

5. Reasons to re-examine the conflict of interest rules

Blurring the line between legal and business conflicts

Until these recent Supreme Court decisions, the distinction between a legal conflict and a business conflict seemed clear. A legal conflict precludes a lawyer from acting on a matter. To do so would violate the lawyer's legal and ethical responsibilities. In contrast, a business conflict might result in the client questioning its relationship with a lawyer or law firm and, if dissatisfied, deciding to terminate the relationship, but a business conflict is not a breach of a lawyer's professional duties.

With the *Neil* decision's extension of the duty of loyalty to unrelated matters including non-litigious matters, business conflicts are blurring into legal conflicts. Lawyers may now find themselves in breach of their duty of loyalty and in a legal conflict of interest unless they have the express permission of both clients to act for each of them in the unrelated matters. Lawyers may be in breach of the duty regardless of the type of work for which they were retained or the surrounding facts and circumstances. They may be in breach of the duty where it was not realistically possible to foresee the breach, due to actions on the part of the client (for example, Client A acquires an entity which happens to be suing Client B). They may be in breach of the duty even when it may not be sensible or necessary to balance the duty of loyalty to one client and the right of another client to be represented by counsel of choice.

The need for clear guidelines

Conflict rules should help guide clients and their legal counsel to assess whether or not a conflict exists and enable them to respond in a timely and efficient manner. Unfortunately, the current rules are not clear. Although the Supreme Court has recently made major statements on conflict issues, none of the cases stems from facts representing the conflict situations that lawyers face on a day-to-day basis. The Court's reasons have been lengthy and complex, and lawyers are finding them difficult to apply.

Since *Neil*, in particular, lower court decisions in the conflicts area have been difficult to reconcile and seem to have prompted more litigation, rather than preventing it. Today, significant uncertainty remains

about the tests to use, the rules to follow, and how to apply them.

We believe that clear and practical rules of conduct would relieve much of this uncertainty, and provide reliable guidance on expected standards of practice.

Freedom of choice of counsel

We note that every time a lawyer declares a conflict and is unable to act for a client, that client is denied the choice of counsel, sometimes at great inconvenience, expense, and delay for them.

Current conflict rules can operate to frustrate the choice of counsel, and are having both unexpected and unwelcome effects for small and large law firms and for clients in both urban and rural communities. Some firms are now refusing to take on smaller matters for new clients, fearing that a conflict may bar opportunities for other work from existing or new clients. In highly specialized areas of practice and in small centres, clients may find a limited choice of counsel further restricted because their opponent has engaged several lawyers, sometimes simply to make these lawyers unavailable to any other party.

As well, lawyers may find their career transitions made more complicated, with every prospective firm scrutinizing its client database to ensure that there are no potential conflicts that cannot be appropriately managed.

Client service has become a complex process of searches, consents, and clearances. The start of service is often delayed since the intake process for a new client requires an intense review of the firm's client database. Some firms maintain hundreds of ethical screens and information barriers, dedicating thousands of hours to analyzing and managing potential conflicts. Clients may bear some of these costs directly, or may generally see fees increase to cover them.

The burden of searches, consents, and clearances presents a serious obstacle to taking on legal aid, duty counsel, and *pro bono* work, where a quick response is often essential and efficient file management a practical necessity.

The net result is that rules that were designed to protect client interests are having unintended effects.

One rule may not fit all situations

Lawyers practice in a wide variety of contexts – in solo practices, small general practice firms, boutiques, clinics and legal aid offices, in-house departments, large firms, multi-office and multi-jurisdiction firms, and government ministries and public agencies. Clients, as consumers of legal services, differ widely in their needs, knowledge, levels of sophistication, and dependency. And the services provided by lawyers are equally varied in nature, complexity, and level of involvement in the affairs of the client.

Rules that are based on the assumption that clients are always individuals do not necessarily make sense, particularly when the client is a sophisticated business enterprise, a public agency, or a government. Rules that are based on the assumption that a client has the option of choosing a lawyer from among many lawyers do not necessarily work when the client seeks assistance in a narrow area of practice or is in a smaller centre, rural or remote location. It would seem that the variety of practice contexts in

Canada today requires more situation-specific and flexible rules of conduct to take into account the different types of client-lawyer relationships that exist.

Misuse of conflict rules

One troubling consequence of the current rules is the extent to which allegations of conflict are being used as a tactic to delay, divert, or otherwise inconvenience an opponent. Conflict challenges are preliminary and collateral actions that take time and resources away from the substance of the legal issue or litigation. Courts are expressing their displeasure with the increase in tactical conflict disqualification motions.

Recently, Justice Eric Rice in the British Columbia case *Robertson v. Slater Vecchio*, voiced his concern about applications to disqualify and their effect on the administration of justice:

Until very recently, applications to remove lawyers were so rare an event that, at least in this jurisdiction, few judges or lawyers seemed to be more than vaguely aware that such a remedy existed. Nor, so far as I am aware, was there any general feeling of discontent on the part of the public arising from the possibility of conflict. But there was and is a rising tide of discontent with the length, complexity and costs of proceedings. Since *MacDonald Estate v. Martin*, the application to disqualify has become a growth area as it began to do 20 or so years ago in the United States where it seems to have reached the stage of being a common feature of major litigation. No doubt, some of those applications are brought to prevent a risk of real mischief. But can there be any doubt that many are brought simply because an application to disqualify has become a weapon which can be used, amongst many others, to discomfit the opposite party by adding to the length, cost and agony of litigation. If that becomes a regular feature of our litigation it would not likely do much to improve the profession's standards in an area in which there seem to have been few serious problems. But it could do much to further reduce the court's ability to get to judgment in a timely way.

While we appreciate that there must be a process for disqualifying counsel in the case of a legal conflict, we are concerned that a lack of clear rules provides an opportunity for the misuse of conflict challenges for tactical purposes.

We would like to know to what extent the Canadian legal profession shares these and other concerns relating to the current conflict rules.

6. The areas of concern

We have identified four areas where we believe the current rules need to be reviewed and clarified:

- (i) the scope of the duty of loyalty
- (ii) the scope of the duty of confidentiality
- (iii) the use of retainer letters to clarify expectations
- (iv) conflicts-related issues specific to certain practice areas.

Question 1 – Application of conflict of interest rules

How often do you encounter situations involving a conflict of interest?

- Never
- Rarely
- Often
- Very frequently

7. The scope of the duty of loyalty

Unrelated matters

In *Neil* the Supreme Court reviewed the nature and extent of the lawyer's duty of loyalty. The case involved two clients of the same firm who had opposing interests in a criminal matter. The Court considered the lawyer's duty to the original client and the consequences of a conflict of loyalties in criminal proceedings. Although the Court found that the conflict was insufficient to justify a stay of the proceedings, it indicated that, to avoid a breach of the duty, both clients must consent to the representation when the interests of one client are directly adverse to the immediate interests of the other client, even if the mandates are unrelated:

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

This general rule requires a lawyer or law firm who is acting for A and is approached to represent B on a matter that is directly adverse to the immediate interests of A, to obtain A's consent even if B's matter is totally unrelated to the mandate the lawyer is handling for A. Although one can imagine situations in which Client A might feel upset, it is difficult to see that either the client's confidential information or right to zealous representation is necessarily compromised when the matters are completely unrelated, and particularly so if the matter for B is handled by a different lawyer, in a different practice area, in a different city, or at a different time.

The restated loyalty test focuses attention on the dimensions of the relationship within which the duty arises. As the Supreme Court noted in *Strother*, this relationship is affected by the terms and circumstances of the retainer, as well as by the law of fiduciary duties. Lawyers will be constrained in their ability to act, according to the restated loyalty test, if their representation of one client is directly adverse to the immediate interests of another current client. The easiest example would be litigation against a current client, where helping one client would hurt another.

But often the impact will be more indirect or obscure. In commercial transactions with multiple parties, for instance, advancing the interests of one client may have no impact on the interests of another client. What then is the basis for a prohibition against acting in unrelated matters for another client? The restated loyalty test mirrors provisions in the American Bar Association's *Lawyer's Manual on Professional Conduct*, which sets out the various factors that may be involved in acting against a client. The Manual says that "if a lawyer opposes the client, even in an unrelated matter, the client generally feels betrayed and the attorney-client relationship is undermined". This perception is offered as the justification for a general rule.

Yet none of the Canadian cases has offered this rationale for restating the duty of loyalty, nor is it part of the Canadian law of fiduciary duties. Constructing a rule on a possible perception of betrayal seems at odds with current client and market realities. Some clients may feel hurt, while others may not be concerned, recognizing that lawyers and firms act for many clients. It is our view that the rules should deal with harm and risks of harm, and leave differing expectations of loyalty to be dealt with through the business choices of clients and their lawyers.

Further, the central issues in *Neil* and *Strother* were, in fact, not about an 'unrelated mandate', and no detailed arguments were made on the point. The rationale and scope of the Supreme Court's prohibition against lawyers acting in unrelated mandates remains undeveloped in Canadian law.

As the Court observed in *Neil*:

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

Uncertainty about the application of the duty of loyalty rule to clients with unrelated matters poses problems for clients seeking legal counsel of their choice and for lawyers needing to be sure of the exact extent of their professional responsibilities.

Implied Consent

Both the *Neil* and *Strother* cases recognize that, in some cases, a client's consent to act against it in unrelated matters may be inferred, referring to large enterprises such as governments, banks, and other entities that are frequent parties to litigation. In *Neil*, the Court said:

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

And in *Strother*, the Court noted:

In fact, in the case of some areas of high specialization, or in small communities or other situations of scarce legal resources, clients may be taken to have consented to a degree of overlapping representation inherent in such law practices, depending on the evidence.

Building on the Supreme Court's examples, it would be beneficial to define the types of client-lawyer relationships where client consent may reasonably be presumed, if it is otherwise required. For example, the Supreme Court confirmed in *Strother* that clients who know that a law firm has acted for their business competitors cannot object to such representation on the grounds of a legal conflict, as long as the client's confidential information is protected and the firm reasonably believes that representing each client is possible without adverse effects to the other.

Defining the types of clients with whom an implied consent could be presumed may be worthwhile in order to expand the presumption identified in these Supreme Court decisions beyond the chartered banks and governments.

Criteria to identify such situations might include a client which:

- employs multiple law firms simultaneously
- has multiple transactions on which it seeks specialized expertise
- discloses only transaction-specific confidential information, rather than enterprise-wide strategic information, or
- employs law firms as technical advisors on particular aspects of a transaction or in a discrete area, but is fully in control.

As well, in straightforward commercial transactions, a lawyer may be performing a technical service for a client, such as reviewing a lease or registering a lien, receiving no relevant confidential information from the client.

On the other hand, with respect to vulnerable clients, the Supreme Court's decisions on fiduciary duties recognize vulnerability as a factor which may require heightened protective duties. In the context of the client-lawyer relationship, it may also be helpful to identify when clients are especially vulnerable. With these clients, it may be appropriate to insist that the client's waiver of the duty of loyalty may only occur after the client has received independent legal advice.

We suggest that it may be appropriate to establish a more situationally-focused assessment of the scope of the duty of loyalty, which recognizes the different levels of sophistication of different clients, and the different nature and type of work done for them.

Question 2 – Terms and Circumstances of the Retainer

It is our preliminary view that, as a general rule, the scope of the duty of loyalty should be determined by the terms and circumstances, express or implied, of each retainer.

- (a) What do you think?
- (b) If this approach is adopted, what factors should be relevant? For example, where the matter is limited in scope?

Question 3 – Duty of Loyalty – Unrelated Matters

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

- (a) What do you think?
- (b) If this approach is adopted, in what circumstances do you think that a client would be harmed or the public interest not served if a lawyer were permitted to act against the current client without express consent?
- (c) If this approach is adopted, in what circumstances might an adverse retainer against a current client be permitted?

Business clients, near-clients, and non-clients

Identifying the client becomes critically important in assessing the application and scope of the duty of loyalty. To whom does a lawyer owe this duty aside from the immediate and obvious client? The issue arises, in particular, with three types of clients:

- related entities,
- near-clients, and
- non-clients.

Related Entities

The challenge with corporate clients is the possible scope of the retainer, which may be quite narrow or may extend to shareholders, directors, officers, employees, and affiliated entities. Similarly, when the client is a partnership, with general or limited partners, a trust, or other unincorporated entity, the mandate may extend broadly. In taking on a business organization as a client, is the lawyer also assuming duties to all the related entities?

Many businesses use complex structures, raising difficult questions about a lawyer's duties. Does a relationship with a parent corporation prevent a lawyer from acting for another client against a subsidiary? Will acting on a limited matter for one subsidiary establish a duty of loyalty that extends to other subsidiaries within the group? Does acting for a trustee imply a duty of loyalty to the beneficiaries of the trust in a different capacity? Does acting for a partnership imply a duty of loyalty to each of the partners beyond partnership matters? Are there situations in which acting for one family member creates duties of loyalty to other family members?

Arguments can be advanced either for extending or for limiting the duty of loyalty in these situations depending on the nature and circumstances of the client-lawyer relationship.

Some Canadian corporations or other enterprises enjoy relationships with their outside law firms that date back many years. The lawyer or law firm may have been its trusted advisor, as the business has grown, counseling the corporation on acquisitions, providing specialized services to the corporation when required, and being key to the strategic thinking that has helped the business succeed. In these circumstances, where the client-lawyer relationship is as close as that of a family solicitor, extending the duty of loyalty beyond the corporation to its related companies might be appropriate.

But this type of relationship is not necessarily representative of other corporate clients. Many corporations or other business enterprises retain specialists in a variety of practice areas and jurisdictions. They may hire lawyers on a project or transaction basis, sometimes by way of a request for proposal. Large corporations may employ a dozen or more firms, with the understanding that each firm's duties are shaped by the specific mandate. These corporate clients may also have many subsidiaries in different business sectors in different parts of the world. For these clients, it would be inappropriate to conclude that the lawyer or law firm had voluntarily assumed duties of loyalty to entities which they did not even know existed.

Many corporations have moved away from having one law firm handle all their work, retaining specialists and multiple firms. In this context, it makes sense that, absent evidence that the lawyer is assuming a client-lawyer relationship with a broader group, the client-lawyer relationship should only extend to the retaining client.

As well, to assume loyalty to the entire group would be inconsistent with the doctrine of separate legal personality in *Salomon v. Salomon*. The more limited approach would be consistent with general Canadian law on corporate groups and with the prevailing American law. We believe that there would be value in stating this specifically. Of course, it is always open to a client to extend the scope of the professional duties to affiliates as part of the retainer agreement.

Question 4 – Duty of loyalty and the solicitor/client relationship

It is our preliminary view that, as a general rule, the duty of loyalty should be limited to the individual or entity with whom the lawyer or law firm has a direct solicitor/client relationship (as opposed to others such as family members, beneficiaries, shareholders, or affiliated entities).

(a) What do you think?

(b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

Near-clients

In a number of recent cases, such as *GMP Securities Ltd.*, and *Dobbin*, courts have suggested that lawyers can have a duty of loyalty that extends beyond the boundaries of the formal client-lawyer relationship to encompass ‘near-clients’. The near-client category includes persons “involved in or associated with the firm’s client in the matter”, who subsequently find themselves facing counsel who may have been involved as the situation developed. The onus is on the near-client to prove the relationship. Simple allegations will not suffice.

The lawyer’s obligation to preserve confidentiality in such circumstances is well established. Fifteen years ago, Esson, C.J.S.C.B.C. stated in *Manville Canada Inc.*:

If the applicant has reposed confidence in a lawyer in circumstances which properly give rise to an expectation of confidentiality, that applicant has an interest in protecting that confidence even if it was not, in the strict sense, a client of the lawyer.

In some professional negligence situations, the courts have extended the professional duty of care beyond the scope of the contractual retainer to those who may reasonably be affected by actions or omissions. In *Strother*, the Court spoke of fiduciary duties not being identical to contractual obligations; however, the extent to which these duties may extend outside the client-lawyer relationship is unclear.

The same principle is embodied in the commentary in Chapter V of the CBA *Code of Professional Conduct*:

A lawyer who has acted for a client in a matter should not thereafter, in the same or any related matter, act against the client (or against a person who was involved in or associated with the client in the matter) or take a position where the lawyer might be tempted, or appear to be tempted, to breach the rule relating to confidential information.

Ultimately, an unfettered extension of the near-client principle could find lawyers with a duty to people who have never consulted with them. This type of open-ended exposure is a concern. We believe it would be beneficial for lawyers to have clearer direction on how the duty of loyalty applies.

Question 5 — Limits on extending the duty of loyalty

It is our preliminary view that, as a general rule, duties of loyalty and confidentiality should be owed to the actual client and not extended to clients, customers, advisors, or agents of current clients.

- (a) What do you think?
- (b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

Non-clients

Some cases have applied the duty of loyalty rule broadly to extend beyond the obligation to maintain client confidentiality to a duty to avoid acting in a way that is contrary to the interests of the non-client. A person or corporation could possibly become owed duties as a result of a five minute phone call, an unsolicited e-mail containing confidential information, or a request for proposal process. The lawyer may end up with legal and ethical obligations to a deemed client.

We are concerned that the duty of loyalty not be extended to non-clients, and believe it would be beneficial to develop more specific guidelines to make it clear that this is not the case.

Question 6 — Duty of loyalty to non-clients

It is our preliminary view that, as a general rule, the duty of loyalty should not extend to non-clients.

- (a) What do you think?
- (b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

8. The scope of the duty of confidentiality

There is a concern that the duty of confidentiality, coupled with a presumption that confidential information is shared amongst lawyers within the same organization, has been applied in a manner that is both impractical and unnecessary for law practices today. This is particularly so in larger, multi-office firms with discrete areas of specialization and in the context of the greatly increased mobility of personnel within the profession. Even in smaller firms, and in communities with a limited number of lawyers and law firms, the strict application of these rules and presumptions may impede access to justice and encourage tactical disqualification.

The duty to protect the confidentiality of client information is indisputable. However, we question whether a finding of a breach of the duty of confidentiality should be based solely on a narrowly-focused examination of when and to what extent institutional mechanisms to protect confidential information were in place. The timeliness of the placement of information barriers and ethical screens has become the dominant issue rather than whether or not a breach of the duty in fact occurred or is likely to occur.

Presumed breaches of client confidentiality

In *MacDonald Estate*, the Supreme Court's seminal case on this issue, the need for institutional mechanisms to protect client confidentiality is premised on the "strong inference that lawyers who work together share confidences." It instructs courts to infer that the confidentiality of information has been compromised:

unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted' lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence.

Firms now routinely construct institutional mechanisms to satisfy clients that the risk of information flow has been adequately addressed.

Part of the difficulty in this area derives from the concept of shared knowledge, which rests upon both legal and empirical foundations. Under partnership law, for example, the fact that each partner acts as an agent of the other exposes partners to each other's knowledge – partners cannot have secrets from each other. But secrets involving the business of the partnership on one hand, and confidential information of clients on the other, are very different things.

The conflict rules address the possible client perception that confidential client information would be shared by lawyers in the same firm, but is the assumption in the rules warranted when there is clear evidence to the contrary? In *MacDonald Estate*, the Court did not think so when it stated that the "assumption ... is unrealistic in the era of the mega-firm." Unfortunately, much of the case law following *MacDonald Estate* has focused more on the matter of perception and timing of the putting in place of conflict screens, than on the real risk of improper disclosure. We question the presumption that confidential client information has been shared by lawyers within a law firm, when it can be proved that it has not been.

We suggest that, on a disqualification motion, the courts should have the ability to decide the alleged conflict on the basis of whether or not confidential information has in fact been misused or disclosed. The timing of the erection of information barriers / ethical screens should not be determinative, so long as there are adequate safeguards in place to prevent future misuse or disclosure.

We also suggest that the rules expressly recognize that information barriers / ethical screens are an appropriate and effective way to protect client confidentiality (in addition to their initial purpose of dealing with migrating lawyers).

Question 7 – The presumption regarding confidential information

It is our preliminary view that a law firm should be able to rebut the presumption that lawyers in the firm shared confidential information if the firm is able to prove that there has been no improper disclosure of the information and that, where necessary, sufficient safeguards are in place to prevent disclosure.

- (a) What do you think?
- (b) If this approach is adopted, how would you suggest that the presumption be rebutted? For example, is a lawyer's sworn statement that there has been no disclosure sufficient?
- (c) If this approach is adopted, in what circumstances do you think the nature of the information and the consequences of disclosure of confidential information would be so great that the presumption cannot be rebutted?

The timing of the creation of screening mechanisms

Some of the jurisprudence applying the CBA's *Guidelines on Conflicts from Transfer between Law Firms* has been categorical in stating that any screening mechanism or information barrier must be erected at the time the lawyer migrates or when the alleged conflict could first occur in theory, even though the conflict was not – or even could not have been – recognized at the time.

For example, in the *Alcan Inc.* decision, a lawyer joined a firm, passed the screening interview, and began work. Months later, the firm accepted a retainer to act against Alcan, after running the name through its client and matter data base and not finding a record. It did not know that the lawyer had knowledge of Alcan's business from previous work. Even though there had been no misuse or disclosure of confidential information, the law firm was disqualified. The disqualification was dire for the client, who had to scramble to find alternate counsel after investing significant resources in working with the firm. The disqualification was also troublesome for the firm. In this situation, the current rules required the erection of screens before the firm could even know that they were necessary (in this case, at the time the law firm hired the lawyer).

Similarly a merger of law firms may require a complex set of administrative arrangements to merge filing systems, information technologies, computer networks, and premises. The closing date of the merger cannot possibly coincide with all required arrangements having been completed for the simple reason that, in most cases, it could violate client confidentiality to implement these measures in advance. Until systems are merged, any presumption that information is flowing within the newly-created firm is artificial. However, the rules as currently interpreted may require that a full information barrier be put in place at the time of signing the agreement to merge, even if no access to confidential information between the merging firms is possible at that time.

Question 8 – The timing of information barriers / ethical screens

It is our preliminary view that the timing of the placement of information barriers / ethical screens should not determine the presence of a conflict if it can be proved that no disclosure of confidential information has in fact occurred.

What do you think?

Confidentiality and lawyer mobility

In the wake of the decision in *MacDonald Estate*, the CBA's *Guidelines on Conflicts from Transfer between Law Firms* were largely adopted by law societies. The *Guidelines*, which cover the movement of lawyers between law firms and from government to private practice, have served the profession well, and have been applied in literally hundreds of court decisions. But they are silent on several other ways lawyers change places of work, including the movement of corporate counsel from one corporation to another, or from a law department to a law firm, or vice versa.

The *Guidelines* are also silent on secondments. The *Guidelines* assume that a lawyer's decision to move to another place of work is permanent, and they therefore do not provide guidance on short-term secondments, which are common in the public and private sectors. A firm might not permit a secondment to a regulatory agency if seconded lawyers could not appear before the agency on their return to the firm. Agencies that employ seconded lawyers recognize the danger of having a seconded lawyer work on a file from his or her home firm. However, they generally do not impute knowledge of matters within the firm or of confidential client information beyond actual knowledge. This approach has evolved over time, and is not part of the rules.

We believe that the *Guidelines* should cover a broader range of lawyer mobility possibilities.

Question 9 — Lawyer transfers

It is our preliminary view that the CBA's *Guidelines on Conflicts from Transfer Between Law Firms* should be revised to include transfers between corporations and other practice settings and secondments.

- (a) Do you agree?
- (b) If yes, what other situations might be included?
- (c) Please describe any problems stemming from the *Guidelines on Conflicts from Transfer Between Law Firms* that you have experienced.

9. The use of retainer letters to clarify expectations

An effective and practical conflict of interest regime must meet the interests of both clients and lawyers, as well as respecting the public interest in the administration of justice. Clearly, conflict of interest issues are as important for clients as they are for their lawyers. For every law firm that is unable to act due to a conflict of interest, there will be a client denied his or her choice of lawyer. And every time an alleged conflict becomes a litigation issue, there is, one way or another, added delay and expense for the client.

With on-going business or in-house corporate clients, the client-lawyer relationship may be highly collaborative, with clients involved in assessing options, structuring transactions, and shaping advocacy. In such circumstances, clients will properly expect that their lawyers will candidly discuss possible conflicts, even conflicts which do not reach the threshold of being legal conflicts of interest. Although the Supreme Court of Canada in the *Strother* decision recognized that, from a strictly legal perspective, there is nothing improper in a lawyer acting for a competitor of a client, provided that confidentiality is safeguarded, a business client may want to be consulted if this is about to happen, and have the opportunity to express any concerns. This may shape a firm's decision about whether it is appropriate to act adversely, in unrelated matters, even when the lawyer honestly believes that there is no legal prejudice, nor any risk of the disclosure of confidential information.

Recent case law has made it clear that lawyers in every practice setting would be well advised to use retainer letters to describe the terms of the client-lawyer relationship and the mandate being undertaken for the client. Both the majority and minority judgments in *Strother* noted that contract law governs legal services, but that the circumstances, which include the retainer letter, define the relationship of trust and confidence. The client-lawyer relationship includes obligations that go beyond the bounds of the retainer and the terms negotiated by the parties, unless expressly stated otherwise. It is therefore desirable to have a retainer letter with clear and precise terms for the working relationship, including, if applicable, consent to unrelated adverse retainers and the cessation of the duty of loyalty upon completion of the retainer.

We believe that there are many advantages to retainer letters. They are an appropriate way to record client expectations, and document the shared understanding of the lawyer's mandate. Both lawyers and clients benefit from clarity at the outset of the client-lawyer relationship, thereby minimizing surprises and misunderstandings later. For lawyers, a retainer letter may also limit liability, as was made evident in the *Strother* decision. The lawyer and firm involved would have faced much larger - and perhaps even catastrophic - liability had the retainer not been in place and limited in scope.

We note that the Alberta *Code of Professional Conduct* requires lawyers to provide clients with written information about fees and disbursements soon after being retained, and that some other professionals, such as chartered accountants, have clients sign an engagement letter before work begins.

The contents of retainer letters will vary according to the circumstances but should generally set out, for each new file:

- a) the identity of the client (for example, individual, corporation, group of shareholders, partnership, or partner)

- b) the scope of the mandate
- c) any exceptions to confidentiality requirements
- d) an agreement on fees and billing arrangements
- e) an outline of the proposed schedule for the work to be done
- f) a statement about whether or not the firm may act against the client, on unrelated matters, provided that confidentiality is fully preserved
- g) the procedure for terminating the client-lawyer relationship, and
- h) a statement about when or if any duty or loyalty continues after the retainer ends.

We are aware that the use of retainer letters may well be controversial and will initially impose burdens. It may not be appropriate for existing clients, and we are not suggesting that the profession engage in a retrospective effort to obtain agreements on the terms of mandates after the fact.

But we do believe that retainer letters are a major advance towards serving clients and protecting law firms. We are working to prepare standard models, building on work that has been done by a number of provincial law societies and by a working group of lawyers from various law firms, which may be adapted, as necessary, to specific circumstances.

Question 10 – Retainer letters

It is our preliminary view that, as a general rule, lawyers should be strongly encouraged, if not required, to use retainer letters to define the scope of the client-lawyer relationship.

- (a) What problems, if any, would this pose in your practice?
- (b) Should there be exceptions?
- (c) If you practice in a setting where, as a client, you retain law firms, how would retainer letters affect your practice?

10. Problems that conflict rules pose for specific practice areas

Rules that are articulated at a high level of abstraction may apply awkwardly to specific fact situations. Different types of legal work give rise to different client-lawyer relationships. Different expectations and different obligations are formed depending on the nature of the information that a client needs to disclose, the type of work being done (filing a document as opposed to advising on risk), a client's dependence on the legal advice provided, vulnerability, and a host of other factors. Although the courts have applied conflict rules in the litigation context, much of the practice of law is not litigation based.

We want to learn about problems lawyers from different practice areas are experiencing when they apply the general conflicts rules. We are consulting broadly within the legal profession to learn from the practical experiences of lawyers in every sector.

Is there a need to have more flexibility in the conflicts rules recognizing that different practice areas may experience different challenges? For example, consider:

- lawyers doing local counsel work, reviewing the work product of a lawyer from another jurisdiction without any confidential information being exchanged
- duty counsel in criminal and family cases, who may have extremely brief contact with many nominal clients on a given day
- lawyers working in legal aid clinics and those engaged in *pro bono* work, who may not have the time or organizational capacity to mobilize the searches, clearances, or screens required in the circumstances
- insolvency lawyers who have clients who wish to consent to have the same firm represent different creditors and even different classes of creditor. In large insolvencies, more than a hundred creditors may require legal representation and standing. To require separate representation would be to deny some clients effective access to counsel with experience in the area and would entail unnecessary duplication of effort and expense
- lawyers who work in highly specialized or narrow areas of law, such as aviation or marine law or film and television financing, where there may be only a few experts available
- lawyers who practice in remote or rural communities where there are only a few lawyers
- specialists working in smaller towns who may encounter problems because of the lack of alternative counsel to whom potential clients can be referred
- lawyers doing conveyancing work. In some Canadian and foreign jurisdictions, there are special conflicts rules dealing with conveyancing, recognizing the hazards of representing multiple parties
- lawyers who specialize in competition and anti-trust matters, who are few in number given the size of the Canadian market and the degree of corporate concentration
- lawyers practicing family law. This is an area where conflicts are particularly sensitive because of the emotions involved, and the possible vulnerability of the clients
- lawyers handling routine corporate / commercial matters, such as incorporations or filing *Personal Property Security Act* registrations, or intellectual property filings, prosecutions and opinions. A Canadian filing may simply involve searching availability or the registration with the Canadian Intellectual Property Office of intellectual property registrations that are matters of public record in a foreign jurisdiction.

Question 11 – Specific practice areas

It is our preliminary view that conflicts rules may need to be nuanced to reflect the realities of practice in different circumstances.

- (a) Please describe any particular problems that the conflict of interest rules pose for you or your clients in your community or practice area.
- (b) How could such problems be addressed?

II. Proposed conflicts management tools

We believe that lawyers and law firms could benefit from conflicts management tools that would assist in identifying and managing conflicts of interest. Among the tools that we are considering developing and posting on the CBA web site:

- Model retainer letters (litigation-related)
- Model retainer letters (non-litigation-related)
- Model termination of mandate letters
- Model non-representation letter
- Various models regarding common retainer issues
- Request for proposal checklist
- Independent legal advice checklist
- Checklist for multiple representations
- Checklist for client waiver of conflict
- Checklist for construction of information barrier / ethical screen
- Checklist for interview of transferring lawyer

Question 12 — Model materials and checklists

(a) Please indicate which of these model materials and checklists would be useful to you in your practice.

- Model retainer letters (litigation-related)
- Model retainer letters (non-litigation-related)
- Model termination of mandate letters
- Model non-representation letter
- Various models regarding common retainer issues
- Request for proposal checklist
- Independent legal advice checklist
- Checklist for multiple representations
- Checklist for client waiver of conflict
- Checklist for construction of information barrier/ethical screen
- Checklist for interview of transferring lawyer

Which three would be most useful:

- 1.
- 2.
- 3.

(b) What other tools would be useful?

12. Other issues

Question 13 – Consequences of the current formulation of conflicts rules

- (a) Do you believe the current conflict rules are in need of change?
- (b) Please describe any practice-related or other types of problems with the conflicts rules that you or your clients have experienced that have not been already described.

Question 14 – Other comments

Please add any other comments on conflict of interest rules.

Question 15 – Demographics

It would be helpful to have some demographic information about you and your practice.

(a) What is your practice setting?

- Private practice of law
- In-house counsel
- Corporate law department
- Government ministry, department, or agency
- Legal aid or clinic setting
- Law teacher / academic
- Other (describe)

(b) In what size firm or legal department do you practice?

- Solo practice
- 2 to 5 lawyers
- 6 to 10 lawyers
- 11 to 20 lawyers
- 21 to 50 lawyers
- 51 to 100 lawyers
- Over 100 lawyers

(c) In what areas of law do you practice (three main areas if there are several)?

(d) Where is your main practice located?

- remote or rural location, less than 5,000 population
- village, town, or small city of less than 50,000 population
- regional centre with population of 50,000 to 500,000
- major metropolitan centre with population of 500,000+

13. Next steps

This Consultation Paper sets out some of the initial thinking of the Task Force on the important and complex issue of conflicts. We are keenly aware of the sensitivity of the issues, and the variety of views that exist within the Canadian legal profession. We are consulting broadly before formulating any recommendations.

We also intend to conduct research into reforms undertaken in different jurisdictions to see what we can learn that may be applicable in Canada.

We invite you to comment on the ideas in this Paper and we welcome comments on other areas where a re-examination of conflicts rules might be useful.

Please send your comments by November 29, 2007 to:

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American Bar Association, *Lawyers' Manual on Professional Conduct* (Chicago: ABA, 2001).

15. The Task Force

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Marie-Claude Noël, Project Officer, Legal & Governmental Affairs

16. The consultation questions

Question 1 – Application of conflict of interest rules

How often do you encounter a situation involving a conflict of interest?

- Never
- Rarely
- Often
- Very frequently

Question 2 – Terms and Circumstances of the Retainer

It is our preliminary view that, as a general rule, the scope of the duty of loyalty should be determined by the terms and circumstances, express or implied, of each retainer.

- (a) What do you think?
- (b) If this approach is adopted, what factors should be relevant? For example, where the matter is limited in scope?

Question 3 – Duty of Loyalty – Unrelated Matters

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

- (a) What do you think?
- (b) If this approach is adopted, in what circumstances do you think that a client would be harmed or the public interest not served if a lawyer were permitted to act against the current client without express consent?
- (c) If this approach is adopted, in what circumstances might an adverse retainer against a current client be permitted?

Question 4 – Duty of loyalty and the solicitor/client relationship

It is our preliminary view that, as a general rule, the duty of loyalty should be limited to the individual or entity with whom the lawyer or law firm has a direct solicitor/client relationship (as opposed to others such as family members, beneficiaries, shareholders, or affiliated entities).

- (a) What do you think?
- (b) If you agree with this statement of the general rule, are there circumstances in which you think it should not apply?

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- 3.

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