The Law Society of British Columbia

AGENDA

MEETING: Benchers
DATE: Friday, May 13, 2011
TIME: **7:30 a.m.** Continental breakfast
8:30 a.m. Meeting begins
PLACE: **Bencher Room**

CONSENT AGENDA: The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.		
1	**Minutes of April 15, 2011 meeting** • Draft minutes of the regular session • Draft minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
REGULAR AGENDA		
2	**President's Report** • Written report to be distributed electronically prior to meeting	
3	**CEO's Report** • Written report to be distributed electronically prior to meeting	
4	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	
5	**Amendments to Credentials Rules Governing Articled Students** Mr. Renwick and Mr. Getz to report • Memorandum from Mr. Lucas on behalf of the Credentials Committee and the Act and Rules Subcommittee	Tab 5 p. 5000
OTHER MATTERS *(FOR DISCUSSION AND/OR DECISION)*		
6	**Review of Conflicts Portion of the Model Code of Professional Conduct** Mr. Blom to report • Report from the Ethics Committee	Tab 6 p. 6000
IN CAMERA SESSION		
7	**Bencher Concerns**	

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, April, 15, 2011

PRESENT:

Gavin Hume, QC, President	Peter Lloyd, FCA
Bruce LeRose, QC, 1st Vice-President	David Loukidelis, QC, Deputy Attorney General of BC
Art Vertlieb, QC, 2nd Vice-President	Benjimen Meisner
Haydn Acheson	Nancy Merrill
Rita Andreone	David Mossop, QC
Kathryn Berge, QC	Suzette Narbonne
Joost Blom, QC	Thelma O'Grady
Patricia Bond	Lee Ongman
Robert Brun, QC	David Renwick, QC
E. David Crossin, QC	Claude Richmond
Tom Fellhauer	Alan Ross
Leon Getz, QC	Catherine Sas, QC
Carol Hickman, QC	Richard Stewart, QC
Stacy Kuiack	Herman Van Ommen
Jan Lindsay, QC	Kenneth Walker

ABSENT: Satwinder Bains, Gregory Petrisor

STAFF PRESENT:

Tim McGee	Bill McIntosh
Deborah Armour	Jeanette McPhee
Robyn Crisanti	Doug Munro
Charlotte Ensminger	Jack Olsen
Su Forbes, QC	Lesley Pritchard
Jeffrey Hoskins, QC	Alan Treleaven
Michael Lucas	Adam Whitcombe

GUESTS:

The Honourable Barry Penner, QC, Attorney General of BC
Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Johanne Blenkin, Executive Director, BCCLS
Ron Friesen, CEO, CLEBC
Jeremy Hainsworth, Reporter, Lawyers Weekly
Azool Jaffer-Jeraj, President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Joel McLaughlin, Ministerial Assistant to the Attorney General of BC
Sharon Matthews, Vice-President, CBABC
Caroline Nevin, Executive Director, CBABC
Heather Raven, Associate Dean, Academic and Student Relations, UVIC
Wayne Robertson, QC, Executive Director, Law Foundation of BC

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on March 4, 2011 were approved as circulated.

Consent Resolutions

The following resolutions were passed unanimously and by consent.

2. 2010 Law Society Scholarship: Credentials Committee Recommendation

BE IT RESOLVED to adopt the recommendation of the Credentials Committee that the 2011 Law Scholarship of $12,000 be awarded to Jennifer Lee-Ann Smith, with Karen Lisa Whonnock as runner-up, subject to the conditions set out in Ms. Small's memorandum at page 2001 of the *in camera* meeting materials.

3. Act and Rules Subcommittee: Amendment to Rule 3-57 (Payment of Fees from Trust)

BE IT RESOLVED to rescind Rule 3-57(3) and substitute the following:

(3) A bill or letter is delivered within the meaning of this Rule if it is

(a) mailed to the client at the client's last known address,

(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number,

(d) transmitted by electronic mail to the client at the client's last known electronic mail address, or

(e) made available to the client

(i) by means that allow the client to review the content of the document and save or print a copy, or

(ii) by other means agreed to by the client.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

REGULAR AGENDA – for Discussion and Decision

4. Attorney General's Greeting

Mr. Hume welcomed the Honourable Barry Penner, QC, Attorney General of BC and his Ministerial Assistant, Joel Mclaughlin and invited the Attorney General to address the meeting. Minister Penner thanked Mr. Hume and spoke briefly on a number of topics, including:

- the pending HST referendum process
- the upcoming Spring Session of the Legislature

Mr. Hume noted that Minister Penner has a standing invitation to attend Benchers meetings as an ex officio Bencher of the Law Society.

5. President's Report

Mr. Hume referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President since his last report, and elaborated on the following matters.

a. **Meeting with BC Chief Justices**

Mr. Hume and Mr. McGee met recently with Chief Justices Finch and Bauman. They had a positive discussion of the Law Society's current initiatives to enhance access to legal services.

b. **Meeting with the Deputy Attorney General David Loukidelis, QC**

Mr. Hume met recently with Deputy Attorney General David Loukidelis, QC for discussion of a number of topics, including:

- the Report of the Public Commission on Legal Aid in BC and the prospect of a conference on next steps for improving the delivery of legal aid in BC
- the Law Society's pending package of proposed legislative amendments

c. **Federation of Law Societies of Canada Council Meeting & Semi-annual Conference in Banff (March 17-19, 2011)**

Mr. Hume briefed the Benchers as the Law Society's member of the Federation Council regarding the Federation's March Council meeting and Semi-annual Conference of the Federation of Law Societies in Banff.

d. **Recent External Appointments**

Mr. Hume reported on two recent President's board appointments to the Board of Directors of the Continuing Legal Education Society of BC, made in accordance with CLEBC's by-laws and with the advice of the Appointments Subcommittee:

- Thelma O'Grady (Vancouver Bencher) – re-appointed for a second three-year term commencing September 1, 2011
- Ronald Lamperson (County of Nanaimo lawyer) – jointly re-appointed by the CBABC and Law Society Presidents for a second three-year term commencing September 1, 2011

e. **Access to Legal Services Advisory Committee Update**

Committee Chair Art Vertlieb, QC updated the Benchers on a number of current initiatives, including:

- Proposed expansion of permitted activities and services by articled students
- Progress of the Courts Subcommittee and the Solicitors Subcommittee
    - Regarding proposed expansion of permitted activities and services by paralegals

6. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

1. Implementation of Core Process Review Recommendations – Enterprise Content Management
2. Communications Plan Initiatives
3. 2012 Budgeting and Fee Recommendations – Process Update
4. Buildings and Premises – Space Usage Assessment
5. Bencher Retreat - Update re: Planning
6. Continuing Professional Development (CPD) Program – 2010 Results

   Mr. McGee updated the reporting statistics provided in his written report as of April 15, 2011:

   - nine lawyers are currently non compliant and therefore have been suspended
     - of those, five lawyers had already been suspended for non completion of 2009 CPD or for other reasons
   - one other lawyer has been granted an extension to April 30

Mr. LeRose provided an update on planning of the workshop program for the 2011 Benchers' Retreat: *The Future of Legal Regulation in British Columbia*.

7. Report on Outstanding Hearing and Review Reports

The Benchers received and reviewed a report on outstanding hearing decisions.

OTHER MATTERS – For Discussion and/or Decision

8. Review of the Non-Conflicts Portion of the Model Code of Professional Conduct

Ethics Committee Chair Joost Blom, QC briefed the Benchers, providing highlights of the Committee's work over the past seven years, following Federation of Law Societies of Canada's decision to take on as strategic initiative the harmonizing of professional conduct rules across the county. Mr.Blom noted the key roles performed by then-Bencher (now Life Bencher) David Zacks, QC and Law Society Ethics Advisor Jack Olsen in supporting the work of the Federation in developing its model code of conduct (the "Model Code").

Mr. Blom noted that the Model Code has been adopted by the Law Society of Alberta and the Law Society of Manitoba. He reminded the Benchers that in October 2010 they reviewed the non-conflicts provisions of the Model Code, which were then posted to the Law Society website for comment by the profession, while the Federation continued to work on the conflicts provisions. Mr. Blom referred the Benchers to the Ethics Committee memorandum at page 8000 of the meeting materials for discussion of changes made in the course of developing the current draft of the BC version of the Model Code (the "BC Model Code" at page 8106 of the meeting materials). Mr. Blom confirmed that the Ethics Committee is seeking the Benchers' adoption of the BC Model Code (without conflicts provisions) and with deferral of implementation to an undetermined future date, pending completion of the Federation's review of the

Model Code's conflicts provisions and the Ethics Committee's further advice to the Benchers in that regard.

Mr. Blom advised that the Ethics Committee expects to brief the Benchers on the conflicts portion of the Code in detail over the next several months, and to recommend a consultation process with the profession similar to that conducted with the non-conflicts portion of the BC Code. The Committee expects that consultation process and its subsequent review of submissions from the profession on the conflicts portion of the Code to be completed later in the year.

Mr. Blom moved (seconded by Mr. Getz) that the BC Model Code (without conflicts provisions) be adopted to replace the current Professional Conduct Handbook, deferring implementation to an undetermined future date.

The key points raised in the ensuing discussion were:

- the Model Code is logically structured and clearly drafted, and provides a helpful Commentary
- wherever possible the BC Model Code follows the structure and language of the Model Code, with changes made only where substantive or technical improvement is intended and considered necessary
- national harmonization of conduct rules is important and remains the long-term goal
- both the Model Code and the BC Model Code are and will continue to be "living documents"

The motion was carried.

Mr. Brun confirmed that his law partner will provide the Ethics Committee with suggestions on the issue of whether discovery should be closed or open.

9. Bencher Governance Considerations

Mr. Hume introduced this matter, outlining the process followed by the Executive Committee in reaching the recommendations set out in the Committee's memorandum at page 9000 of the meeting materials (Appendix 2 to these minutes). Mr. Hoskins provided additional background, noting that:

- the memorandum classifies the Executive Committee's recommendations on a number of Bencher governance issues into two categories (each in turn divided into "HIGH PRIORITY" and "LOW PRIORITY")
    - matters that can be addressed by simple rule changes
    - matters that require a referendum vote by the membership to endorse proposed rule changes

Mr. Getz moved (seconded by Mr. Richmond) that:

- all matters classified in the Executive Committee's memorandum as "HIGH PRIORITY" (except matters 6, 7 and 8) be referred to the Executive Committee for review and development of recommendations to be brought back to the Benchers in due course

- matters 6, 7 and 8 be referred to an independent committee for review and development of recommendations to be brought back to the Benchers in due course

The key points raised in the ensuing discussion were:

- Bencher governance issues are likely to receive significant attention in the 2012-2014 Strategic Plan

- review of Bencher election and term of office issues by an independent committee of non-Benchers will enhance public and profession confidence

- a stand-alone Bencher governance committee and a subcommittee of the Executive Committee on governance issues might each present benefits and drawbacks in the areas of background, focus and objectivity

The motion was carried.

10. Continuing Legal Education Society of BC (CLE) Update

Mr. Stewart and Ms. O'Grady provided a CLE update in their capacity as Benchers appointed to the CLE board of directors. Both confirmed their confidence in CLE's board of directors, management, staff and operations.

Mr. Stewart focused on administration and management issues, under four topics:

- Leadership

- Board composition and structure

- Board meetings

- Finances

Ms. O'Grady outlined CLE's products, services and strategic priorities. Mr. Stewart noted CLE's commitment to fiscal responsibility and the inherent tension between that commitment and CLE's non-profit identity, and confirmed that the CLE board is attuned to the need for balance in that regard.

11. Lawyers Insurance Fund (LIF) 2010 Year End Report

LIF Director Su Forbes, QC provided the Benchers with an overview of LIF's 2010 performance. Ms. Forbes's remarks were supplemented by a PowerPoint presentation (attached as Appendix 3 to these minutes).

12. Federation of Law Societies of Canada Update: Report on the Banff Council Meeting & Semi-annual Conference (March 17-19, 2011)

Mr. Hume reported to the Benchers as the Law Society's member of the Federation Council regarding the March Council meeting and Semi-annual Conference in Banff. Mr. Hume identified strategic planning and governance as key topics discussed at the Council meeting. Mr. Hume referred to progress reports on several of the Federation's strategic initiatives, including the development of national standards for admission to and discipline by member law societies, common law degree standards, and a model code of conduct.

Mr. Hume noted that the Conflicts section of the Model Code of Conduct was approved, except the issues of current client conflicts and the financial harm exception to the duty of confidentiality, which were referred to the Model Code Standing Committee, which he chairs. Mr. Hume also noted that the Council approved the formation of a Federation Standing Committee on Access to Legal Services, and that Vancouver Bencher David Mossop, QC has been appointed to that committee.

Mr. Hume then reported on the Federation's Semi-annual Conference, advising that public oversight was the conference theme, and that the Law Society's research paper and plans for a BC-based oversight model were received positively. Mr. Hume identified coordination of national initiatives as a key topic of discussion, and as illustration of the importance of the various strategic initiatives discussed at the Council meeting, particularly in the context of protecting professional independence.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

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2011-04-29

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

April 15, 2011

Introduction

My report this month includes updates on a number of projects including our internal working group tasked with defining our needs for a new organization wide system for information and document management and an update on initiatives under our new Law Society Communications Plan. Our financial results for the first quarter ending March 31 will be presented at the next Bencher meeting on May 13, 2011.

1. Implementation of Core Process Review Recommendations – Enterprise Content Management

A major finding of the Core Process Review completed in 2010 was that we are an organization that relies heavily on the creation, storage and retrieval of data and on the exchange of relevant, accurate information across our various departments. However, the report also found that we do not have a modern system or information management tool to support that need.

In response, we created an internal working group co-chaired by Adam Whitcombe, Chief Information and Planning Officer, and Jeanette McPhee, Chief Financial Officer, with a mandate to define our user needs in detail, consult on what would constitute the best solution, and create the necessary business case for consideration. The working group has accordingly broken the project into three phases. The first phase will be the detailed needs analysis, the second phase will involve system and vendor selection based on the first phase results and the third phase will involve working with the selected vendors and staff to implement the solutions.

The working group has concluded a competitive search and assessment for a consultant to assist in the critical first phase of the project. Based upon a number of criteria including experience, track record and cost, KPMG Canada Advisory Services has been selected. Work has already started, led by Dominic Jaar, an associate partner with KPMG Canada's Information Management Services Group. Dominic is a lawyer and has been involved in the development of international standards and leading practices regarding information management solutions for a variety of organizations. The KPMG engagement is expected to take about 12 weeks and will produce a comprehensive report covering recommended solutions, a roadmap for implementation, budget estimates and a proposed timeline. The cost of the engagement is within the 2011 capital budget provision for the Law Society's electronic document and information management solutions.

I will be updating the Benchers throughout the year on this important project and the other major projects implementing the Core Process Review report recommendations.

2. Communications Plan Initiatives

Communications re: Ombudsperson

A central part of Law Society's Communications Plan is to support our strategic objective of enhancing public confidence in our ability to effectively regulate the profession. In March the Benchers approved two initiatives with this in mind, the development of a proposal for independent oversight and enhanced communications regarding the role the BC Ombudsperson plays in reviewing the Law Society's handling of complaints against lawyers.

Work on an independent oversight model is underway and will be brought forward for consideration by the Benchers as part of the new strategic plan discussions in the fall. To address the direction given regarding the Ombudsperson, the Communications department is implementing a four-step plan as follows:

a. All information being sent to complainants is being reviewed for form and substance to ensure that the complainant review options are clear and easy to follow, including instructions on recourse to the Ombudsperson;

b. Information regarding the Ombudsperson on the Law Society's website is being expanded and located alongside other information about our complaints process and elsewhere as appropriate;

c. Statistical information regarding the number of Ombudsperson reviews, the outcomes and any explanatory information will be included in an annual media release as well as part of the Law Society's annual review; and

d. The Office of the Ombudsperson will be apprised of these initiatives.

New Law Society External Website

As reported at the last Bencher meeting, the Law Society's external website has recently been completely overhauled to make it more user-friendly, relevant and informative. Since the launch a month ago, the site has been visited 89,000 times by 37,600 unique visitors who viewed a total of 551,000 pages. For purposes of comparison, consider that in March of last year our site had 29,800 unique visitors, so the new site is generating much broader interest in an even shorter period of time. The launch was also picked up by several legal organizations who posted news of it through their own news media and our tweets have been re-tweeted by many. The most popular page is the Lawyer Lookup (41,000 page views) followed by Lawyer Login

(16,000). Anecdotally, we have had a number of positive comments about the site, with ease of use and better overall look and feel being the most common. The Communications and IS/IT teams deserve recognition for their hard work and ingenuity in the redesign and relaunch of this key Law Society communications tool.

3. 2012 Budgeting and Fee Recommendations – Process Update

The budgeting process for all Law Society operations for 2012 is now underway under the leadership of Jeanette McPhee, our Chief Financial Officer. All departmental managers are working on their budgetary projections for 2012 using a "zero based" approach to ensure that departmental needs are assessed afresh in each budget cycle. This is detailed, time-consuming work but it is necessary to support a robust budget assessment and fee recommendation process which the Finance Committee will undertake later in May. Four meetings of the Finance Committee have now been scheduled commencing on May 25, 2011. The timeline provides that formal recommendations to the Benchers on all mandatory fees (including all third party agencies and organizations we support) for 2012 will be made at the Bencher meeting in July.

As an aside, I believe we are unique among organizations in most of the free world in that we (staff and Benchers alike) are required to estimate and commit to budgets almost seven months in advance of the effective date and with only a fraction of the current year results available to guide that process. This is because we are (together with New Brunswick) one of only two Law Societies in Canada that must submit their regulatory fees for approval by the members. This necessitates long lead times for mailings and coordination with the AGM. The Benchers have authorized a change to this requirement as part of our package of legislative change requests. We are hopeful this package will be brought forward in the next full legislative session, which is most likely in 2012.

4. Buildings and Premises – Space Usage Assessment

It is a "best practice" for businesses to review and assess how they are utilizing their available office space at least every five years. The Law Society last undertook a comprehensive space analysis for 845 Cambie in 2005. This was done primarily to support the development of the then empty fourth Floor to establish working premises for our new Trust Assurance Department.

Since then we have had a number of moves, adds and changes on all floors and it is time to once again ensure that we are effectively utilizing the building space and properly meeting our operational needs. We have engaged SSDG Design Group (SSDG did the last review in 2005) to conduct this review and

we expect their report by the end of June 2011.

Although coincidental, the timing of the SSDG review is now fortuitous because of the departure of the CLE Society from the third floor by the end of August 2011 and the recent notice from the Vancouver Opera that they are vacating their premises at 839 Cambie and 750 Cambie by the end of September 2011. The space usage assessment will assist us in making recommendations regarding the re-leasing of the pending vacant premises which also accord with Law Society's own space usage requirements. Jeanette will be available at the meeting to discuss this process in greater detail

5. Bencher Retreat - Update re: Planning

Planning for the upcoming Bencher retreat at Whistler on June 16, 2011 – June 19, 2011 is proceeding well. The theme for the Friday conference portion of the retreat is "The Future of Legal Regulation in British Columbia". We are hoping to have the agenda finalized by the Bencher meeting on Friday and Gavin and Bruce can provide further details at that time.

6. Continuing Professional Development (CPD) Program – 2010 Results

I would like to provide a brief update on the statistics for our CPD program as at March 31, 2011. Out of approximately 10,300 practicing lawyers, 45 lawyers have not yet completed the 2010 CPD requirement compared to 170 at the same time last year. Of the 45 lawyers:

- 4 must complete only the ethics requirement
- 27 have not reported any hours
- 14 have reported some hours

Alan Treleaven will be available at the meeting to update these results and to answer any questions.

Timothy E. McGee
Chief Executive Officer

Memo

The Law Society of British Columbia

1012

To Benchers

From Jeffrey G. Hoskins, QC for Executive Committee

Date April 5, 2011

Subject **Some governance issues**

Following a recent meeting with the President and the CEO, I was asked to prepare a memorandum on a number of governance issues for the consideration of the Executive Committee and for them to refer to the Benchers topics they considered worthy. The Executive Committee discussed the topics that I prepared and resolved to refer those matters that appear below to the Benchers for further consideration.

The Committee classified some matters as high priority or importance and others as lower priority or importance. I have further divided the issues into matters that can be done by a simple Rule change and those that require the authority of the members voting in a referendum under section 12 of the *Legal Profession Act*.

Of the matters that the Benchers consider should be pursued further, there may be some that can be referred to Act and Rules Subcommittee for implementation and others that require further study and can be considered as part of the new Strategic Planning process later this year.

Things that can be done by simple rule change: HIGH PRIORITY

1. Appointment of non-lawyer non-Bencher members of public to regulatory committees

Under the current Rules, membership in the Discipline Committee, Credentials Committee, Practice Standards Committee and Special Compensation Fund Committee are limited to current Benchers and lawyers. All other Committees are open to the membership of anyone appointed by the President.

This excludes from the key regulatory functions of the Law Society all members of the general public, including Life Appointed Benchers and many retired judges. Given that the Benchers are now prepared to have non-lawyer non-Benchers sitting on hearing panels, they may be willing to consider such persons as members of the regulatory committees.

The Benchers can change this restriction by amending the Rules that govern the composition of those Committees.

2. Election of Executive Committee

The current Rule 1-39(11)(b) provides as follows:

> (11) If a vote is required for an election under this Rule,
>
> (b) a ballot must be rejected unless it contains votes for the same number of candidates as there are positions to be filled, and

As a result, Benchers are compelled to vote for three candidates, even if they have a preference for only one or two. This is unlike the rules in any other Law Society election or in public elections such as local government elections in British Columbia. Aside from the restriction on civil liberties, since all votes count the same in the final result, the result of the election can be affected.

There is no requirement for a referendum of members for the Benchers to change the rules governing the election of the Executive Committee.

3. Bencher elections by electronic means

The Law Society conducts Bencher elections at least annually. The process is labour-intensive and completely paper-based. Some years ago, we investigated the cost of changing to an electronic web-based system, such as that used by a great many organizations today. While the cost for a relatively small membership base such as the Law Society's was thought to be prohibitive at one time, is it time to investigate again to see if technological advances and/or increased membership make a difference?

Things that can be done by simple rule change: - LOWER PRIORITY

4. Webcasting general meetings –

In 2003, the membership voted 87.7 per cent in favour of the following referendum question:

> **Question 1: Webcasting of general meetings**
>
> Are you in favour of the Benchers amending the Rules respecting general meetings to
>
> (a) allow members to attend and vote by way of the Internet, and

(b) ensure that the meeting would not be invalidated by reason alone of a technical failure that prevented some members from attending and voting by way of the Internet?

Despite that endorsement, the Benchers have never implemented the rule change that was mandated. At the time, the cost involved was considered too great and the issue of the Law Society collecting mandatory fees on behalf of the CBA-BC Branch complicated the question of instituting a change that potentially could affect the outcome of that debate.

Is it time to investigate the current cost of making the transition or to ask the Benchers if they are interested in such an investigation?

5. Appointment of lawyer Bencher to fill vacancy in last 6 months of a term

Rule 1-38 permits the Benchers to appoint a lawyer to fill a vacancy for Bencher that occurs in the last quarter of the term of office. (In the first three-quarters of the term, the Rules require that a Bencher by-election be held promptly). However, the Benchers have made no such appointment in well over 20 years.

One reason that the Benchers have decided not to make an appointment in the past is that the tag-end term used to be counted as if it were a full term for the purpose of Bencher term limits. That rule was amended in early 2010 so that a half term or less does not count against the Bencher term limit.

I suspect that some Benchers considered it unseemly for the Benchers as a whole to apparently endorse one possible candidate for Bencher in the general election that inevitably follows quickly in November of the same year.

The Benchers may want to consider a policy guideline as to when they will consider appointing a lawyer to ensure more continuous representation, especially for districts with only one or two Benchers. Alternatively, if the Benchers are not inclined ever to use the power to appoint, they may consider rescinding the Rule.

Things that require a referendum vote to amend the Rules

The issues that follow are all subject to section 12 of the *Legal Profession Act*, which requires that the membership endorse rule changes in a referendum ballot before the Benchers can give them effect by amending the Law Society Rules. This requirement was included in the *Legal Profession Act* because the nature of these provisions gives the appearance that the self-interest of the Benchers is involved.

In order to dispel that appearance and give any proposals for reform more credibility with the membership voting in a subsequent referendum, I suggest that the Benchers refer

some or all of the following issues to a committee of knowledgeable and trusted people who are not current Benchers, such as senior members of the Bar, former Appointed Benchers and members of the general public. That would also have the effect of taking the issues off the Bencher agenda leaving it free for broader issues. It would be helpful if the Benchers would commit in advance to putting the recommendations of the independent Committee to the members in a referendum and to implementing changes that are duly approved by the members.

HIGH PRIORITY

6. Bencher turnover

Every two years, there is a general election of Benchers and the terms of Appointed Benchers come to an end, and several are replaced at the same time. In alternate years, an election is required to replace the out-going President and sometimes others who have left for one reason or another. The result is a very large number of inexperienced Benchers in alternate years and a very low number in other years.

These are the figures for the past decade:

YEAR	NEW BENCHERS
2001	2
2002	13
2003	2
2004	8
2005	1
2006	11
2007	1
2008	5
2009	2
2010	10
2011	1

The inefficiency of this system came to me once again in the orientation of a single new Bencher that took place recently. The Law Society was required to dedicate a large number of staff hours per Bencher to the education of one individual. Other years, the logistics of orienting and training a large number of people has become a problem.

I think that there is also a risk factor and a quality control issue of sorts in having up to 42 per cent of the Board completely without experience at the same time. With annual partial elections and an eight-year term limit, the annual turnover should be somewhat over one-eighth, allowing for other vacancies. In other words, we should expect four or five new Benchers annually.

One common way of mitigating the effects of high turnover of elected officials is "staggered elections" - electing only a partial slate of candidates at intervals, so there is always substantial carry-over when new members arrive.

In the case of Bencher elections, I would suggest electing as close as possible to half of the Benchers each year. The provincial government could also be asked to appoint half of the Appointed Benchers each year. I suspect that they would find that easier to handle than the current six-at-a-time approach. In Vancouver especially, I think there would be a benefit for the voters who now have to select up to 13 candidates in a field that often exceeds 30.

The transition from full elections to partial staggered elections would have some manageable complexities. In the long run, though, this would have little effect on the Law Society administration of elections, in that the current Rules require at least one election on November 15 every year, to replace the outgoing President in off years.

7. Bencher term of office

The current term of office for Benchers in British Columbia is two years. The Bencher term of office is three years in Alberta and four years in Ontario. Frequency of election has its rewards in terms of involvement of the electorate, but it is also a distraction and an expense. It may be worth considering what the optimum term of office for Benchers would be.

If the term of office were increased to three years, this would require an amendment to the term limit, which is currently eight years for most Benchers. Presumably that would have to be increased to nine.

8. Bencher electoral districts

Since 1955 Benchers have been elected in the districts established under the *County Boundaries Act*. Originally there were 20 elected Benchers. Five have been added over the years, but all to existing districts. There have been no revisions to the boundaries in 56 years, with the exception of the division of the County of Yale into Okanagan and Kamloops Districts. In the meantime, the County Courts were abolished 20 years ago, and the County Boundaries now have little legal significance outside of Bencher elections.

Most problematic is that the uneven distribution of lawyer population in the province has left the districts with a wide variation in the number of lawyers represented by Benchers.

The table on the next page shows the numbers of members in each District as of March 1, 2011, along with the number of members per Benchers who represent the District. While

the average Bencher represents 453 lawyers, the actual figures vary from a low of 70 to a high of 575.

Bencher representation by district

DISTRICT (Benchers)	MEMBERS	MEMS/BENCHER	VARIATION (%)
Cariboo (2)	212	106	-76.6
Kamloops (1)	243	243	-46.4
Kootenay (1)	123	123	-72.9
Nanaimo (1)	435	435	- 4.0
Okanagan (1)	459	459	+ 1.3
Prince Rupert (1)	70	70	-84.6
Vancouver (13)	7,090	545	+20.2
Victoria (2)	1,151	575	+26.9
Westminster (3)	1,548	516	+13.8
TOTALS (25)	**11,331**	**453**	

The Supreme Court of Canada has found that, in the context of federal and provincial elections, Canadians have a right under section 3 of the *Charter* to relative parity of voting power (*Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158). Other factors apply, of course, and the *Charter* does not govern Bencher elections, but the principle is one that could be better served with some adjustments.

This issue has been looked at in the past, without resolution (except the Yale County division). Here are some suggestions that may bear further examination:

- divide Cariboo County into Prince George (109 lawyers) and the rest (103 lawyers)
- increase Vancouver Island (1,586 lawyers) by one Bencher (397 per Bencher)
- make Richmond (268 lawyers) part of Westminster County (increases to 1,816 lawyers or 454 per Bencher)

- divide the enhanced (by Richmond) Westminster County into two districts: one east of Pitt River and Surrey Langley boundary with one Bencher (485 lawyers) and one west with three Benchers (1,331 lawyers, 444 per Bencher)
- make the North Shore and Sunshine Coast a separate district with one Bencher (411 lawyers)
- leave the districts as they are (or adjust slightly) but apply a formula to determine the number of Benchers (e.g., one Bencher for every 450 members or part thereof on July 1 before each election)

9. Election of Second Vice-President by Benchers

The current Rules indicate that the members elect the Second Vice-President at the Annual General Meeting. In reality, the Benchers make that decision when they decide who the Bencher nominee will be. The Rules to do not even give the AGM the option to reject the Bencher nominee. "If only one candidate is nominated, the President must declare that candidate the Second Vice President elect." Rule 1-18(5).

In over 30 years since this system was instituted, there has been no candidate nominated to challenge the Benchers' nominee. It has been suggested that the resulting process is a sham and the Benchers ought to come clean and amend the Rules to indicate the true state of affairs, which is that the Benchers elect the Second Vice-President.

10. Term of office of a President or Vice-President who takes office mid-year

Rule 1-3(5) governs the situation when a President or Vice-President resigns mid-term, which in recent years has happened twice - in 2003 and in 2004. When a President or Vice-President resigns on or after July 1, i.e., in the second half of the calendar year, those on the "Ladder" below the officer who resigned move up one rung for the remainder of the year and stay there for the next year, when they would have been at that level. That is what happened in 2003-04.

However, when a President or Vice-President resigns in the first half of the year, those below move up and a new Second Vice-President is chosen. At the end of the year, the President is finished and everyone else on the ladder moves up. That is what happened in 2004. As a result, some or all of the Benchers on the Ladder serve less time as President or Vice-President than they may have expected. A President, through no doing of his or her own, may serve as little as slightly more than six months in that position.

The Benchers may want to consider a rule amendment to move the watershed date from July 1 (half-way through the year) to another date, such as April 1 (one-quarter way through the year). Alternatively, the amended Rule could allow the Benchers to decide

when the situation arises. Either way, the amendment would require membership approval in a referendum.

LOWER PRIORITY

11. Eligibility of President to be re-elected for second one-year term

The Executive Committee also considered a related issue, which they found to be a lower priority.

The automatic replacement of the President on an annual basis has a negative effect on the continuity of the leadership of the Law Society. This is partly dispelled by the Ladder, which gives a long apprenticeship to each incoming President. However, it is also subject to the inclination of each incumbent as to how much the Vice-Presidents are involved in decision-making.

Before 1998, the Act allowed for the Benchers to resolve to continue a Treasurer (as he or she then was) for a second one-year term of office. That was removed from the current Act and not included in the Rules.

The Benchers, or an independent committee, might want to consider giving the Benchers the flexibility to extend a president (and the vice-presidents) in appropriate circumstances.

Lawyers Insurance Fund

Lawyers Insurance Fund

2010 Year End Report

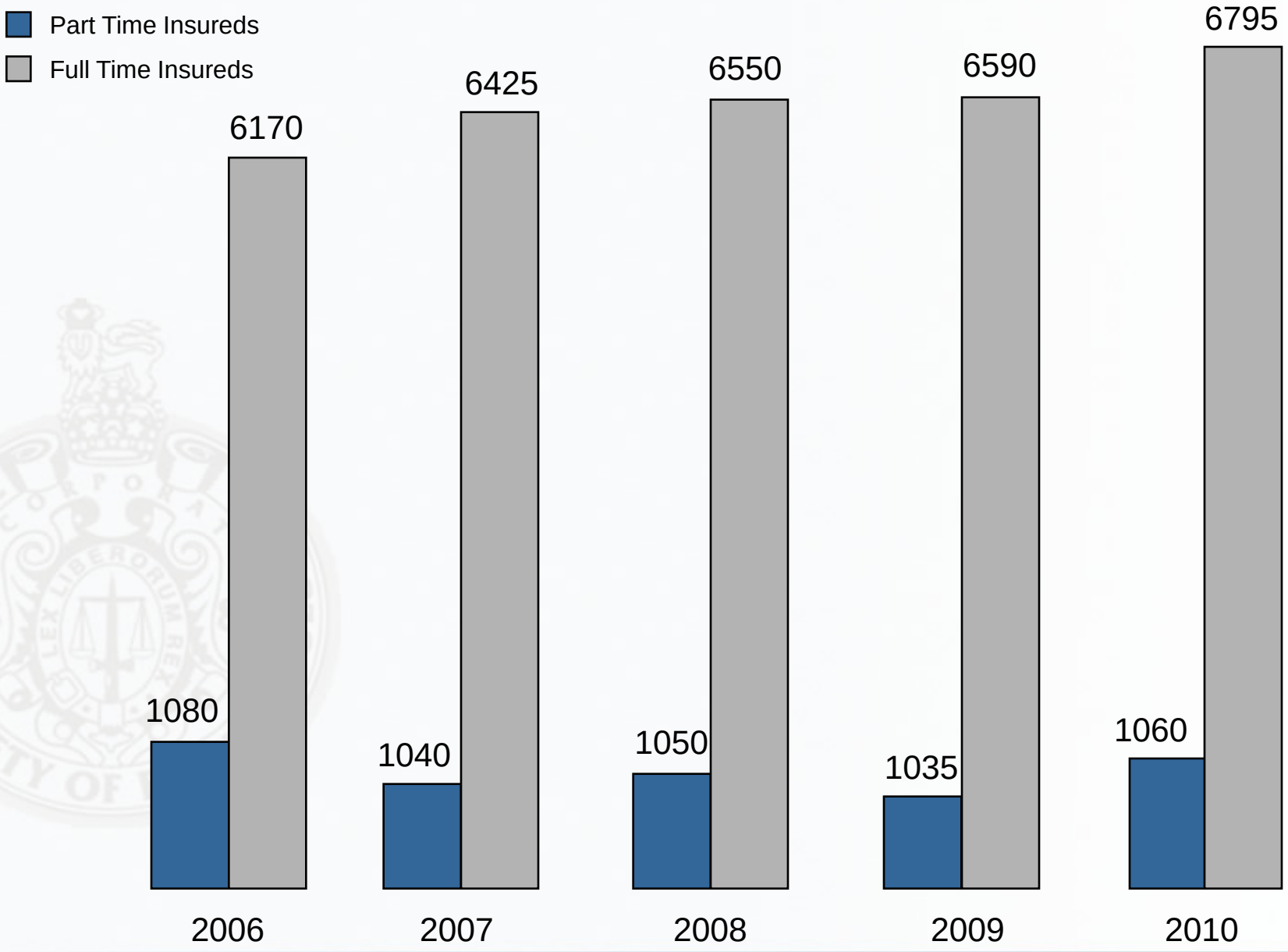
Overview

1. BC lawyers
2. Part A (negligence) stats
3. Part B (theft) stats
4. Insurance fee
5. Service Evaluation Forms

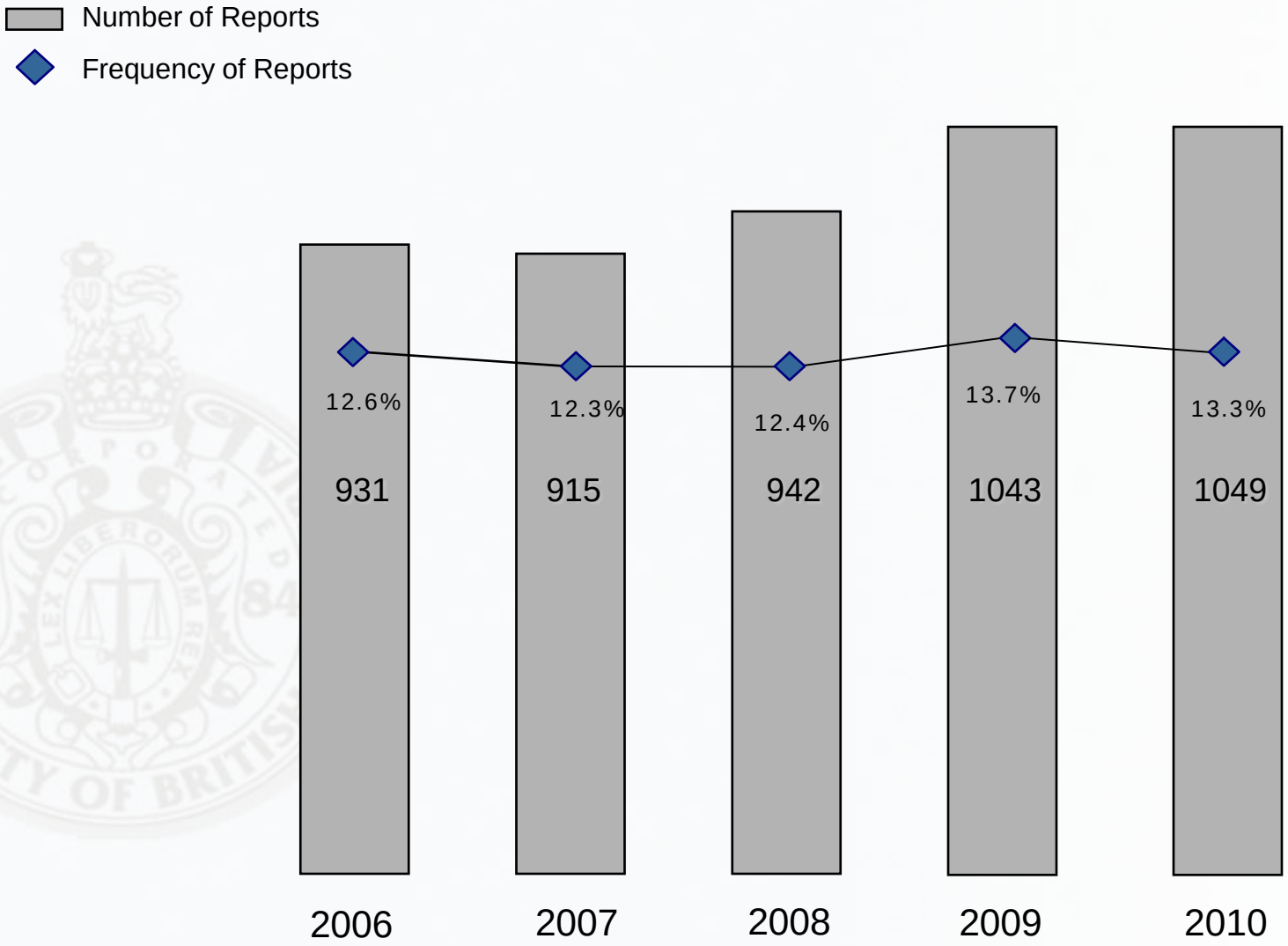
Lawyers in BC

Total number of lawyers	12,000
Non-practising or retired	2,000
Practising	10,000
Practising – in-house	2,000
Practising – private practice	8,000

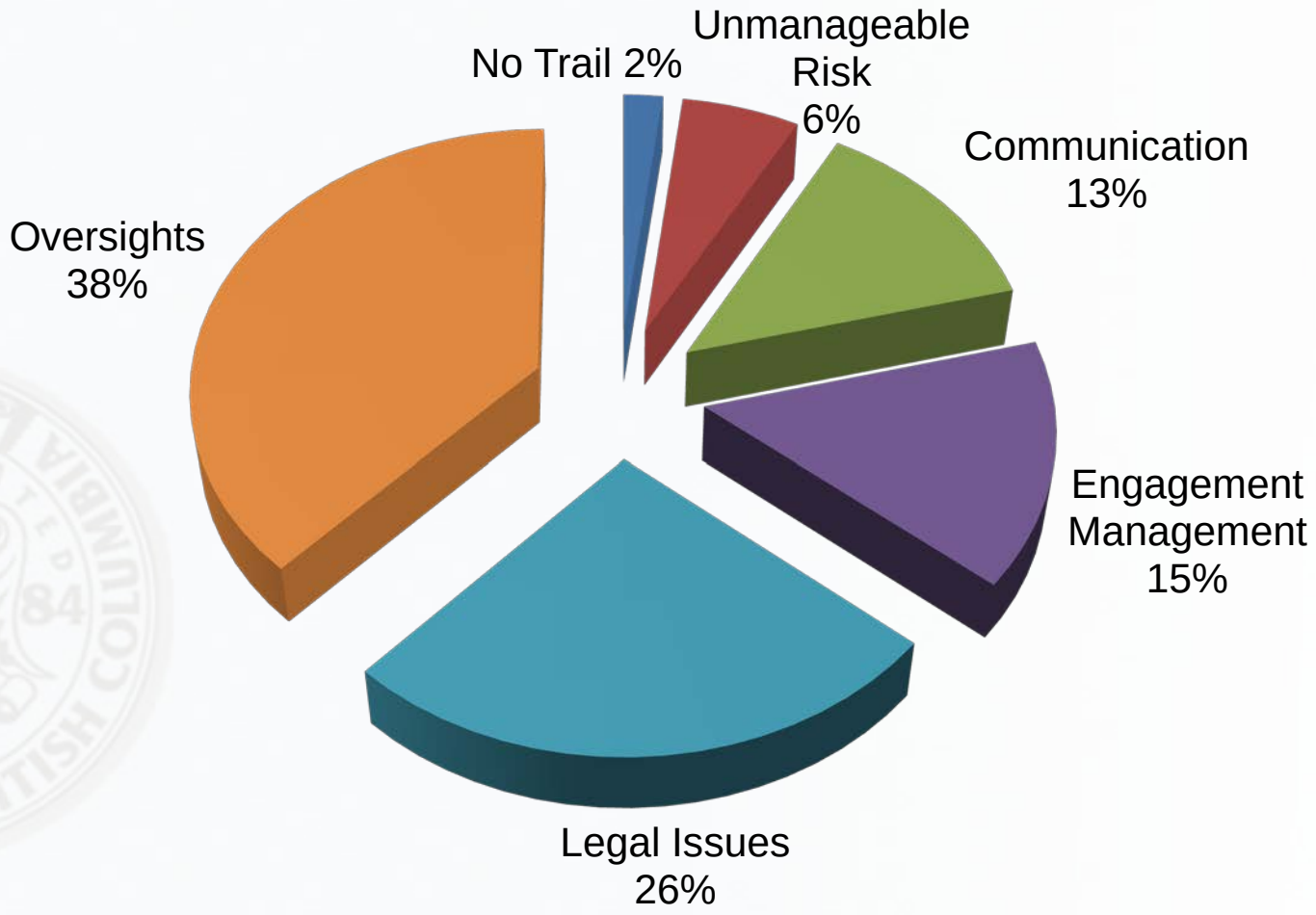
Full and Part Time Insureds



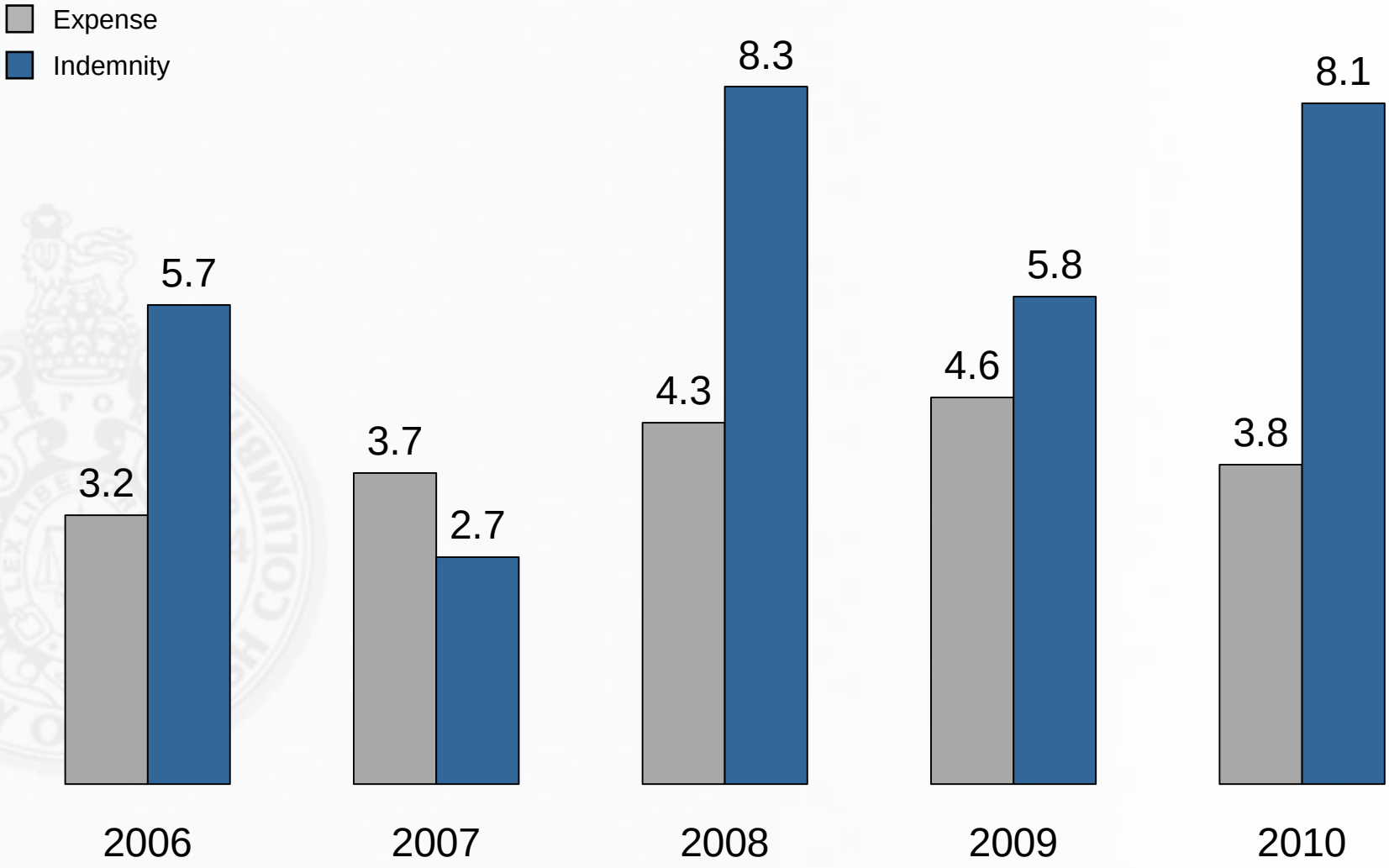
Number and Frequency of Reports



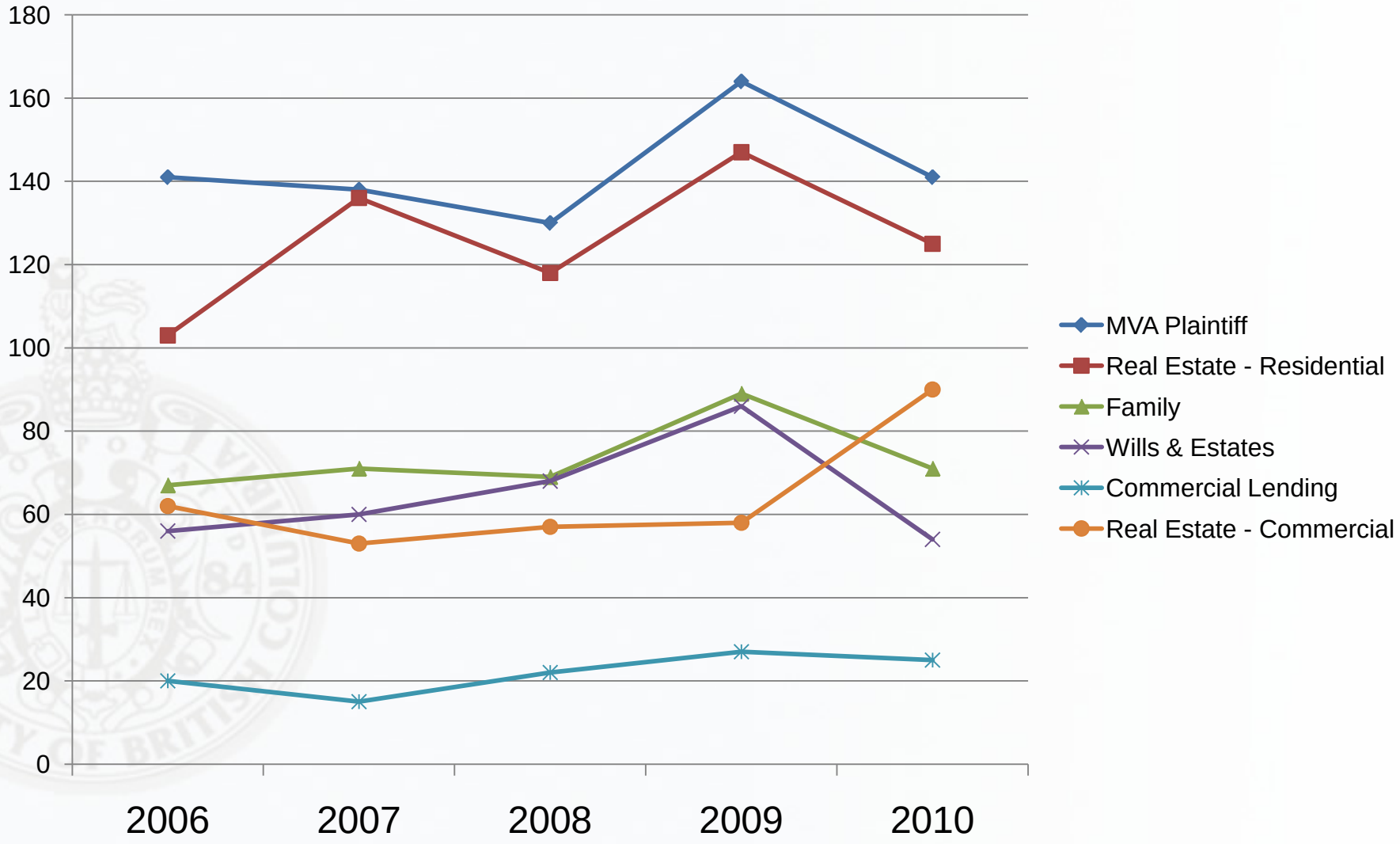
Causes of Reports



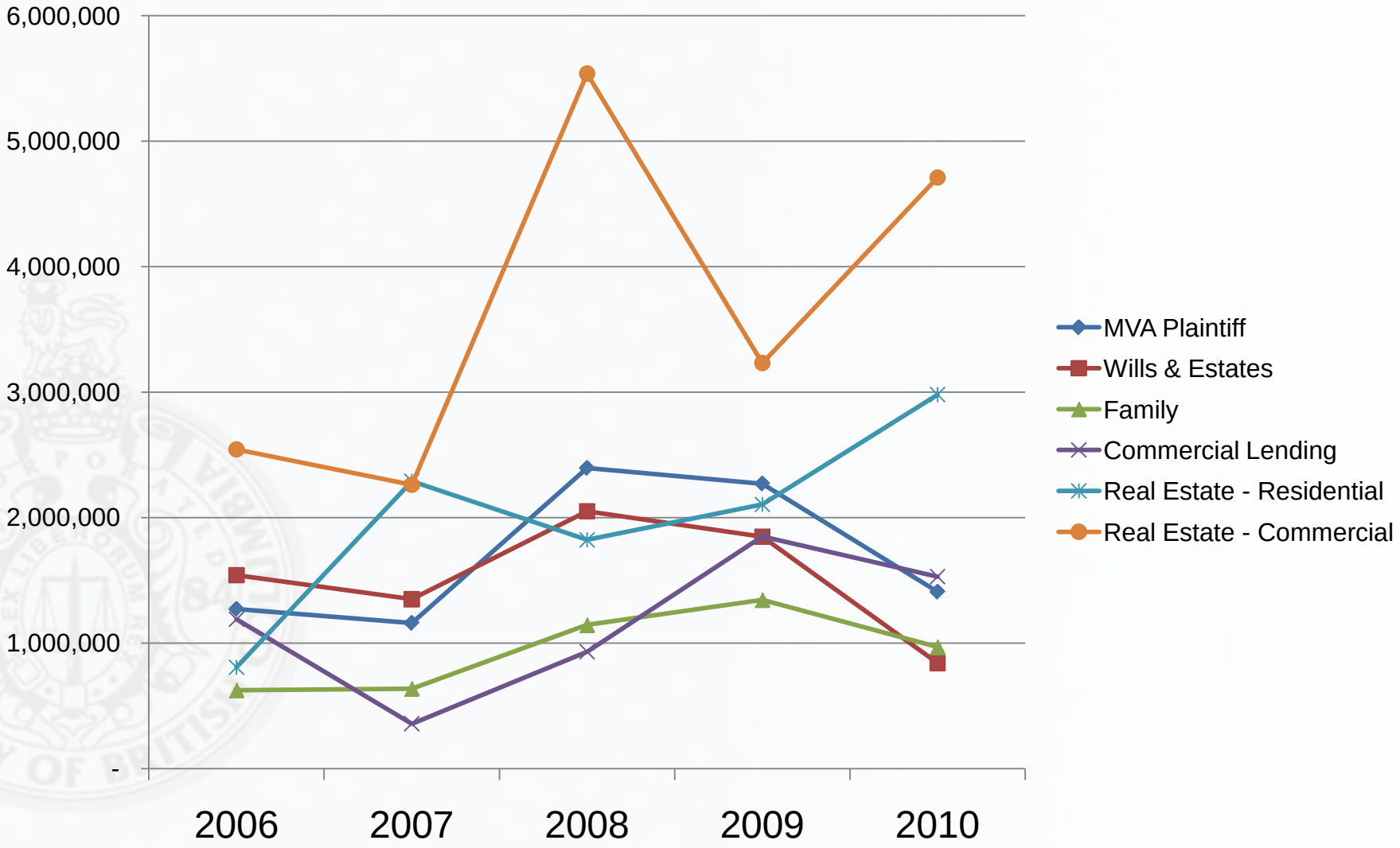
Claim Payments



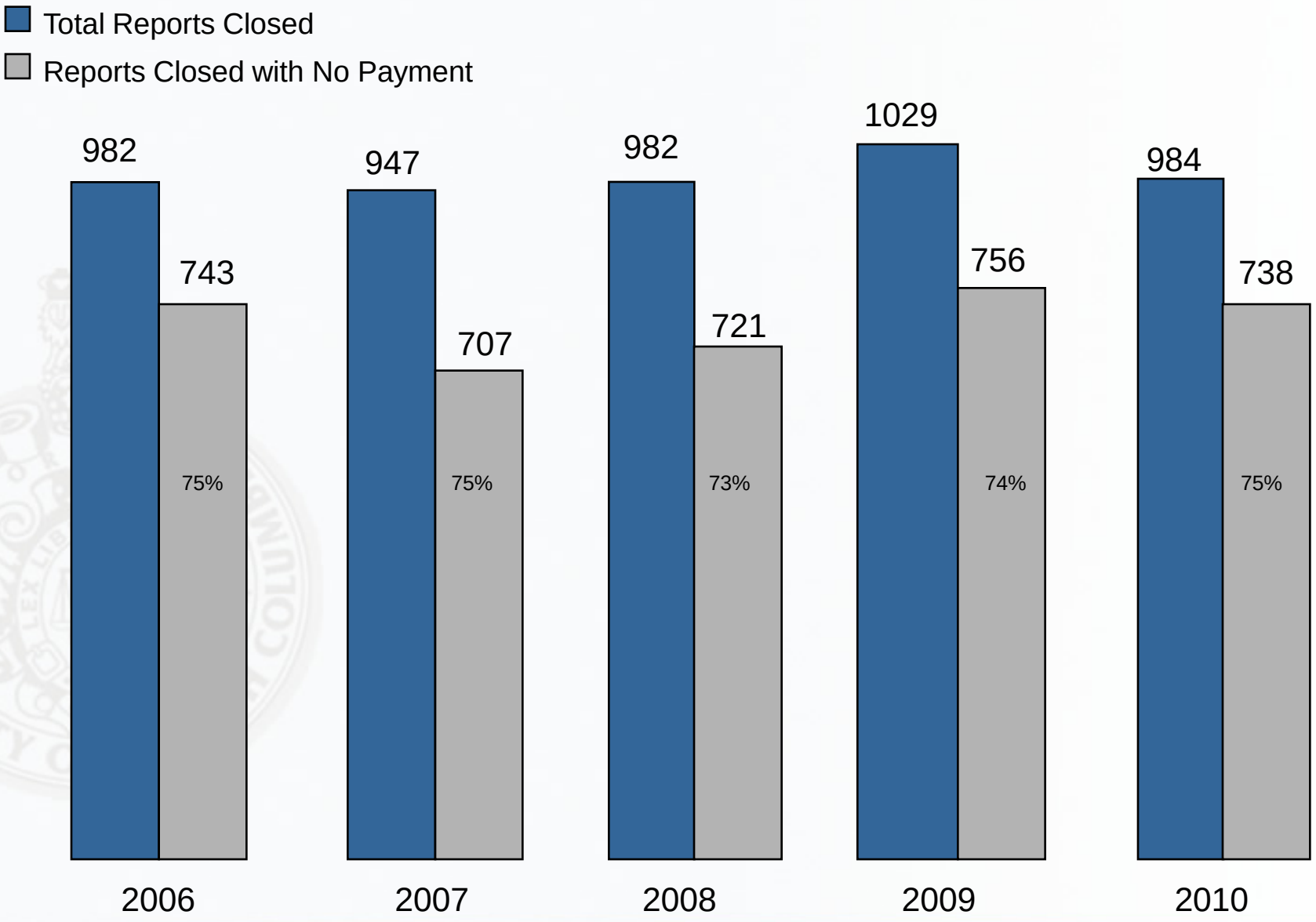
Frequency Trends - 6 Practice Areas



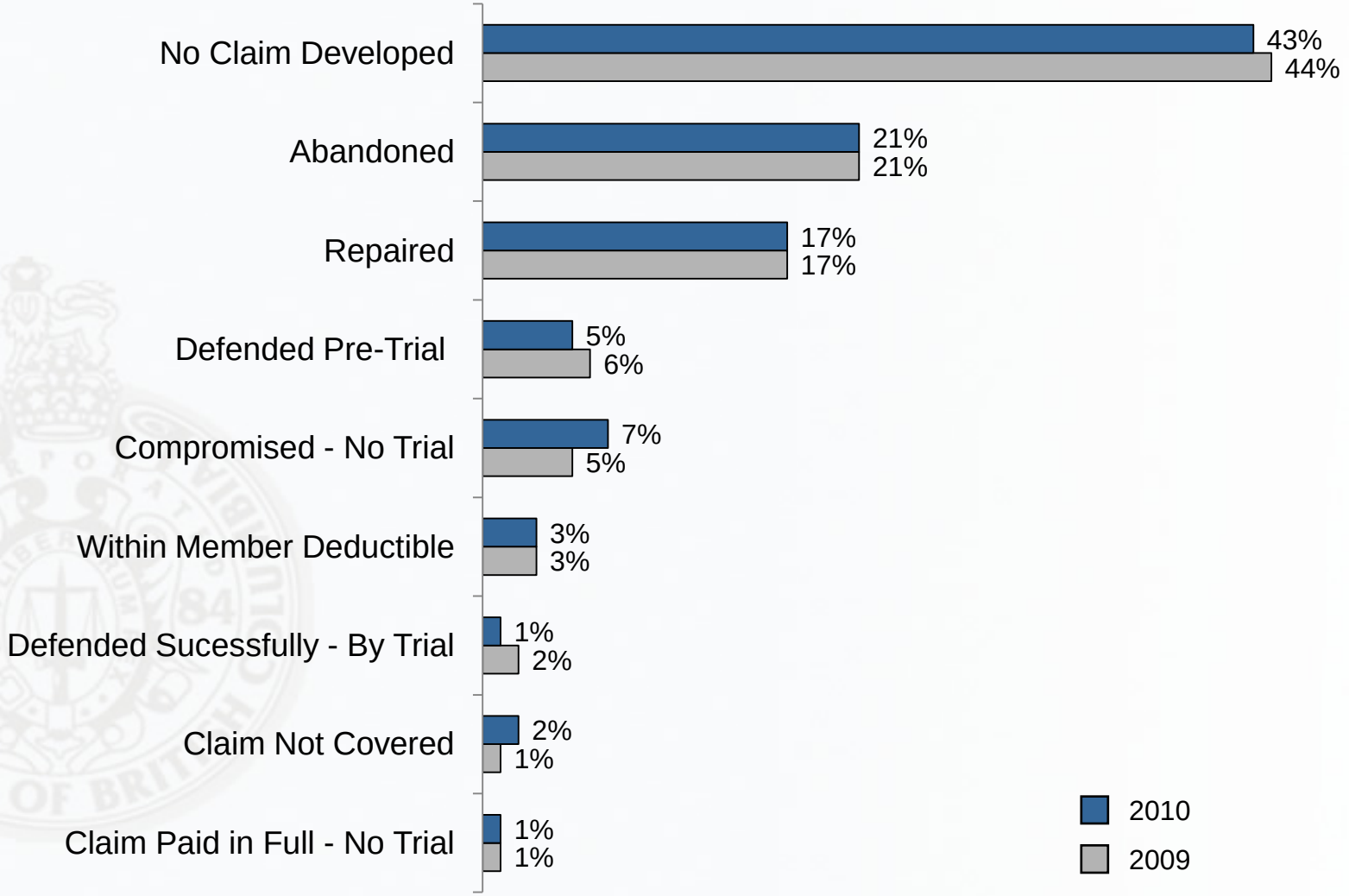
Severity Trends - 6 Practice Areas



Closed Reports with No Payment



Results of Reports



Other Results in 2010

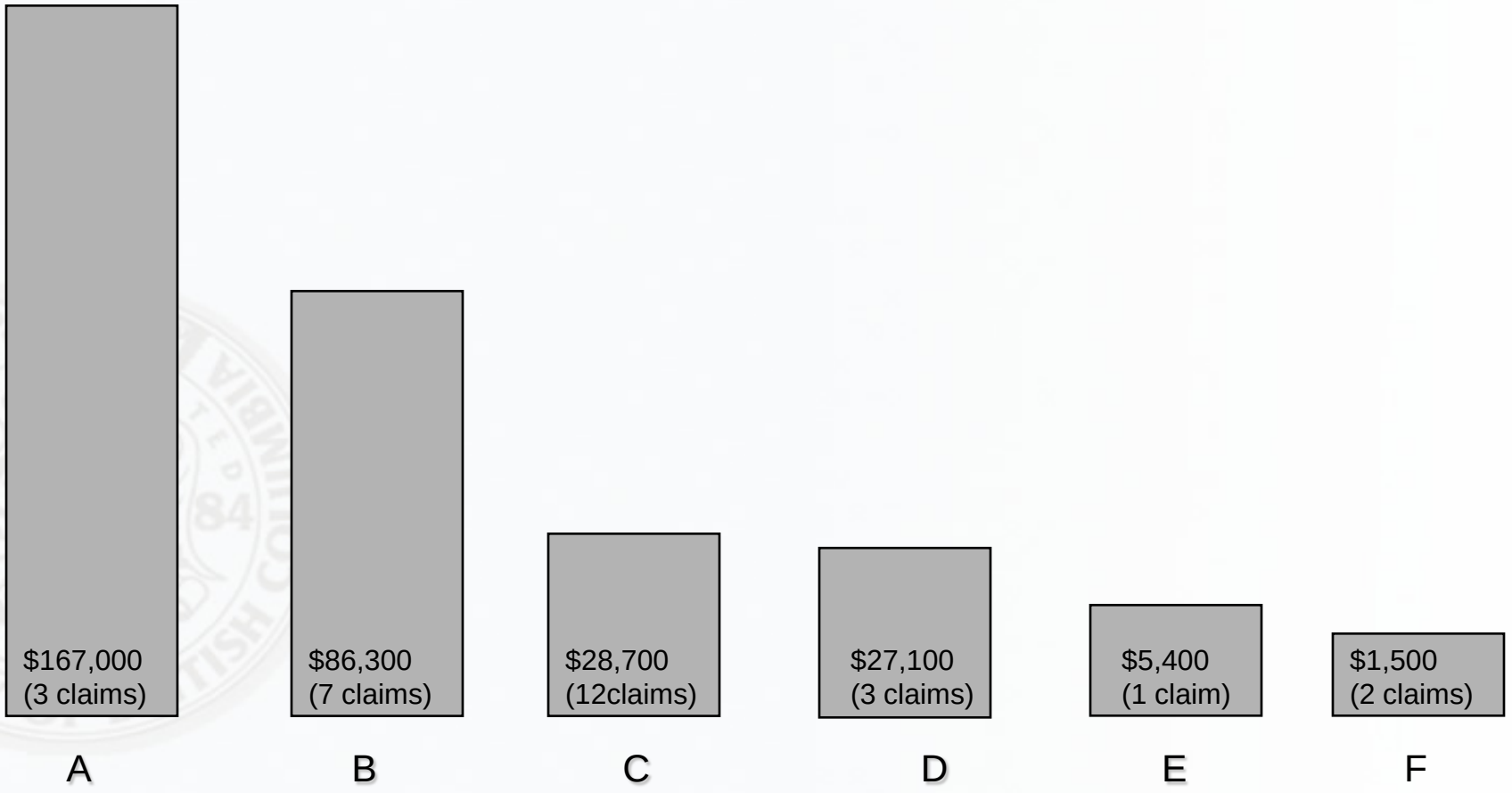
Indemnity payments	106
Excess payments (settlements over $1 million)	1
Percentage of claims defended in-house	20%
Number of risk management presentations	16
Matters tried	15
• Trials won	13
• Trials lost	2
• Appeals won	1
• Appeals lost	0

Part B

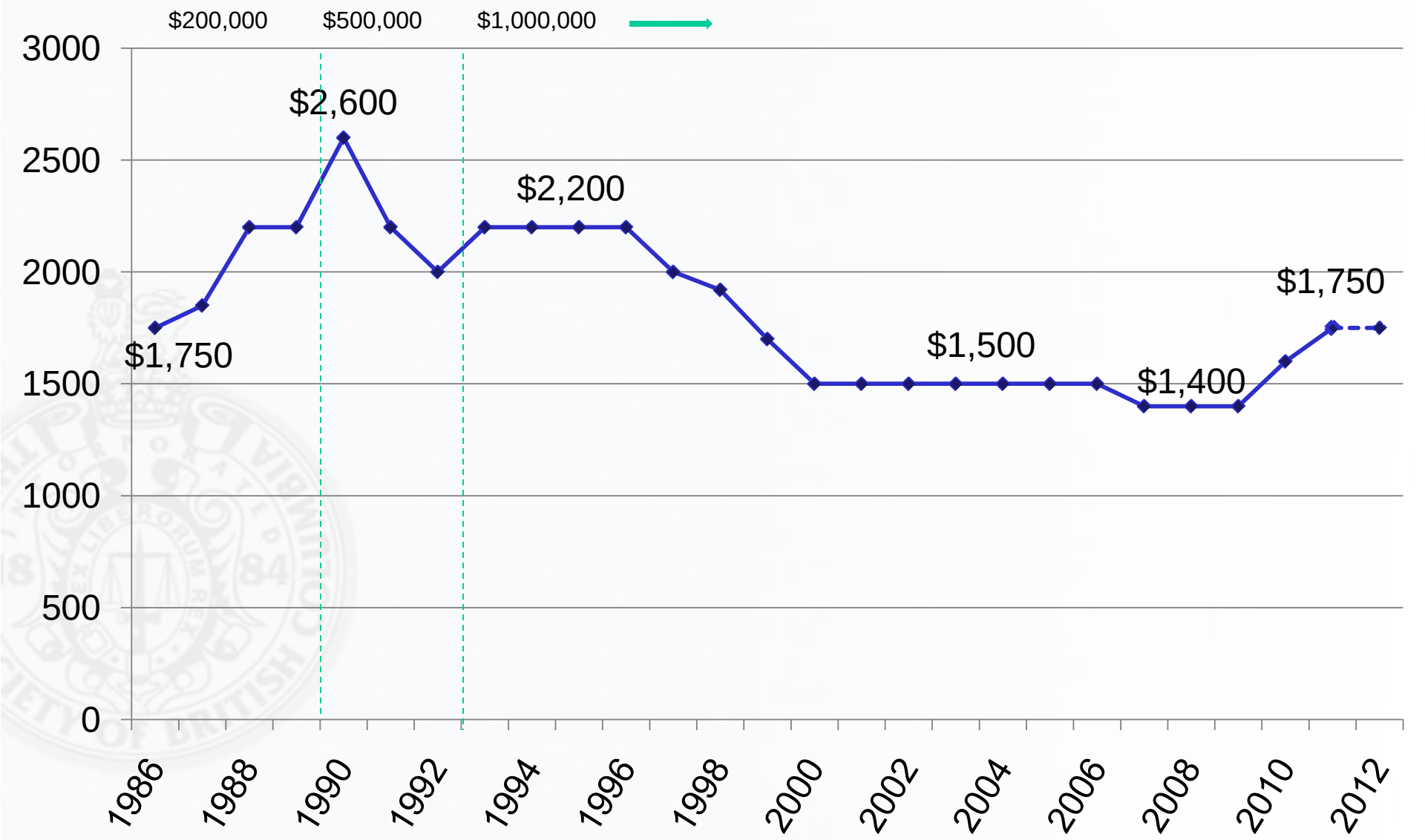
In 2010:

- 18 claims were paid on behalf of 6 different lawyers, totaling approximately $270,000.
- 1 claim did not fall within coverage for Part B, as it did not involve a misappropriation by the lawyer.
- 1 claim was resolved without payment under Part B as the client was paid by the lawyer's custodian.
- $786.21 was recovered from lawyers (or their custodians) on whose behalf we had made Part B payments.

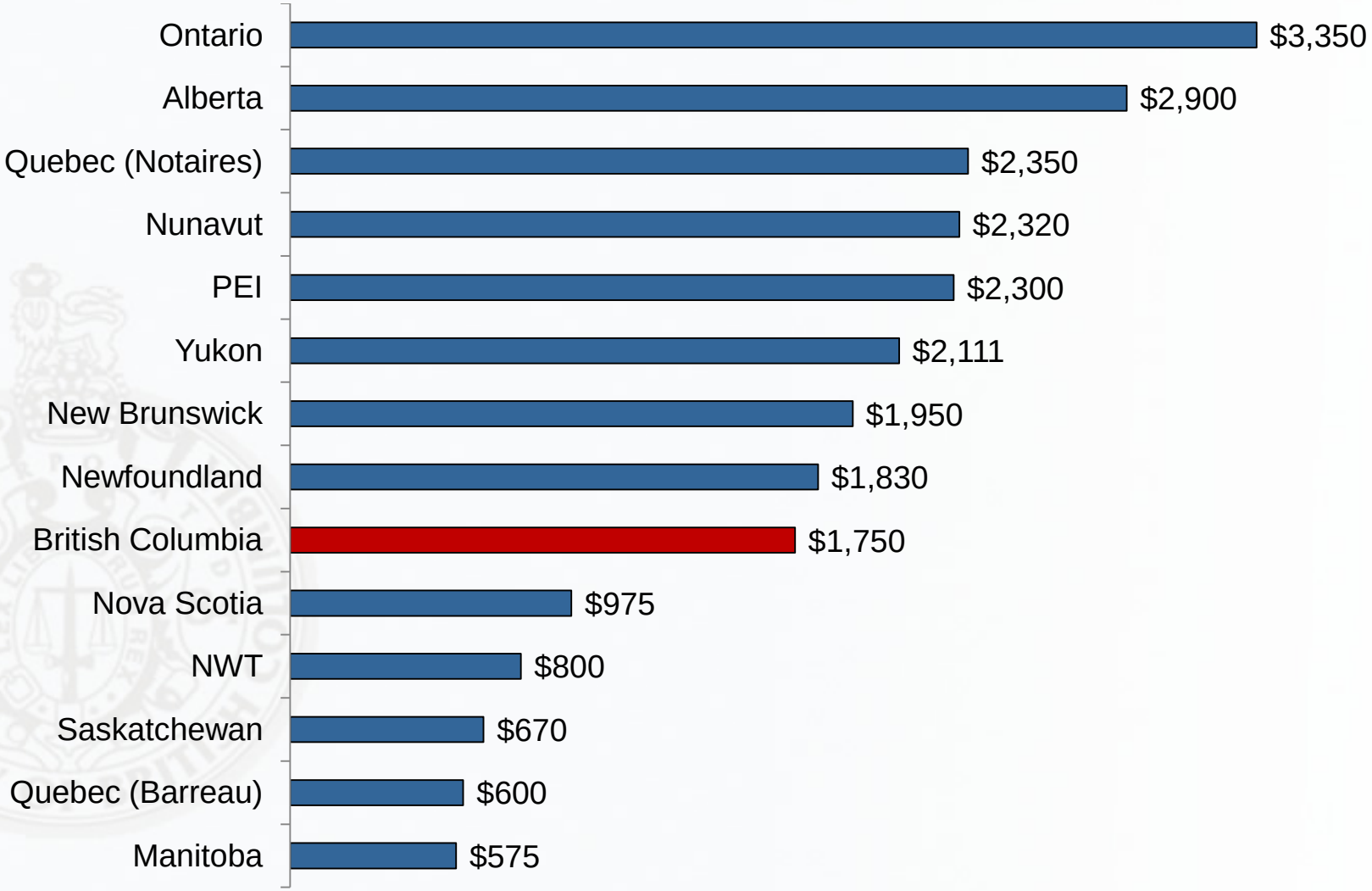
Part B – Lawyers with Paid Claims



Insurance Fee History



Insurance Fee Comparison



Part B - Claimants

- "I most appreciated the kindness, compassion and clarity with which I was treated."

- "Fair. Easy to deal with."

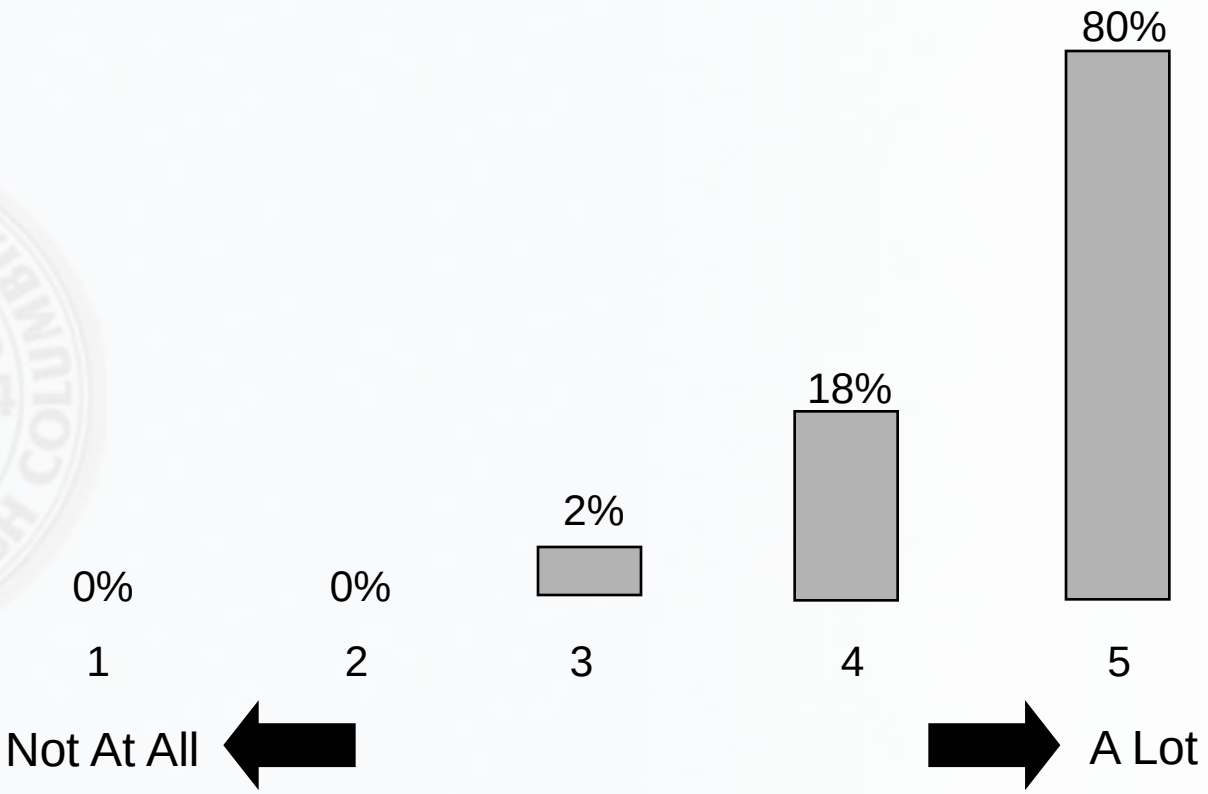
- "I liked the fact that you were very courteous and prompt, and there to help people, like me who are deceived by people, like my former lawyer."

Service Evaluation Forms - Responses

- SEF's completed – 435 (out of 984)
- Kudos (good) – 287
- Grumbles (bad) – 5
- Risk Management comments – 280

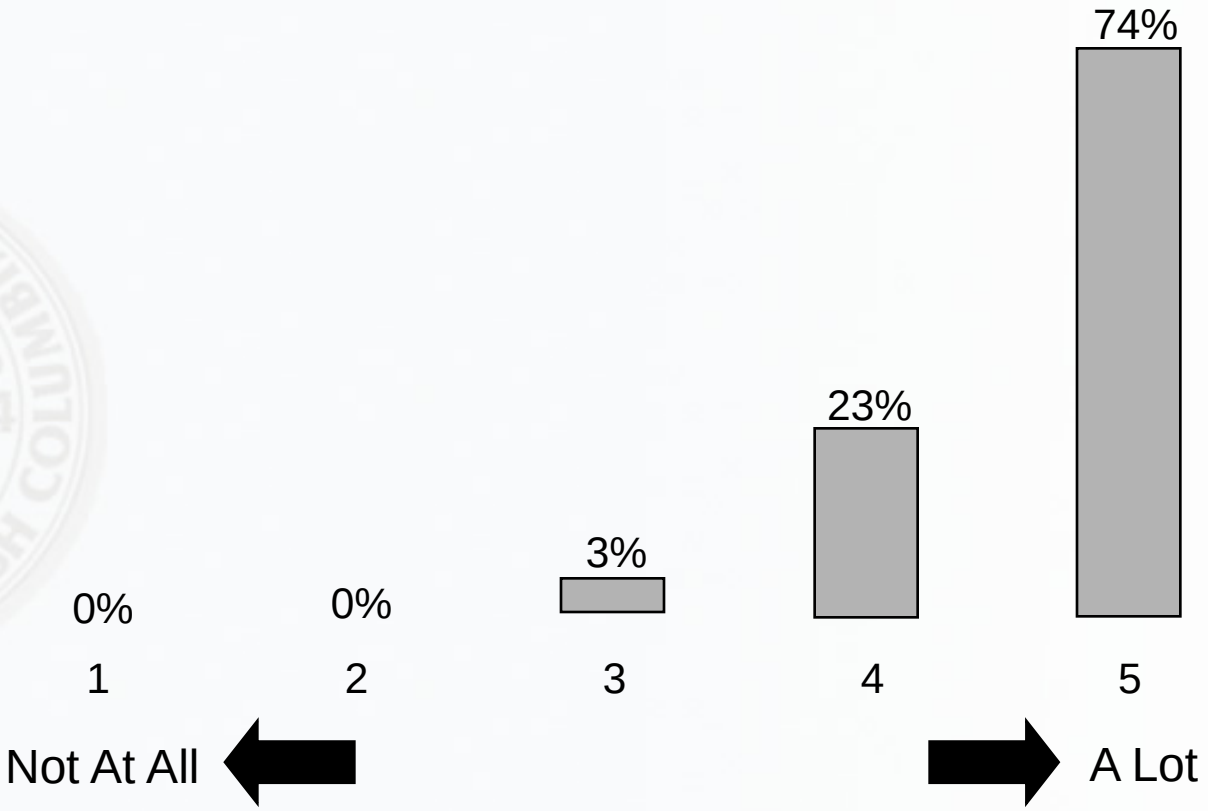
Part A Service Evaluation Form Results

How satisfied overall were you with the outcome of your claim?



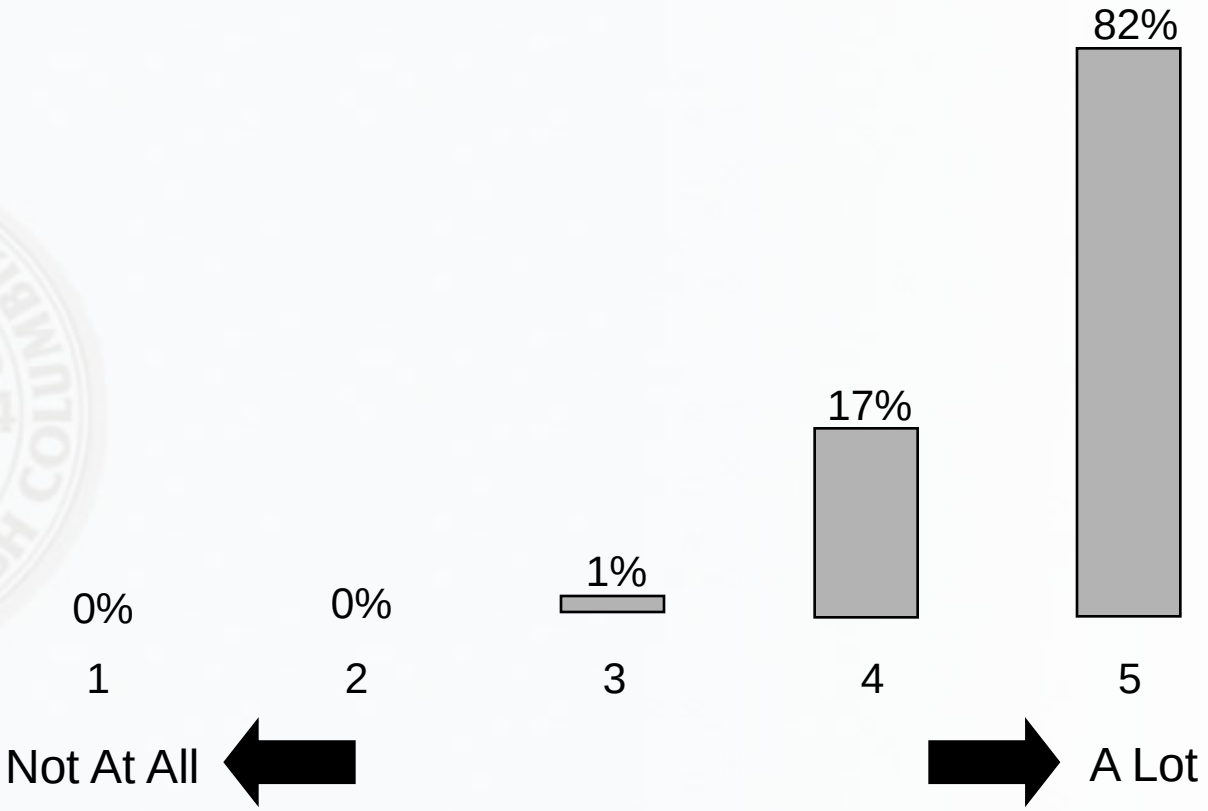
Part A Service Evaluation Form Results

How satisfied overall were you with the handling of your claim?



Part A Service Evaluation Form Results

How satisfied overall were you with the services provided by LIF claims counsel?



Thank you

Memo

The Law Society of British Columbia 5000

To The Benchers

From Michael Lucas on behalf of the Credentials Committee and the Act and Rules Subcommittee

Date May 3, 2011

Subject **Articled Students and the Delivery of Legal Services**

ACTION

In order to implement a recommendation of the Delivery of Legal Services Task Force, the Act and Rules Subcommittee recommends the Benchers amend the Rules concerning articled students as contained in the attached draft Rules, for the reasons described below.

INTRODUCTION

In late 2010, the Benchers accepted the Report of the Delivery of Legal Services Task Force. One of that Task Force's recommendations, accepted by the Benchers, was that the Credentials Committee be directed to explore expanded duties for articled students. The recommendation of the Delivery of Legal Services Task Force was made in an effort to increase the public's access to legal services by creating a model by which lawyers are able to provide services for which the lawyer remains ultimately responsible, through individuals (including articled students) who should be able to offer the services at a lower rate than that charged by a lawyer.

The Credentials Committee has been considering the issue since the beginning of 2011. It reviewed provisions from other jurisdictions in Canada and considered the matter in light of the recommendations made by the Delivery of Legal Services Task Force against the Credentials Committee's obligation to ensure that participants in the admission program are properly trained as entry-level lawyers when they have completed the program.

After a considerable amount of discussion, the Committee resolved that students should be permitted to provide a wider range of services than is currently permitted in the rules, and considered a draft rule. The matter was ultimately referred to the Act and Rules Subcommittee to refine the rule.

DISCUSSION

The Credentials Committee weighed the request made by the Benchers against the Committee's responsibility to ensure that students in the admission program develop the skills necessary to be successful as entry-level lawyers. There was much debate around how to reach an effective balance.

The Credentials Committee ultimately settled on recommending that an articled student be allowed to offer all legal services that a lawyer is able to offer on the condition that the student's principal, or another practising lawyer who is responsible for supervising the student on a particular file:

- has ensured that the student is competent to provide the services offered;
- supervises the student providing the legal services to the extent necessary in the circumstances; and
- has properly prepared the student before the student appears or access counsel in any litigation matter.

The Credentials Committee also reported that it decided that there should be some limits on the foregoing. In particular, the Credentials Committee recommended that a student must not appear as counsel:

- on an appeal in the Court of Appeal or Supreme Court of Canada;
- in a civil or criminal jury trial; or
- on a trial proceeding by way of indictment in the Supreme Court

unless the principal or another practising lawyer is in attendance at the time that the Court appearance is made, and is directly supervising the provision of the service. In other words, an articled student may not appear by him or herself in a civil or criminal jury trial, but may take part in the trial (including leading evidence or making submissions) provided that the supervising lawyer is present in Court directly supervising the student's provision of the services.

The Credentials Committee also reported that it had concluded that a student not give or receive an undertaking, given the importance of undertakings to the practice of law. The Committee believed that undertakings offered or received by a student on his or her own should not be allowed, but that, if another lawyer supervising the student was prepared to sign the undertaking, the student could sign it as well. This "co-signing" of undertakings

could, the Committee believed, be useful to the student's understanding of the importance of undertakings and the responsibility associated with them.

The Credentials Committee then addressed the question of what to do with temporary articled students. Temporary articled students are not enrolled in the Admissions Program, but have all the rights and responsibilities of an articled student. Consequently, if any changes were made to the rules concerning what articled students are permitted to do, they would affect temporary articled students as well unless specific provisions were made to exclude the temporary articled students from that rule.

The Credentials Committee recognized that it needed to have a larger policy debate at some future date about the temporary articled program. In the interim, however, it settled on recommending a temporary solution to the issue, by which the student enrolled in temporary articles under Rule 2-42 would be permitted to provide only the services that articled students are currently permitted to provide pursuant to Rule 2-43.

DRAFT RULE

The Credentials Committee referred its discussion and debate to the Act and Rules Subcommittee to consider a rule to implement the policy decisions made by it.

The Subcommittee has considered the attached draft rule and concluded that it is an effective way to implement the decisions of the Credentials Committee.

It is proposed to add this rule in this location because it logically falls into a general sequence of regulatory requirements. Describing what an articled student can do logically follows the requirements of the articling term, and precedes the requirement of the mid-term report. The rules then sequentially describe different considerations concerning the articling students (Rule 2-33 to 2-41). Rule 2-42 describes requirements concerning temporary articles. Amendments to Rule 2-43 that will describe what temporary articled students can do would logically follow.

RECOMMENDATION

The Subcommittee recommends that the Benchers approve the rule changes in accordance with the draft rule attached to this memorandum.

MDL/al

Attachment.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Admission program

Legal services by articled students

2-32.01 (1) Subject to any prohibition in law, an articled student may provide all legal services that a lawyer is permitted to provide, but the student's principal or another practising lawyer supervising the student must ensure that the student is

(a) competent to provide the services offered,

(b) supervised to the extent necessary in the circumstances, and

(c) properly prepared before acting in any proceeding or other matter.

(2) An articled student must not

(a) appear as counsel without the student's principal or another practising lawyer in attendance and directly supervising the student in the following proceedings:

(i) an appeal in the Court of Appeal, the Federal Court of Appeal or the Supreme Court of Canada;

(ii) a civil or criminal jury trial;

(iii) a trial proceeding by way of indictment in the Supreme Court.

(b) give an undertaking unless the student's principal or another practising lawyer supervising the student has also signed the undertaking, or

(c) accept an undertaking unless the student's principal or another practising lawyer supervising the student also accepts the undertaking.

Court and tribunal appearances by temporary articled students

2-43 (1) Despite Rule 2-32.01, ~~An~~ a person enrolled in temporary ~~articled~~ articles ~~student may~~ must not appear as counsel before a tribunal except~~:~~

(a) in the Federal Court ~~of Canada~~or the Federal Court of Appeal as ~~that~~ the Court permits,

(b) in the Supreme Court of British Columbia in Chambers on any

(i) uncontested matter, or

(ii) contested application for

(A) time to plead,

LAW SOCIETY RULES

(B) leave to amend pleadings, or

(C) discovery and production of documents, or

(iii) other procedural application relating to the conduct of a cause or matter,

(c) before a registrar or other officer exercising the power of a registrar of the Supreme Court of British Columbia or Court of Appeal for British Columbia,

(d) in the Provincial Court of British Columbia

(i) on any summary conviction offence or proceeding,

(ii) on any matter in the Family Division or the Small Claims Division, or

(iii) when the Crown is proceeding by indictment or under the *Youth Criminal Justice Act* (Canada) in respect of an indictable offence, for the purposes only of

(A) speaking to an application for an adjournment,

(B) setting a date for preliminary inquiry or trial,

(C) speaking to an application for judicial interim release or an application to vacate a release or detention order and to make a different order, or

(D) an election or entry of a plea of Not Guilty on a date before the trial date,

(e) on an examination of a debtor,

(f) on an examination for discovery in aid of execution, or

(g) before an administrative tribunal.

(2) ~~An~~ A person enrolled in temporary ~~articled~~ articles ~~student is~~ must not ~~permitted to~~ do the following:

(a) conduct an examination for discovery;

(b) represent a party who is being examined for discovery;

(c) represent a party at a pre-trial conference.

(3) A person enrolled in temporary articles under Rule 2-42(2)(c) *[Temporary articles]* may appear in court only on a summary conviction matter and under the direct supervision of a practising lawyer.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 2 – Admission and Reinstatement

Admission program

Legal services by articled students

2-32.01 (1) Subject to any prohibition in law, an articled student may provide all legal services that a lawyer is permitted to provide, but the student's principal or another practising lawyer supervising the student must ensure that the student is

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(b) give an undertaking unless the student's principal or another practising lawyer supervising the student has also signed the undertaking, or

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Court and tribunal appearances by temporary articled students

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(a) in the Federal Court or the Federal Court of Appeal as the Court permits,

(b) in the Supreme Court of British Columbia in Chambers on any

(i) uncontested matter, or

(ii) contested application for

(A) time to plead,

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LAW SOCIETY RULES

(C) discovery and production of documents, or

(iii) other procedural application relating to the conduct of a cause or matter,

(c) before a registrar or other officer exercising the power of a registrar of the Supreme Court of British Columbia or Court of Appeal for British Columbia,

(d) in the Provincial Court of British Columbia

(i) on any summary conviction offence or proceeding,

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(2) A person enrolled in temporary articles must not do the following:

(a) conduct an examination for discovery;

(b) represent a party who is being examined for discovery;

(c) represent a party at a pre-trial conference.

(3) A person enrolled in temporary articles under Rule 2-42(2)(c) *[Temporary articles]* may appear in court only on a summary conviction matter and under the direct supervision of a practising lawyer.

ARTICLED STUDENTS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. By adopting the following Rule:

Legal services by articled students

2-32.01(1) Subject to any prohibition in law, an articled student may provide all legal services that a lawyer is permitted to provide, but the student's principal or another practising lawyer supervising the student must ensure that the student is

(a) competent to provide the services offered,

(b) supervised to the extent necessary in the circumstances, and

(c) properly prepared before acting in any proceeding or other matter.

(2) An articled student must not

(a) appear as counsel without the student's principal or another practising lawyer in attendance and directly supervising the student in the following proceedings:

(i) an appeal in the Court of Appeal, the Federal Court of Appeal or the Supreme Court of Canada;

(ii) a civil or criminal jury trial;

(iii) a trial proceeding by way of indictment in the Supreme Court.

(b) give an undertaking unless the student's principal or another practising lawyer supervising the student has also signed the undertaking, or

(c) accept an undertaking unless the student's principal or another practising lawyer supervising the student also accepts the undertaking.

2. By rescinding Rule 2-43 and substituting the following:

Court and tribunal appearances by temporary articled students

2-43(1) Despite Rule 2-32.01, a person enrolled in temporary articles must not appear as counsel before a tribunal except

(a) in the Federal Court or the Federal Court of Appeal as the Court permits,

(b) in the Supreme Court of British Columbia in Chambers on any

(i) uncontested matter, or

(ii) contested application for

(A) time to plead,

(B) leave to amend pleadings, or

(C) discovery and production of documents, or

(iii) other procedural application relating to the conduct of a cause or matter,

(c) before a registrar or other officer exercising the power of a registrar of the Supreme Court of British Columbia or Court of Appeal for British Columbia,

(d) in the Provincial Court of British Columbia

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(3) A person enrolled in temporary articles under Rule 2-42(2)(c) *[Temporary articles]* may appear in court only on a summary conviction matter and under the direct supervision of a practising lawyer.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

New BC Code of Conduct (Conflicts Provisions): Based on Federation of Law Societies Model Code of Conduct

May 3, 2011

Purpose of Report:	**Report to Benchers on Conflicts Portion of New British Columbia Code of Professional Conduct**
Prepared by:	**Ethics Committee**

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date May 3, 2011

Subject **New British Columbia Code of Conduct (Conflicts Provisions) Based on Federation of Law Societies Model Code of Conduct**

I. Background

The purpose of this presentation is to bring you up to date on the work that both the Federation and we have done on the conflicts portion of the Model Code, and to request that you direct us to consult with the profession, generally, on that work. Our expectation is that we will make further changes to the BC Code based on our consultation with the profession before recommending you adopt a final version of the conflicts portion of the Code.

You will recall that the new Code of Professional Conduct that we will ultimately propose for British Columbia is based on the Federation of Law Societies Model Code, and has much language in common with it, but amends it in ways we think will improve it for use in British Columbia. We are calling the BC version of the Code "the BC Code."

At the April 2011 meeting you approved the non-conflicts portion of the BC Code, with the changes we recommended from the Federation of Law Societies Model Code. You agreed to delay setting an effective date for implementation of that portion of the Code until we advise you further concerning the issues involved in adopting the conflicts portion of the Code. We advised you at that meeting that the special advisory committee of the Federation which was struck to conduct a further review of conflicts issues, giving special attention to the views of the Canadian Bar Association, has now completed its work. However, the Federation has not yet made a final decision about the content of a rule with respect to acting against current clients and will be considering that issue again after a further review of the conflicts rules by a new Federation Committee with responsibility for the Model Code, the Standing Committee on the Model Code.

The purpose of the Standing Committee on the Model Code is to monitor the implementation of the Model Code by Law Societies across the country, and to review issues on an ongoing basis with the aim of standardizing as many provisions of the Code as possible among the Law Societies over a number of years. The Federation has

appointed Gavin Hume to chair that committee. In addition to reviewing the Model Code, generally, the Standing Committee will be reviewing some aspects of the draft conflicts rules throughout the balance of 2011 before those rules are finalized. That review will include a consideration of further representations made by the Canadian Bar Association.

We think it likely that any consultation with the profession you direct will be completed by the end of the summer of 2011. We plan to review the conflicts portion of the Code again after that time and advise you toward the end of this year of our recommendation regarding adoption of it. We also expect to recommend an implementation plan for the Code as a whole, but that recommendation needs to take account of factors that are currently not known to us, including the Federation's ultimate view about the conflicts portion of the Model Code and the views of the profession on the work on conflicts we have done so far.

II. Proposed Major Changes to the Conflicts Portion of the Model Code

This section highlights some of the major changes from the Federation Model Code that the Ethics Committee is proposing for the BC Code. References are to sections in the BC Code or the Model Code, as indicated in the heading.

BC Code Definitions of "conflict of interest" and "conflicting interest"

Since these terms are defined in the Commentary following Subrule 2.04(2), we thought it unnecessary to also include them in the definition section.

BC Code Subrules 2.04(1) and Subrule 2.04(2)

We added the words "except as permitted under this Code" to Subrule 2.04(1) and the words "or as otherwise permitted under this Code" to Subrule 2.04(2). Some parts of the Code, notably Appendix C – Real Property Transactions, permit a lawyer to act in situations that would ordinarily be situations of conflict and the purpose of these changes is to recognize that.

BC Code Subrule 2.04(3) Acting Against Current Clients

The effect of BC Code Subrule 2.04(3) is the same as the Model Code Subrule 2.04(3), although it is worded slightly differently from the Model Code and is made expressly subject to Subrules 2.04(4) and 2.04(5) of the BC Code. Subrule 2.04(3) is modeled on

the test set out in *R. v. Neil*, 2002 SCC 70 and refined in *Strother v. 344920 Canada Inc.*, 2007 SCC 24.

Subrule 2.04(3) in both the Model Code and BC Code seeks to adhere closely to the test set out in Neil.

The basic approach of the Federation with respect to Subrule 2.04(3) may be summed up in the following quotation from *R. v. Neil* (Binnie J. at para 29):

> 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.

Arguing that its views were also consistent with *R. v. Neil*, the Canadian Bar Association Task Force on Conflicts of Interest approach to the issue of a lawyer acting against a current client emphasized the following principles:

> 1. recognize that there are three different types of "conflicting interest": a "conflict of duty and interest", a "conflict of duty and duty", and a "conflict of duty with relationship";
>
> 2. define a "conflicting interest" to mean an interest that gives rise to a "substantial risk of material and adverse effect on representation";
>
> 3. provide 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;
>
> 4. provide that a lawyer may act in a matter which is adverse to the interests of a current client provided that: the matter is unrelated to any matter in which the lawyer is acting for the current client and no conflicting interest is present;

Benchers who wish to follow the discussion about this rule between the Federation and the Canadian Bar Association may wish to review the following documents:

Canadian Bar Association Documents

See "Final Report" (August 2008) and "CBA Response to Federation of Law Societies of Canada Advisory Committee Report on Conflicts of Interest" (August 16, 2010) at:

http://www.cba.org/CBA/groups/conflicts/

Federation of Law Societies of Canada Documents

See Federation of Law Societies Advisory Committee On Conflicts of Interest – Final Report (June 2, 2010) and Federation of Law Societies Advisory Committee On Conflicts of Interest – Supplementary Report (February 14, 2011) at:

http://www.flsc.ca/en/whatsnew/whatsnew.asp#110223

[More recent exchanges between the Federation and the CBA are available to Benchers from Jack Olsen or Joanne Hudder (jolsen@lsbc.org or jhudder@lsbc.org) on request].

It is noteworthy that Federation Model Subrule 2.04(3) and BC Code Subrule 2.04(3) provide more scope for lawyers to act against current clients than the current *Professional Conduct Handbook*. Chapter 6, Rule 6.3 of the Handbook only permits a lawyer to act against a current client if the matters are unrelated, no confidential information is at risk and the affected clients consent. Subrule 2.04(3) in both the Model Code and BC Code versions permits a lawyer to act with client consent alone.

Although a dialogue between the Federation and the CBA concerning appropriate wording for Rule 2.03(3) continues, and the issue will be pursued further by the both the Federation Standing Committee and ourselves, we prefer not to consider any changes to the current wording in the BC Code until we have heard from the profession.

Model Code Subrule 2.04(4) Concurrent Representation

The BC Code eliminates Model Code Subrule 2.04(4) "Concurrent Representation" and substitutes for it "Acting Against Current Clients without express consent." We are of the view that existing Subrule 2.04(3) of the BC Code permits some of the representations specifically contemplated by Model Code Subrule 2.04(4), but identified a number of problems with the Model Code Subrule: it permits different lawyers in the firm to act for clients with different interests, identifies no standards for screening confidential information and refers to no criteria to determine whether such representation is actually in the interests of the clients or the public interest.

BC Code Subrule 2.04(4) Acting against Current Clients without express consent

We have removed language from the Commentary to Subrule 2.04(3) and made it into Subrule 2.04(4), in place of the Model Code Subrule 2.04(4) [see above]. We were of the view that the concept of permitting lawyers to act against current clients without consent in the circumstances identified in Subrule 2.04(4) merited its own rule. Subrule 2.04(4)

is the BC Code counterpart to Chapter 6, Rule 6.4 of the *Professional Conduct Handbook*. Two of the noteworthy differences between Subrule 2.04(4) and Rule 6.4 are the following:

- Subrule 2.04(4) does not require that a client have previously or commonly consented to a lawyer acting against that client but, instead, permits the lawyer to do so if the client is a "substantial entity."

- The lawyer must reasonably believe he or she is able to represent that client without adversely affecting the immediate legal interests of the other.

BC Code Subrule 2.04(5) Acting Against Current Clients with advance agreement

We added Subrule 2.04(5) so that lawyers can attempt to agree with their clients in advance about whether and under what circumstances lawyers can act against their clients in unrelated matters, when no confidential information is at risk. We were of the view that it is highly desirable that lawyers and their clients agree from the beginning of the engagement about the areas and ways in which lawyers can act against a client for whom they are taking on a mandate. While it is possible that courts may find, in some instances, that the client's inability to know all circumstances where the lawyer's firm may wish to act against them in the future might preclude the effectiveness of such an agreement, there may be many circumstances where the expressly stated wishes of the parties in such matters will be conclusive.

BC Code Subrule 2.04(6) Acting Against Former Clients

This Subrule is analogous to Chapter 6, Rule 7 of the *Professional Conduct Handbook* and, in our view, does not alter it in any substantive way. We propose to eliminate the language from the Model Code Subrule [Subrule 2.04(5)] "or against persons who were involved in or associated with a former client." It was our view that this provision makes it unnecessarily difficult to act against a former client on an unrelated matter, since it would in some cases require the consent of persons who were never the lawyer's clients.

BC Code Subrule 2.04(7)

Subrule 2.04(7) [analogous to Model Code Subrule 2.04(6)] recognizes that in unusual circumstances where a lawyer's firm has received confidential client information, a lawyer may act against a former client of the lawyer's firm, with appropriate screening in place.

BC Code Subrule 2.04(8 to 13) Joint Retainers

These subrules are the equivalent of Chapter 6, Rules 4 to 6.01 of the *Professional Conduct Handbook.* Sample letters currently in Appendix 6 of the *Professional Conduct Handbook* would be moved from the Code itself to the LSBC website.

Model Code Subrule 2.04(12 to 16) Acting for Borrower and Lender

We are of the view it is undesirable for lawyers to act for both borrower and lender in any situations other than those contemplated for simple conveyances. We have removed these subrules from the BC Code.

BC Code Subrules 2.04(13 to 16) Limited Representation

These Subrules are imported unchanged from Chapter 6, Rules 7.01 to 7.04 of the *Professional Conduct Handbook* and are designed to permit lawyers to act pro bono for clients under the auspices of a not for profit organization without incurring the usual obligations under the traditional conflicts rules.

BC Code Subrules 2.04(17 to 25) Conflicts Arising as a Result of Transfer Between Law Firms

These Subrules import the current rules in Chapter 6, Rules 7.1 to 7.9 and Appendix 5 of the *Professional Conduct Handbook* into the BC Code. The Benchers made some changes to the *Professional Conduct Handbook* in 2009 to take account of the experience with these rules since 1995 and, as a result, the BC Code provisions are slightly less onerous than those of the Model Code for a firm that is being joined by a new lawyer.

BC Code Subrule 2.04(26) Conflicts with Clients

Although it is clear from the Model Code rules respecting conflicts that a lawyer may not act when he or she is in a conflict with a client, we were concerned that the Model Code has no standards to determine when such a conflict exists. Subrule 2.04(26) imports from Chapter 7 of the *Professional Conduct Handbook* the standards that the LSBC has been using since 1993: a lawyer may not act if it would reasonably be expected the lawyer's professional judgment would be affected by the lawyer's or anyone else's relationship with the client or interest in the client or the subject matter of the legal services. We have given a variety of opinions on this standard since 1993 and, although the standard is not an exacting one, it nevertheless provides better guidance for lawyers than the Model Code.

BC Code Appendix C Real Property Transactions

Appendix C imports into the BC Code, without change, Appendix 3 of the *Professional Conduct Handbook.*

III. Recommendation

We recommend that you direct us to consult the profession about the conflicts portion of the proposed BC Code and take the views of the profession into account in proposing a new version of the BC Code to you.

IV. Attachments

So that you can identify the changes we propose to make to the conflicts portion of the Federation's Model Code, we attach the following three versions of the conflicts portion of the Code:

1) The current version of the conflicts portion of the Federation of Law Societies Model Code ("the Model Code").

2) The Code that we propose for British Columbia ("the BC Code") which is based on the Model Code and has many rules in common with it, but amends it in ways we think will improve it for use in British Columbia.

3) A redlined version of the BC Code that highlights the changes we propose to make to the Federation Model Code.

We also attach:

4) A table of concordance between the conflicts provisions of the draft BC Code and the current *Professional Conduct Handbook.*

[maybenchers02mtbenchers/11]

Draft Federation of Law Societies Model Code of Professional Conduct

(Conflicts Provisions Only)

August 2010

For Discussion Purposes Only

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" is a person who:

(a) consults the lawyer and on whose behalf a lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services.

In the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing;

For greater clarity, a client does not include a near-client, affiliated entity, director, shareholder, employee or family member unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established.

Commentary
A lawyer-client relationship may be established without formality.

"conflict of interest" or **"conflicting interest"** arises when there is 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 client, a former client or a third person;

Commentary
A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of <province or territory>;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not advise or represent more than one side of a dispute.

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.

Commentary

As defined in these rules, a conflict of interest or a conflicting interest arises when there is 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 client, a former client or a third person. A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility..

A lawyer should be aware that he or she might owe duties to a third person, even though no formal lawyer-client relationship exists. The lawyer might, for instance, receive confidential information from a person, giving rise to a duty of confidentiality. Duties to third persons might also arise when a lawyer acts in non-lawyer capacity, for example as a corporate director or officer, or as an executor of an estate.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest.

A lawyer's disclosure should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflicting interest could have an adverse effect on the client's interests. This would include the lawyer's relations to the parties and interest in or connection with the matter, if any.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be

better served by not engaging another lawyer, such as when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

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. Conflicting interests include, but are not limited to, the financial interest of a lawyer, a law partner or an associate of a lawyer including a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, an associate a family member or a law partner, had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture the financial interests that do not compromise a lawyer's duty to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. A lawyer acting for a friend or family member may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

A lawyer's sexual or close personal relationship with a client may also conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. A primary risk is that the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

Sole practitioners who practise in association with other lawyers in cost-sharing or other arrangements should consider whether a conflict would exist if two lawyers in an association represent clients in opposite sides of a dispute. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts and other organizations. A dual role may result in a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client.

The lawyer should also consider Rule 6.03 (Outside Interests and Practice of Law).

While subrule (2) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Acting Against Current Clients

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.

Commentary

As defined in these rules, consent means fully informed and voluntary consent after disclosure. Consent must either be in writing or recorded in writing and sent to the client. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time to permit a genuine and independent decision. A lawyer must also take reasonable steps to ensure that the client understands the matters disclosed.

The consent of a client described in this rule may be express or inferred. A lawyer should record in writing the basis for inferring the consent of a client. It may be reasonable to infer such consent when:

- the matters are unrelated;
- the lawyer has no relevant confidential information arising from one client that might reasonably affect the other;
- the parties affected have commonly consented to lawyers acting against them in unrelated matters; and
- the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the legal interests of the other.

In the case of a sophisticated client, such as a government, financial institution, publicly traded or similarly substantial company, or entity with in-house counsel, a lawyer need not provide the client with a written record of the basis for inferring consent where the lawyer has advised the client in a written retainer letter at the outset of the retainer that consent to represent a client whose interests are directly adverse to the immediate legal interests of the current client will be inferred when the four conditions set out above have been met.

The attempt to create conflicts of interest for purely tactical reasons, for example by consulting multiple lawyers on behalf of a client or as in-house counsel in order to prevent them from representing another client is contrary to the requirement in Rule 6.02(1) to act in good faith with

all persons with whom a lawyer has dealings and is likely to undermine public confidence in the profession and the administration of justice.

Concurrent Representation

2.04 (4) A law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the advantages and disadvantages of the firm so acting has been made to each client;

(b) each client consents after having received advice from a lawyer independent of the firm;

(c) it is in the best interests of the clients that the firm so acts;

(d) each client is represented by a different lawyer at the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) the law firm withdraws from the representation of all clients if a dispute that cannot be resolved develops between the clients.

Commentary

Concurrent representation, as distinguished from joint retainers as discussed below, permits law firms to act for a number of clients in a matter, for example, competing bids in a corporate acquisition, in which the clients' interests are immediately divergent and may conflict, but the clients are not in a dispute. A law firm may agree to act in such circumstances provided the requirements of the rule are met. In particular, the clients are to be fully apprised of and understand the risks associated with the arrangement.

In some situations, although all the clients would consent, the law firm should not accept a concurrent retainer. For example, in a matter in which one of the clients was less sophisticated or more vulnerable than the other, acting under this rule would be undesirable because the less sophisticated and more vulnerable client may later regret his or her consent and perceive the situation as having been one in which the law firm gave preferential and better services to the other client.

Acting Against Former 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 the former client:

(a) in the same matter,

(b) in any related matter, or

(c) except as provided by subrule (6), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information.

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Commentary
It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter. Generally this Rule would prohibit a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer.

2.04 (6) If a lawyer has acted for a former client and obtained confidential information relevant to a new matter, a partner or associate of the lawyer may act in the new matter against the former client if:

(a) the former client consents to the lawyer's partner or associate acting; or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
The guidelines at the end of the Commentary to subrule (26) regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Joint Retainers

2.04 (7) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (7). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

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

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (9).

2.04 (8) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (9) When a lawyer has advised the clients as provided under subrule (7) and 2.04(8) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary
Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (10) Except as provided by subrule (11), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

(a) refer the clients to other lawyers; or

(b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

(i) no legal advice is required; and

(ii) the clients are sophisticated.

Commentary
This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (11) Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary
This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflicting interest, or when the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue

develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Acting for Borrower and Lender

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (7) to (11), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in subrule (6) to the lending client before accepting the retainer**,**

(b) provide the advice described in subrule (7), or

(c) obtain the consent of the lending client as required by subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary
Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act. Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Conflicts from Transfer Between Law Firms

Application of Rule

2.04 (17) In this rule:

(a) **"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;

(b) **"confidential information"** means information obtained from a client that is not generally known to the public; and

(c) **"matter"** means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

2.04 (18) This rule applies when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

2.04 (19) Subrules (20) to (22) do not apply to a lawyer employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Commentary

The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

Lawyers and support staff — This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law firms with multiple offices — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public

interest that it continue to represent its client in the matter.

Law Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses relevant confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties;

(iv) the availability of suitable alternative counsel; and

(v) issues affecting the public interest.

Commentary

The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

2.04 (21) For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

2.04 (22) If the transferring lawyer actually possesses relevant information respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm:

(a) the lawyer must execute an affidavit or solemn declaration to that effect, and

(b) the new law firm must

(i) notify its client and the former client or, if the former client is represented in the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under this rule, and

(ii) deliver to the persons notified under subclause (i) a copy of any affidavit or solemn declaration executed under clause (a).

Transferring Lawyer Disqualification

2.04 (23) Unless the former client consents, a transferring lawyer referred to in subrule (20) or (22) must not:

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client.

2.04 (24) Unless the former client consents, members of the new law firm must not discuss with a transferring lawyer referred to in subrule (20) or (22) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (17) to (26) may apply to a tribunal of competent jurisdiction for a determination of any aspect of those subrules.

Due Diligence

2.04 (26) A lawyer must exercise due diligence to ensure that each lawyer and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained complies with subrules (17) to (26), including not disclosing confidential information of clients of the firm or any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

When a law firm ("new law firm") considers hiring a lawyer or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

(b) the interests of the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("former client") that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with subrule (20)(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (25) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of subrule (20)(b). Ideally, this process should be completed before the transferring person is hired.

B. If no conflict exists

Although the notice required by subrule (22) need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.

A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (25) for a determination of that issue.

C. If the new law firm is not sure whether a conflict exists

There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:

(a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (20)(b), particularly clause (v). Only when the entire firm must be disqualified under subrule (20) will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The current matter should be discussed only within the limited group that is working on

the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised
   (a) that the screened lawyer is now with the new law firm, which represents the current client, and
   (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The screened lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Doing Business with a Client

Definitions

2.04 (27) In subrules (27) to (41),

"**independent legal advice"** means a retainer in which:

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

(i) another lawyer, or

(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

"independent legal representation" means a retainer in which

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

Commentary
If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

"related persons" means related persons as defined in the *Income Tax Act* (Canada); and

2.04 (28) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

Commentary
The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (29) Subject to subrule (30), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice and

(c) if the client requests the lawyer to act, obtain the client's ~~written~~ consent.

Commentary
If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer. A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (32).

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

Borrowing from Clients

2.04 (31) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary
Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (32) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (33) Subject to subrule (31), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (34) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (35) Except as provided by subrule (36), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (36) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (27) to (36) (Doing Business with a Client); and

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

Testamentary Instruments and Gifts

2.04 (37) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (38) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (39) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (40) A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (41) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

CONFLICTS

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(conflicts provisions only)

Clean Version

May 2011

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf a lawyer renders or agrees to render legal services; or

(b) having consulted a lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary
A lawyer-client relationship may be established without formality. When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing; For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

“interprovincial law firm” means a law firm that carries on the practice of law in more than one province or territory of Canada;

“law firm” includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

“lawyer” means a member of the Society and includes a law student registered in the Society’s pre-call training program;

“Society” means the Law Society of British Columbia;

“tribunal” includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures.

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not advise or represent more than one side of a matter, except as permitted under this Code.

2.04 (2) A lawyer must not act or continue to act in a matter when there is a conflicting interest, unless, after disclosure, the client consents, or as otherwise permitted under this Code.

Commentary

In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

A conflict of interest or a conflicting interest arises when there is a substantial risk that a lawyer's representation of a client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client or a third person. A substantial risk is one that is significant and, while not certain or probable, is more than a mere possibility.

A lawyer should be aware that he or she might owe duties to a third person, even though no formal lawyer-client relationship exists. The lawyer might, for instance, receive confidential information from a person, giving rise to a duty of confidentiality. Duties to third persons might also arise when a lawyer acts in a non-lawyer capacity, for example as a corporate director or officer, a trustee or a personal representative of an estate.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest. It is prudent to avoid situations in which the possibility of a conflicting interest arising is significant.

A lawyer's disclosure should inform the client of the relevant circumstances and the reasonably foreseeable ways in which the conflicting interest could have an adverse effect on the client's interests. This includes the lawyer's relations to the parties and interest in or connection with the matter, if any.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may

not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, such as when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

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. Conflicting interests include, but are not limited to, the financial interest of a lawyer, a law partner or an associate of a lawyer including a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, an associate, a law partner or a family member had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client.

It is not a conflict of interest, however, if the financial interests do not compromise a lawyer's duty to the client. For example, a lawyer owning a small number of shares of a corporation would not necessarily be in a conflict of interest when acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. A lawyer acting for a friend or family member may be in a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

A lawyer's sexual or close personal relationship with a client may also conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. A primary risk is that the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

Sole practitioners who practise in association with other lawyers in cost-sharing or other arrangements should consider whether a conflict would exist if two lawyers in the association represent clients on opposite sides of a dispute. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client as well. For example, there is a dual role when a lawyer or his or her law firm acts

for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts and other organizations.

A dual role may result in a conflict of interest or other problems because it may

- affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- obscure legal advice from business and practical advice,
- invalidate the protection of lawyer and client privilege, or
- disqualify the lawyer or the law firm from acting for the organization.

Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider Rule 6.03 (Outside Interests and Practice of Law).

While subrule (2) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Acting Against Current Clients

2.04 (3) Subject to subrules (4) and (5), a lawyer must not represent a client whose immediate legal interests are directly adverse to those of a current client, even if the matters are unrelated, unless both clients consent.

Commentary

As defined in these rules, consent means fully-informed and voluntary consent after disclosure. Consent must either be in writing or recorded in writing and sent to the client. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time to permit a genuine and independent decision. A lawyer must also take reasonable steps to ensure that the client understands the matters disclosed.

For a discussion of the issue of acting against current clients see *R. v. Neil,* 2002 SCC 70. The Supreme Court of Canada reaffirmed its bright-line test discussed in *R. v. Neil*, and provided additional guidance on how it is to be applied in *Strother v. 344920 Canada Inc.*, 2007 SCC 24.

In that case, the Court provides context in which to distinguish a commercial interest from a legal one. Binnie, J states at para 55:

> The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. This is not to say that

> commercial interests can *never* be relevant. *The American Restatement* offers the example of two business competitors who seek to retain a single law firm in respect of competing applications for a single broadcast licence, i.e. a unique opportunity. The *Restatement* suggests that acting for both without disclosure and consent would be improper because the subject matter of both retainers is the same licence (*Restatement (Third) of Law Governing Lawyers*, vol. 2, at § 121 (2000)). The lawyer's ability to provide even-handed representation is put in issue. However, commercial conflicts between clients that do not impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact.
>
> [emphasis in original]

An attempt to create conflicts of interest for purely tactical reasons, for example by consulting multiple lawyers in order to prevent them from representing another client, is contrary to the requirement in Rule 6.02(1) to act in good faith with all persons with whom a lawyer has dealings and is likely to undermine public confidence in the profession and the administration of justice. A lawyer must not engage in this improper practice or assist a client in doing so.

Acting against Current Clients without express consent

2.04 (4) A lawyer may represent a client whose immediate legal interests are directly adverse to those of a current client without the express consent of one or both of the clients concerned if all of the following conditions apply:

(a) the matters involved are unrelated;

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other;

(c) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel that has commonly consented to lawyers acting for and against them in unrelated matters; and

(d) the lawyer reasonably believes that he or she is able to represent that client without adversely affecting the immediate legal interests of the other.

Acting against Current Clients with advance agreement

2.04 (5) A lawyer may represent a client whose immediate legal interests are directly adverse to those of another current client who has agreed in advance, provided that

(a) the matters involved are unrelated,

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other, and

(c) if the client is not a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel, the client has obtained independent legal advice on the subject.

Acting Against Former Clients

2.04 (6) Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,

(b) any related matter, or

(c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client,.

Commentary
This Rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

2.04 (7) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with subrule (21), that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
The guidelines at the end of Appendix D regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which,

having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Joint Retainers

2.04 (8) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other. The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with subrule (8).

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (8). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

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

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (10).

2.04 (9) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (10) When a lawyer has advised the clients as provided under subrules (8) and (9) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (11) Except as provided by subrule (13), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

(a) refer the clients to other lawyers; or

(b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

(i) no legal advice is required; and

(ii) the clients are sophisticated.

2.04 (12) If the contentious issue referred to in subrule (11) is not resolved, the lawyer must withdraw from the joint representation.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

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

2.04 (13) Subject to this rule, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary
This rule does not relieve the lawyer of the obligation, when the contentious issue arises, to obtain the consent of the clients if there is or is likely to be a conflicting interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Limited representation

2.04 (14) In subrules (14) to (17) **"limited legal services"** means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter.

2.04 (15) A lawyer must not provide limited legal services if the lawyer is aware of a conflict of interest and must cease providing limited legal services if at any time the lawyer becomes aware of a conflict of interest.

2.04 (16) A lawyer may provide limited legal services notwithstanding that another lawyer has provided limited legal services under the auspices of the same not-for-profit organization to a client adverse in interest to the lawyer's client, provided no confidential information about a client is available to another client from the not-for-profit organization.

2.04 (17) If a lawyer keeps information obtained as a result of providing limited legal services confidential from the lawyer's partners and associates, the information is not imputed to the partners or associates, and a partner or associate of the lawyer may

(a) continue to act for another client adverse in interest to the client who is obtaining or has obtained limited legal services, and

(b) act in future for another client adverse in interest to the client who is obtaining or has obtained limited legal services.

Conflicts Arising as a Result of Transfer Between Law Firms

Application of Rule

2.04 (18) In subrules (18) to (26):

"client", includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, in addition to those included in the definitions part of this Code;

"confidential information" means information that is not generally known to the public obtained from a client; and

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship,

(b) in a partnership,

(c) in an arrangement for sharing space,

(d) as a law corporation,

(e) in a government, a Crown corporation or any other public body, and

(f) in a corporation or other body;

(g) in a Multi-Disciplinary Practice (MDP);

"lawyer" means a member of the Society, and includes an articled student enrolled in the Law Society Admission Program;

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary
Treating space-sharing lawyers as a law firm recognizes (a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and (b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client. Subrules (18) to (26) apply to lawyers transferring to or from government service and into or out of an in-house counsel position, but do not extend to purely internal transfers in which, after transfer, the employer remains the same. Subrules (18) to (26) treat as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm

and a legal aid program with many community law offices. The more autonomous that each such unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent.

See the definition of **"MDP"** in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.

2.04 (19) Subrules (18) to (26) apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

Subrules (18) to (26) are intended to regulate lawyers and articled law students who transfer between law firms. They also impose a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rules and with the duty not to disclose confidences of clients of:

(a) the lawyer's firm, or

(b) other law firms in which the non-lawyer staff have worked.

2.04 (20) Subrules (21) and (22) do not apply to a lawyer employed by the federal or provincial or territorial attorney general or department of justice who continues to be employed by that attorney general or department of justice after transferring from one department, ministry or agency to another.

Firm Disqualification

2.04 (21) If the transferring lawyer actually possesses confidential information relevant to a matter referred to in subrule (19)(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm can establish, in accordance with subrule (22), when called upon to do so by a party adverse in interest, that

(i) it is reasonable that its representation of its client in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy and timing of the measures taken under subparagraph (ii);

(B) the extent of prejudice to the affected clients; and

(C) the good faith of the former client and the client of the new law firm; and

(ii) it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

Commentary
Appendix D may be helpful in determining what constitutes "reasonable measures" in this context. Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues identified may prejudice clients and may be considered sharp practice.

Continued Representation not to Involve Transferring Lawyer

2.04 (22) If the transferring lawyer actually possesses information relevant to a matter referred to in subrule (19)(a) respecting the former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must notify its client of the relevant circumstances and its intended action under subrules (18) to (26).

2.04 (23) Unless the former client consents, a transferring lawyer to whom subrule (21) or (22) applies must not:

(a) participate in any manner in the new law firm's representation of its client in that matter; or

(b) disclose any confidential information respecting the former client.

2.04 (24) Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer to whom subrule (21) or (22) applies.

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (7) or (18) to (26) may apply to a court of competent jurisdiction for a determination of any aspect of those subrules, or seek the opinion of the Society on the application of those subrules.

Due Diligence

2.04 (26) A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

(a) complies with subrules (18) to (26), and

(b) does not disclose confidences of clients of

(i) the firm, and

(ii) another law firm in which the person has worked.

Conflicts with Clients

2.04 (27) A lawyer must not perform any legal services if it would reasonably be expected that the lawyer's professional judgment would be affected by the lawyer's or anyone else's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary
Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this subrule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

2.04 (28) The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under subrule (27).

Commentary
Generally speaking, a lawyer may act as legal advisor or as business associate, but not both.

These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyers Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies.

Whether or not insurance coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Insurance Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing Business with a Client

Independent legal advice

2.04 (29) In subrules (29) to (44), when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflicting interest in the matter.

2.04 (30) A lawyer giving independent legal advice under this Rule must:

(a) advise the client that the client has the right to independent legal representation;

(b) explain the legal aspects of the matter to the client, who appears to understand the advice given; and

(c) inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view.

Commentary

A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflicting interest in the matter to act for the client in relation to the matter.

If a client elects to waive independent legal representation and to rely on independent legal advice only, the lawyer retained has a responsibility that should not be lightly assumed or perfunctorily discharged.

Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

2.04 (31) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary

This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (32) Subject to subrule (33), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (35).

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

Borrowing from Clients

2.04 (34) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary
Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (35) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (36) Subject to subrule (34), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (37) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (38) Except as provided by subrule (39), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (39) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (29) to (44) (Doing Business with a Client); and

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

Testamentary Instruments and Gifts

2.04 (40) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (41) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (42) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (43) A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (44) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

APPENDIX C — REAL PROPERTY TRANSACTIONS

Application

1. This Appendix does not apply to a real property transaction between corporations, societies, partnerships, trusts, or any of them, that are effectively controlled by the same person or persons or between any of them and such person or persons.

Acting for parties with different interests

2. A lawyer must not act for more than one party with different interests in a real property transaction unless:

   (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,

   (b) the transaction is a simple conveyance, or

   (c) paragraph 8 applies.

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in rule 2.04 (8) to (13).

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

   (a) the value of the property or the amount of money involved,

   (b) the existence of non-financial charges, and

   (c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary
The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them: (a) the payment of all cash for clear title,

(b) the discharge of one or more encumbrances and payment of the balance, if any, in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit.

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

The following are examples of transactions that must not be treated as simple conveyances:

(h) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless subparagraph (f)

applies, or

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage.

A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2, the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

Unrepresented parties in a real property transaction

7. If one party to a real property transaction does not want or refuses to obtain independent legal representation, the lawyer acting for the other party may allow the unrepresented party to execute the necessary documents in the lawyer's presence as a witness if the lawyer advises that party in writing that:

(a) the party is entitled to obtain independent legal representation but has chosen not to do so,

(b) the lawyer does not act for or represent the party with respect to the transaction, and

(c) the lawyer has not advised that party with respect to the transaction but has only attended to the execution and attestation of documents.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7, it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for him or her to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

APPENDIX D — CONFLICTS ARISING AS A RESULT OF TRANSFER BETWEEN LAW FIRMS

Matters to consider when interviewing a potential transferee

1. When a law firm considers hiring a lawyer or articled student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, *before transfer,* whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm that the transferring lawyer is leaving, and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

   During the interview process, the transferring lawyer and the new law firm need to identify, first, all cases in which:

   (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client,

   (b) the interests of these clients in that matter conflict, and

   (c) the transferring lawyer actually possesses relevant information respecting that matter.

   When these three elements exist, the transferring lawyer is personally disqualified from representing the new client unless the former client consents.

   Second, they must determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm.

   If this element exists, then the transferring lawyer is disqualified unless the former client consents, and the new law firm is disqualified unless the firm takes measures set out in this Code to preserve the confidentiality of information.

   In Rules 2.04 (18) to (26), "confidential" information refers to information not generally known to the public that is obtained from a client. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

   In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not disclose client confidences during the interview process itself.

Matters to consider before hiring a potential transferee

2. After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

(a) **If a conflict does exist**

If the new law firm concludes that the transferring lawyer does possess relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, then the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(i) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or

(ii) the new law firm complies with Rule 2.04 (21).

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under Rule 2.04 (25) for an opinion of the Society or a determination by a court that it may continue to act, it bears the onus of establishing the matters referred to in Rule 2.04 (21). Again, this process must be completed before the transferring lawyer is hired.

An application under Rule 2.04 (25) may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under Rule 2.04 (25) that is intended to provide informal guidance to applicants.

The circumstances referred to in Rule 2.04(21)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account.

(b) **If no conflict exists**

If the new law firm concludes that the transferring lawyer possesses relevant information respecting a former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must notify its client "of the relevant circumstances and its intended action under Rule 2.04(18) to (26).

Although Rule 2.04(22) does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, absent such consent, the transferring lawyer must not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that, if disclosed, may prejudice the former client.

A former client who alleges that the transferring lawyer has such confidential information may apply under Rule 2.04(25) for an opinion of the Society or a determination by a court on that issue.

(c) **If the new law firm is not sure whether a conflict exists**

There may be some cases in which the new law firm is not sure whether the transferring lawyer possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

Reasonable measures to ensure non-disclosure of confidential information

3. As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:

(a) if the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Rather, the new law firm that seeks to implement reasonable

measures must exercise professional judgement in determining what steps must be taken "to ensure that there will be no disclosure to any member of the new law firm."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

Adoption of all guidelines may not be realistic or required in all circumstances, but lawyers should document the reasons for declining to conform to a particular guideline. Some circumstances may require extra measures not contemplated by the guidelines.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm," the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of Rule 2.04(21)(b).

GUIDELINES:

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.

4. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

5. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

   (a) that the screened lawyer is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

6. Unless to do otherwise is unfair, insignificant or impracticable, the screened lawyer should not participate in the fees generated by the current client matter.

7. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.

8. The screened lawyer should use associates and support staff different from those working on the current client matter.

CONFLICTS

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(conflicts provisions only)

Redlined Version

May 2011

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" ~~is~~ means a person who:

(a) consults ~~the~~ a lawyer and on whose behalf a lawyer renders or agrees to render legal services; or

(b) having consulted ~~the~~ a lawyer, ~~has~~ reasonably ~~concluded~~ concludes that the lawyer has agreed to render legal services on his or her behalf.

~~In the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing;~~

~~For greater clarity, a client does not include a near-client, affiliated entity, director, shareholder, employee or family member unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established.~~

Commentary

A lawyer-client relationship may be established without formality.

~~In the case of~~When an individual ~~who~~ consults ~~the~~a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that ~~they~~such an individual had a reasonable expectation that a lawyer-client relationship would be established.

~~**"conflict of interest"** or **"conflicting interest"** arises when there is 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 client, a former client or a third person;~~

~~**Commentary**~~

~~A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.~~

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of ~~<province or territory>~~British Columbia;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures~~;~~.

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not advise or represent more than one side of a ~~dispute~~matter, except as permitted under this Code.

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, or as otherwise permitted under this Code.

Commentary

In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

~~As defined in these rules, a~~A conflict of interest or a conflicting interest arises when there is a substantial risk that ~~the~~ a lawyer's representation of ~~the~~ a client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client or a third person. A substantial risk is one that is significant~~,~~ and, while not certain or probable, is more than a mere possibility.~~.~~

A lawyer should be aware that he or she might owe duties to a third person, even though no formal lawyer-client relationship exists. The lawyer might, for instance, receive confidential information from a person, giving rise to a duty of confidentiality. Duties to third persons might also arise when a lawyer acts in a non-lawyer capacity, for example as a corporate director or officer, a trustee or ~~as an executor~~ a personal representative of an estate.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest. It is prudent to avoid situations in which the possibility of a conflicting interest arising is significant.

A lawyer's disclosure should inform the client of the relevant circumstances and the reasonably foreseeable ways ~~that~~ in which the conflicting interest could have an adverse effect on the client's interests. This ~~would~~ includes the lawyer's relations to the parties and interest in or connection with the matter, if any.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's

behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, such as when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

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. Conflicting interests include, but are not limited to, the financial interest of a lawyer, a law partner or an associate of a lawyer including a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, an associate, ~~a family member or~~ a law partner or a family member~~,~~ had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. ~~The definition of~~

It is not a conflict of interest, however, ~~does not capture~~if the financial interests ~~that~~ do not compromise a lawyer's duty to the client. For example, a lawyer owning a small number of shares of a ~~publicly traded~~ corporation would not necessarily ~~have~~ be in a conflict of interest ~~in~~ when acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. A lawyer acting for a friend or family member may ~~have~~ be in a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

A lawyer's sexual or close personal relationship with a client may also conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. A primary risk is that the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

Sole practitioners who practise in association with other lawyers in cost-sharing or other arrangements should consider whether a conflict would exist if two lawyers in ~~an~~ the association represent clients ~~in~~ on opposite sides of a dispute. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client as well. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts and other organizations.

A dual role may result in a conflict of interest or other problems because it may

- affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- it may obscure legal advice from business and practical advice,
- it may invalidate the protection of lawyer and client privilege, and or
- it has the potential of disqualifying the lawyer or the law firm from acting for the organization.

Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider Rule 6.03 (Outside Interests and Practice of Law).

While subrule (2) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Acting Against Current Clients

2.04 (3) Subject to subrules (4) and (5), A a lawyer must not represent a client whose immediate legal interests are directly adverse to the immediate legal intereststhose of a current client, —even if the matters are unrelated, –unless both clients consent.

Commentary

As defined in these rules, consent means fully fully-informed and voluntary consent after disclosure. Consent must either be in writing or recorded in writing and sent to the client. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time to permit a genuine and independent decision. A lawyer must also take reasonable steps to ensure that the client understands the matters disclosed.

For a discussion of the issue of acting against current clients see *R. v. Neil,* 2002 SCC 70. The Supreme Court of Canada reaffirmed its bright-line test discussed in *R. v. Neil*, and provided additional guidance on how it is to be applied in *Strother v. 344920 Canada Inc.*, 2007 SCC 24.

In that case, the Court provides context in which to distinguish a commercial interest from a legal one. Binnie, J states at para 55:

> The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. This is not to say that commercial interests can *never* be relevant. *The American Restatement* offers the example of two business competitors who seek to retain a single law firm in respect of competing applications for a single broadcast licence, i.e. a unique opportunity. The *Restatement* suggests that acting for both without disclosure and consent would be improper because the subject matter of both retainers is the same licence (*Restatement (Third) of Law Governing Lawyers*, vol. 2, at § 121 (2000)). The lawyer's ability to provide even-handed representation is put in issue. However, commercial conflicts between clients that do not impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact.
> [emphasis in original]~~The consent of a client described in this rule may be express or inferred. A lawyer should record in writing the basis for inferring the consent of a client. It may be reasonable to infer such consent when:~~
>
> - ~~the matters are unrelated;~~
> - ~~the lawyer has no relevant confidential information arising from one client that might reasonably affect the other;~~
> - ~~the parties affected have commonly consented to lawyers acting against them in unrelated matters; and~~
> - ~~the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the legal interests of the other.~~
>
> ~~In the case of a sophisticated client, such as a government, financial institution, publicly traded or similarly substantial company, or entity with in-house counsel, a lawyer need not provide the client with a written record of the basis for inferring consent where the lawyer has advised the client in a written retainer letter at the outset of the retainer that consent to represent a client whose interests are directly adverse to the immediate legal interests of the current client will be inferred when the four conditions set out above have been met.~~

~~The~~ An attempt to create conflicts of interest for purely tactical reasons, for example by consulting multiple lawyers ~~on behalf of a client or as in-house counsel~~ in order to prevent them from representing another client, is contrary to the requirement in Rule 6.02(1) to act in good faith with all persons with whom a lawyer has dealings and is likely to undermine public confidence in the profession and the administration of justice. A lawyer must not engage in this improper practice or assist a client in doing so.

~~Concurrent Representation~~Acting against Current Clients without express consent

2.04 (4) A ~~law firm~~lawyer may represent a client whose immediate legal interests are directly adverse to those of a current client without the express consent of one or both of the clients concerned if all of the following conditions apply:

(a) the matters involved are unrelated;

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other;

(c) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel that has commonly consented to lawyers acting for and against them in unrelated matters; and

(d) the lawyer reasonably believes that he or she is able to represent that client without adversely affecting the immediate legal interests of the other.

~~act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:~~

~~(a) disclosure of the advantages and disadvantages of the firm so acting has been made to each client;~~

~~(b) each client consents after having received advice from a lawyer independent of the firm;~~

~~(c) it is in the best interests of the clients that the firm so acts;~~

~~(d) each client is represented by a different lawyer at the firm;~~

~~(e) appropriate screening mechanisms are in place to protect confidential information; and~~

~~(f) the law firm withdraws from the representation of all clients if a dispute that cannot be resolved develops between the clients.~~

~~Commentary~~

~~Concurrent representation, as distinguished from joint retainers as discussed below, permits law firms to act for a number of clients in a matter, for example, competing bids in a corporate acquisition, in which the clients' interests are immediately divergent and may conflict, but the clients are not in a dispute. A law firm may agree to act in such circumstances provided the requirements of the rule are met. In particular, the clients are to be fully apprised of and understand the risks associated with the arrangement.~~

~~In some situations, although all the clients would consent, the law firm should not accept a concurrent retainer. For example, in a matter in which one of the clients was less sophisticated or more vulnerable than the other, acting under this rule would be undesirable because the less sophisticated and more vulnerable client may later regret his or her consent and perceive the situation as having been one in which the law firm~~

~~gave preferential and better services to the other client.~~

Acting against Current Clients with advance agreement

2.04 (5) A lawyer may represent a client whose immediate legal interests are directly adverse to those of another current client who has agreed in advance, provided that

(a) the matters involved are unrelated,

(b) the lawyer has no relevant confidential information arising from the representation of one client that might reasonably affect the other~~.~~, and

(c) if the client is not a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel, the client has obtained independent legal advice on the subject.

Acting Against Former Clients

2.04 (~~5~~6) Unless the former client consents, a lawyer must not act against a former client in ~~or against persons who were involved in or associated with a former client in a matter in which the lawyer represented the former client~~:

(a) ~~in~~ the same matter,

(b) ~~in~~ any related matter, or

(c) ~~except as provided by subrule (6), in~~ any ~~new~~ other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client,~~obtained from the other retainer relevant confidential information~~.

~~.~~

Commentary

~~It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter. Generally this~~ This Rule ~~would~~ prohibits a lawyer from attacking ~~the~~ legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

~~**2.04 (6)** If a lawyer has acted for a former client and obtained confidential information relevant to a new matter, a partner or associate of the lawyer may act in the new matter against the former client if:~~

~~(a) the former client consents to the lawyer's partner or associate acting; or~~

2.04 (7) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's ~~law~~ firm may act against the former client in the new matter, if the firm establishes, in accordance with subrule (21), that it is ~~in the interests of justice~~reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
The guidelines at the end of ~~the Commentary to subrule (26)~~Appendix D regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Joint Retainers

2.04 (~~7~~8) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary
Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced~~.~~. This is especially so when one of the clients is less sophisticated or

more vulnerable than the other. The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with subrule (8).

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (~~7~~8). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

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

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (~~9~~10).

2.04 (~~8~~9) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (~~9~~10) When a lawyer has advised the clients as provided under subrules (~~7~~8) and ~~2.04~~(~~8~~9) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (~~10~~11) Except as provided by subrule (~~11~~13), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

(a) refer the clients to other lawyers; or

(b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

(i) no legal advice is required; and

(ii) the clients are sophisticated.

2.04 (12) If the contentious issue referred to in subrule (11) is not resolved, the lawyer must withdraw from the joint representation.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

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

2.04 (~~11~~13) Subject to this rule, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

This rule does not relieve the lawyer of the obligation, when the contentious issue arises, to obtain the consent of the clients ~~when~~ if there is or is likely to be a conflicting interest, or ~~when~~ if the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

~~**Acting for Borrower and Lender**~~

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (7) to (11), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in subrule (6) to the lending client before accepting the retainer,

(b) provide the advice described in subrule (7), or

(c) obtain the consent of the lending client as required by subrule (8), including confirming

~~the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.~~

~~**Commentary**~~

~~Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.~~

~~Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.~~

Limited representation

2.04 (14) In subrules (14) to (17) **"limited legal services"** means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter.

2.04 (15) A lawyer must not provide limited legal services if the lawyer is aware of a conflict of interest and must cease providing limited legal services if at any time the lawyer becomes aware of a conflict of interest.

2.04 (16) A lawyer may provide limited legal services notwithstanding that another lawyer has provided limited legal services under the auspices of the same not-for-profit organization to a client adverse in interest to the lawyer's client, provided no confidential information about a client is available to another client from the not-for-profit organization.

2.04 (17) If a lawyer keeps information obtained as a result of providing limited legal services confidential from the lawyer's partners and associates, the information is not imputed to the partners or associates, and a partner or associate of the lawyer may

(a) continue to act for another client adverse in interest to the client who is obtaining or has obtained limited legal services, and

(b) act in future for another client adverse in interest to the client who is obtaining or has obtained limited legal services.

Conflicts ~~from~~ Arising as a Result of Transfer Between Law Firms

Application of Rule

2.04 (~~17~~18) In ~~this~~ subrules (18) to (26):

"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~~whether or not a solicitor-client relationship exists between them, in addition to those included in the definitions part of this Code;

"confidential information" means information that is not generally known to the public obtained from a client ~~that is not generally known to the public~~; and

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship,

(b) in a partnership,

(c) in an arrangement for sharing space,

(d) as a law corporation,

(e) in a government, a Crown corporation or any other public body, and

(f) in a corporation or other body;

(g) in a Multi-Disciplinary Practice (MDP);

"lawyer" means a member of the Society, and includes an articled student enrolled in the Law Society Admission Program;

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

Subrules (18) to (26) apply to lawyers transferring to or from government service and into or out of an in-house counsel position, but do not extend to purely internal transfers in which, after transfer, the employer remains the same.

Subrules (18) to (26) treat as one "law firm" such entities as the various legal services units of a

government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each such unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent.

See the definition of **"MDP"** in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.~~The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.~~

2.04 (~~18~~19) ~~This rule~~Subrules (18) to (26) ~~applies~~ apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

Subrules (18) to (26) are intended to regulate lawyers and articled law students who transfer between law firms. They also impose a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rules and with the duty not to disclose confidences of clients of:

(a) the lawyer's firm, or

(b) other law firms in which the non-lawyer staff have worked.

2.04 (~~19~~20) Subrules (~~20~~21) ~~to~~ and (22) do not apply to a lawyer employed by the federal~~, a~~ or provincial or ~~a~~ territorial ~~Attorney~~ attorney ~~General~~ general or ~~Department~~ department of ~~Justice~~ justice who~~, after transferring from one department, ministry or agency to another,~~ continues to be employed by that ~~Attorney~~ attorney ~~General~~ general or ~~Department~~ department of ~~j~~Justice after transferring from one department, ministry or agency to another.

~~**Commentary**~~

~~The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.~~

~~**Lawyers and support staff —** This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.~~

~~**Government employees and in-house counsel —** The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.~~

~~**Law firms with multiple offices —** This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.~~

~~Law~~ Firm Disqualification

2.04 (~~20~~21) If the transferring lawyer actually possesses ~~relevant~~ confidential information relevant to a matter referred to in subrule (19)(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm can establish~~es~~, in accordance with subrule (22), when called upon to do so by a party adverse in interest, that

(i) it is reasonable that its representation of its client ~~in the interests of justice that it act~~ in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy and timing of the measures taken ~~to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur~~under subparagraph (ii);

(B) the extent of prejudice to ~~any party~~the affected clients; and

(C) the good faith of the ~~parties~~former client and the client of the new law firm; and

~~(ii) the availability of suitable alternative counsel; and~~

~~(iii)~~(ii) ~~issues affecting the public interest.~~it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

Commentary

Appendix D may be helpful in determining what constitutes "reasonable measures" in this context.

Issues arising as a result of a transfer between law firms should be dealt with promptly~~.~~. A lawyer's failure to promptly raise any issues identified may prejudice clients and may be considered sharp practice.~~The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.~~

Continued Representation not to Involve Transferring Lawyer

~~**2.04 (21)** For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.~~

2.04 (22) If the transferring lawyer actually possesses ~~relevant~~ information relevant to a matter referred to in subrule (19)(a) respecting the former client, but that information is not confidential information ~~but~~ that may prejudice the former client if disclosed to a member of the new law firm~~.~~:

~~(a) the lawyer must execute an affidavit or solemn declaration to that effect, and~~

the new law firm must

notify its client ~~and the former client or, if the former client is represented in the matter, the former client's lawyer,~~ of the relevant circumstances and ~~the firm's~~its intended action under ~~this rule~~subrules (18) to (26)~~., and~~

~~(i)~~

~~(ii) deliver to the persons notified under subclause (i) a copy of any affidavit or solemn declaration executed under clause (a).~~

~~**Transferring Lawyer Disqualification**~~

2.04 (23) Unless the former client consents, a transferring lawyer ~~referred~~ to whom ~~in~~ subrule (~~20~~21) or (22) applies must not:

(a) participate in any manner in the new law firm's representation of its client in ~~the~~ that matter; or

(b) disclose any confidential information respecting the former client.

2.04 (24) Unless the former client consents, members of the new law firm must not discuss ~~with a transferring lawyer referred to in subrule (20) or (22)~~ the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer to whom subrule (21) or (22) applies.

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (7) or (~~17~~18) to (26) may apply to a ~~tribunal~~ court of competent jurisdiction for a determination of any aspect of those subrules, or seek the opinion of the Society on the application of those subrules.

Due Diligence

2.04 (26) A lawyer must exercise due diligence ~~to ensure~~ in ensuring that each ~~lawyer~~ member and employee of the lawyer's law firm, ~~each non-lawyer partner and associate,~~ and each other person whose services the lawyer has retained

(a) complies with subrules (~~17~~18) to (26), and

(b) ~~including~~ does not ~~disclosing~~ disclose confiden~~tial information~~ces of clients of

(i) the firm, and ~~or~~

~~(i)~~(ii) ~~any o~~another law firm in which the person has worked.

~~**Commentary**~~

~~**MATTERS TO CONSIDER**~~

~~When a law firm ("new law firm") considers hiring a lawyer or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which:~~

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

(b) the interests of the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("former client") that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with subrule (20)(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

~~Alternatively, if the new law firm applies under subrule (25) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of subrule (20)(b). Ideally, this process should be completed before the transferring person is hired.~~

~~B. If no conflict exists~~

~~Although the notice required by subrule (22) need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.~~

~~The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.~~

~~If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.~~

~~A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (25) for a determination of that issue.~~

~~C. If the new law firm is not sure whether a conflict exists~~

~~There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.~~

~~REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION~~

~~As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:~~

~~(a) when the transferring lawyer actually possesses confidential information respecting a~~

former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (20)(b), particularly clause (v). Only when the entire firm must be disqualified under subrule (20) will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The current matter should be discussed only within the limited group that is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised

    (a) that the screened lawyer is now with the new law firm, which represents the current client, and

    (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened lawyer should use associates and support staff different from those working on the current matter.

In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Conflicts with Clients

2.04 (27) A lawyer must not perform any legal services if it would reasonably be expected that the lawyer's professional judgment would be affected by the lawyer's or anyone else's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary

Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this subrule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

2.04 (28) The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under subrule (27).

Commentary

Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyers Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies.

Whether or not insurance coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Insurance Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing Business with a Client

~~**Definitions**~~**Independent legal advice**

2.04 (~~27~~29) In subrules (~~27~~29) to (~~41~~44), when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who

~~**"independent legal advice"** means a retainer in which:~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client,~~ has no conflicting interest ~~with respect to the client's transaction~~in the matter~~,~~.

2.04 (30) A lawyer giving independent legal advice under this Rule must:

(~~b~~a) ~~the client's transaction involves doing business with~~

~~(i) another lawyer, or~~

~~(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,~~

~~(c) the retained lawyer has advised~~ advise the client that the client has the right to independent legal representation~~,~~ ;

(~~d~~b) ~~the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,~~

~~(e) the retained lawyer has explained~~ explain the legal aspects of the ~~transaction~~ matter to the client, who ~~appeared~~ appears to understand the advice given~~,~~ ; and

(~~f~~c) ~~the retained lawyer informed~~ inform the client of the availability of qualified advisers in other fields who would be in a position to ~~give an opinion to~~advise the client ~~as to the desirability or otherwise of a proposed investment~~ on the matter from a business point of view~~.~~ ;

~~**"independent legal representation"** means a retainer in which~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and~~

~~(b) the retained lawyer will act as the client's lawyer in relation to the matter;~~

Commentary

A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflicting interest in the matter to act for the client in relation to the matter.

If a client elects to waive independent legal representation and to rely on independent legal advice only, the ~~retained~~ lawyer retained has a responsibility that should not be lightly assumed or perfunctorily discharged.

Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

~~**"related persons"** means related persons as defined in the *Income Tax Act* (Canada); and~~

~~**"syndicated mortgage"** means a mortgage having more than one investor.~~

2.04 (~~28~~31) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

~~This provision applies to any transaction with a client, including:~~

~~(a) lending or borrowing money;~~

~~(b) buying or selling property;~~

~~(c) accepting a gift, including a testamentary gift;~~

~~(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;~~

~~(e) recommending an investment; and~~

~~(f) entering into a common business venture.~~

Commentary

This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted~~.~~. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (~~29~~32) Subject to subrule (~~30~~33), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's ~~written~~ consent.

Commentary

If the lawyer does not choose to ~~make disclosure of~~disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (~~32~~35).

2.04 (~~30~~33) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (~~31~~34) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the

loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (~~32~~35) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (~~33~~36) Subject to subrule (~~31~~34), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (~~34~~37) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (~~35~~38) Except as provided by subrule (~~36~~39), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (~~36~~39) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a ~~non-profit~~non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (~~27~~29) to (~~36~~44) (Doing Business with a Client); and

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

Testamentary Instruments and Gifts

2.04 (~~37~~40) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (~~38~~41) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (~~39~~42) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (~~40~~43) A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (~~41~~44) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

APPENDIX C — REAL PROPERTY TRANSACTIONS

Application

1. This Appendix does not apply to a real property transaction between corporations, societies, partnerships, trusts, or any of them, that are effectively controlled by the same person or persons or between any of them and such person or persons.

Acting for parties with different interests

2. A lawyer must not act for more than one party with different interests in a real property transaction unless:

   (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,

   (b) the transaction is a simple conveyance, or

   (c) paragraph 8 applies.

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in rule 2.04 (8) to (13).

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

   (a) the value of the property or the amount of money involved,

   (b) the existence of non-financial charges, and

   (c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary

The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

(a) the payment of all cash for clear title,

(b) the discharge of one or more encumbrances and payment of the balance, if any,

in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit.

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

The following are examples of transactions that must not be treated as simple conveyances:

(h) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless subparagraph (f) applies, or

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage.

A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2, the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

Unrepresented parties in a real property transaction

7. If one party to a real property transaction does not want or refuses to obtain independent legal representation, the lawyer acting for the other party may allow the unrepresented party to execute the necessary documents in the lawyer's presence as a witness if the lawyer advises that party in writing that:

(a) the party is entitled to obtain independent legal representation but has chosen not to do so,

(b) the lawyer does not act for or represent the party with respect to the transaction, and

(c) the lawyer has not advised that party with respect to the transaction but has only attended to the execution and attestation of documents.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7, it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for him or her to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

APPENDIX D — CONFLICTS ARISING AS A RESULT OF TRANSFER BETWEEN LAW FIRMS

Matters to consider when interviewing a potential transferee

1. When a law firm considers hiring a lawyer or articled student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, *before transfer,* whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm that the transferring lawyer is leaving, and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

   During the interview process, the transferring lawyer and the new law firm need to identify, first, all cases in which:

   (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client,

   (b) the interests of these clients in that matter conflict, and

   (c) the transferring lawyer actually possesses relevant information respecting that matter.

   When these three elements exist, the transferring lawyer is personally disqualified from representing the new client unless the former client consents.

   Second, they must determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm.

   If this element exists, then the transferring lawyer is disqualified unless the former client consents, and the new law firm is disqualified unless the firm takes measures set out in this Code to preserve the confidentiality of information.

   In Rules 2.04 (18) to (26), "confidential" information refers to information not generally known to the public that is obtained from a client. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

   In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not disclose client confidences during the interview process itself.

Matters to consider before hiring a potential transferee

2. After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

(a) **If a conflict does exist**

If the new law firm concludes that the transferring lawyer does possess relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, then the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(i) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or

(ii) the new law firm complies with Rule 2.04 (21).

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under Rule 2.04 (25) for an opinion of the Society or a determination by a court that it may continue to act, it bears the onus of establishing the matters referred to in Rule 2.04 (21). Again, this process must be completed before the transferring lawyer is hired.

An application under Rule 2.04 (25) may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under Rule 2.04 (25) that is intended to provide informal guidance to applicants.

The circumstances referred to in Rule 2.04(21)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account.

(b) **If no conflict exists**

If the new law firm concludes that the transferring lawyer possesses relevant information respecting a former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must notify its client "of the relevant circumstances and its intended action under Rule 2.04(18) to (26).

Although Rule 2.04(22) does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, absent such consent, the transferring lawyer must not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that, if disclosed, may prejudice the former client.

A former client who alleges that the transferring lawyer has such confidential information may apply under Rule 2.04(25) for an opinion of the Society or a determination by a court on that issue.

(c) **If the new law firm is not sure whether a conflict exists**

There may be some cases in which the new law firm is not sure whether the transferring lawyer possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

Reasonable measures to ensure non-disclosure of confidential information

3. As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:

(a) if the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Rather, the new law firm that seeks to implement reasonable

measures must exercise professional judgement in determining what steps must be taken "to ensure that there will be no disclosure to any member of the new law firm."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

Adoption of all guidelines may not be realistic or required in all circumstances, but lawyers should document the reasons for declining to conform to a particular guideline. Some circumstances may require extra measures not contemplated by the guidelines.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm," the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of Rule 2.04(21)(b).

GUIDELINES:

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.

4. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

5. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

   (a) that the screened lawyer is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

6. Unless to do otherwise is unfair, insignificant or impracticable, the screened lawyer should not participate in the fees generated by the current client matter.

7. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.

8. The screened lawyer should use associates and support staff different from those working on the current client matter.

Table of Concordance Between BC Code and *Professional Conduct Handbook*

BC Code Rule	***Professional Conduct Handbook* Rule**
Definitions	No similar definitions
2.04(1)	Chapter 6, Rules 1 to 3
2.04(2)	Chapter 6, Rules 1 to 3
2.04(3)	Chapter 6, Rule 6.3
2.04(4)	Chapter 6, Rule 6.4
2.04(5)	No similar rule
2.04(6)	Chapter 6, Rule 7
2.04(7)	No similar rule
2.04(8) to 2.04(13)	Chapter 6, Rules 4, 5 & 6
2.04(14) to 2.04(17)	Chapter 6, Rules 7.01 to 7.04
2.04(18) to 2.04(26) & Appendix D	Chapter 6, Rules 7.1 to 7.9 and Appendix 5
2.04(27)	Chapter 7, Rules 1 & 2
2.04(28)	No similar rule
2.04(29)	No similar rule
2.04(30)	No similar rule
2.04(31)	Chapter 7, Rule 3
2.04(32)	Chapter 7, Rules 2 to 5
2.04(33)	Chapter 7, Rules 2 & 5
2.04(34)	Chapter 7, Rule 4
2.04(35)	No similar rule
2.04(36)	No similar rule

2.04(37)	No similar rule
2.04(38)	No similar rule
2.04(39)	No similar rule
2.04(40)	Chapter 7, Rule 2
2.04(41)	Chapter 7, Rule 2
2.04(42)	No similar rule
2.04(43)	Chapter 8, Rule 19
2.04(44)	No similar rule
Appendix C	Appendix 3
Appendix D	Appendix 5

Table of Concordance Between *Professional Conduct Handbook* and BC Code

***Professional Conduct Handbook* Rule**	**BC Code Rule**
Chapter 6, Rule 1 to 3	2.04(1) & 2.04(2)
Chapter 6, Rule 6.3	2.04(3)
Chapter 6, Rule 6.4	2.04(4)
Chapter 6, Rule 7	2.04(6)
Chapter 6, Rule 7	2.04(6)
Chapter 6, Rules 4, 5 & 6	2.04(8) to 2.04(12)
Chapter 6, Rules 7.01 to 7.04	2.04(14) to 2.04(17)
Chapter 6, Rules 7.1 to 7.9 & Appendix 5	2.04(18) to 2.04(26) & Appendix D
Chapter 7, Rule 1 & 2	2.02(27, 32, 38, 40, 41),
Chapter 8, Rule 19	2.04(43)

Appendix 3

Appendix 5

Appendix C

Appendix D