THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, May 13, 2011

PRESENT:

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

ABSENT:

Nancy Merrill
Claude Richmond
Catherine Sas, QC

STAFF PRESENT:

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

GUESTS:

Chris Axworthy, QC, Faculty of Law Dean, Thompson Rivers University
Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Anne Chopra, Equity Ombudsperson
Rob Seto, CLE
Donna Greschner, Faculty of Law Dean, UVIC
Jeremy Hainsworth, Reporter, Lawyers Weekly
Azool Jaffer-Jeraj, President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Sharon Matthews, Vice-President, CBABC
Caroline Nevin, Executive Director, CBABC
Wayne Robertson, QC, Executive Director, Law Foundation of BC

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on April 15, 2011 were approved as circulated.

REGULAR AGENDA – for Discussion and Decision

2. 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 a number of matters, including those outlined below.

a. Independent Committee on Bencher Election Issues Update

Life Benchers Brian Wallace, QC (Chair), Patrick Kelly and Patricia Schmit, QC have been appointed to an independent committee to consider and provide recommendations regarding a number of Bencher election issues (Benchers' term of office, Bencher turnover and election district boundaries), as directed by the Benchers at their April meeting.

b. Access Symposium Steering Committee Update

Weekly meetings of the Access Symposium Steering Committee are proceeding, with planning of the program for a fall symposium on enhancing access to legal services in BC still in the formative stages.

c. April 28 – 2011 Certificate Luncheon

The annual luncheon to recognize current recipients of 50 and 60-Year Certificates was held on April 28. Mr. Hume has received a number of letters of appreciation from attendees.

d. May 9 – Meeting with the Attorney General (Legislative Amendments)

Mr. Hume and Mr. McGee met with the Honourable Barry Penner, QC to discuss the purpose of Law Society's package of proposed amendments to the Legal Profession Act that was submitted to the Legislature last fall (enhancement of the Society's ability to carry out its mandate).

e. May 10 – Meeting with Chief Justice Bauman (Enhanced Role of Paralegals in the BC Courts)

Mr. Hume met with Chief Justice Bauman to review the Law Society's proposal for expanding the permitted range of court services by paralegals.

f. Subcommittee on Hearing Panel Pools Update

The Subcommittee is currently reviewing the 126 applications received from BC lawyers for inclusion in the non-Bencher lawyer pool. Work is well advanced on a website notice and call for applications for inclusion in the non- lawyer pool.

g. Money-Laundering Litigation Update

Mr. Hume briefed the Benchers, referring to the Federation submissions circulated in advance of the meeting by Ms. Armour and noting that the Law Society is well-represented by Mr. Doust.

h. Selection of the Benchers' Nominee for 2012 Second Vice-President

Mr. Hume reminded the Benchers that the candidacy deadline for seeking the Benchers' nomination as 2012 Second Vice-President is the June 18 Benchers meeting.

3. CEO's Report

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

a. Financial Report – Q1 Operating Results

b. 2012 - 2014 Strategic Plan – Planning Process

c. Government Relations Plan – Meeting with the Attorney General

d. Recruiting for New Hearing Panel Pools

e. BencherNet Update

f. Management Group Retreat

4. Report on Outstanding Hearing and Review Reports

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

5. Amendments to Credentials Rules Governing Articled Students

Mr. Renwick briefed the Benchers as chair of the Credentials Committee. He reminded the Benchers that in late 2010 they accepted the Report of the Delivery of Legal Services Task Force, including its recommendation that the Credentials Committee be directed to explore the expansion of legal services permitted to be performed by articled students.

After outlining the deliberations conducted by the Credentials Committee and the Act & Rules Subcommittee, Mr. Renwick referred to Mr. Lucas's memorandum on behalf of the Committee and the Subcommittee (page 5000 of the meeting materials) for a summary of the recommendations being presented to the Benchers for approval:

> … 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.

> … that an [articled] 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.
>
> … that undertakings offered or received by an [articled] 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. (at page 5001)

Mr. Renwick noted that the proposed amendments to the Law Society Rules entail significant departure from the current approach to regulating the provision of legal services by articled students. Rather than specifying particular permitted services, the proposed amendments start from the premise that an articled student should be able to provide the same services as may be provided by lawyers, with appropriate preparation and supervision by the student's principal or other practising lawyer responsible for supervising the student on a particular file. From that general premise, the proposed Rule 2-32.01 specifies a number of exclusions: services that articled students should not be permitted to provide.

Mr. Renwick also noted that the Rules dealing with temporary articled students will be reviewed next; for the time being, the proposed amendments to Rule 2-43 allow temporary articled students to provide the same services that they may provide under the current rule. Mr. Renwick advised that it is understood that the BC Courts are generally very supportive of the proposed expansion of permitted appearances by articled students in court.

Mr. Renwick moved (seconded by Mr. Getz) that the Benchers adopt the resolution set out at pages 5007-5008 the meeting materials (Appendix 2 to these minutes).

Key points raised in the ensuing discussion were:

- it is important that the Law Society communicate clearly and effectively with current principals and students regarding the purpose and effect of the proposed changes, and the importance of the provision of adequate supervision
    - perhaps to the extent of implementing a principals' undertaking and/or protocol regarding the provision of adequate supervision
- maintenance of public confidence requires that the Discipline Committee be ready to address performance breakdowns arising from inadequate supervision
- the proposed expansion of permitted services by articled students should support the recruiting of articled students by smaller firms in rural areas
- credit is due to the work of Kamloops Bencher Kenneth Walker for his leadership in the development of this initiative, and for his on-going work with articled students
- implementation should be delayed to enable preparation and execution of a thorough communications and Practice Standards plan, focusing on the supervision issues

- the proposed requirement of direct supervision by the student's principal or another practising lawyer for articled students to conduct the defence of criminal proceedings by way of indictment in the Supreme Court only

    - should be extended to articled students' conduct of the defence of criminal proceedings by way of indictment in Provincial Court, in light of the seriousness of potential consequences to clients

    - should not be extended to articled students' conduct of the defence of criminal proceedings by way of indictment in Provincial Court, in light of the resulting increased cost of representation and negative impact on access to legal services

Mr. Renwick and Mr. Getz agreed to a friendly amendment of their motion, making implementation of the proposed amendments be effective September 1, 2011.

Mr. Crossin moved (seconded by Ms. Hickman) that the proposed language for the new Rule 2-32.01(2)(a)(iii) be amended by striking the phrase "*in the Supreme Court*" as follows:

Rule 2-32.01 (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:

…

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

The discussion of the motion to amend centred on the question of whether the risks of prejudice to a client in the event of inadequacies in an articled student's unsupervised conduct of a trial proceeding by way of indictment in Provincial Court

- are appropriate, in light of the strategic goal of enhancing access to legal services

- can be managed adequately by warning principals of the potential disciplinary consequences of inadequate supervision

The motion to amend was defeated.

Ms. Berge moved (seconded by Mr. Ross) that the proposed new Rule 2-32.01(2)(a)(iii) be struck and replaced by "*a proceeding on an indictable offence, unless the offence is within the absolute jurisdiction of a provincial court judge*" as follows:

Rule 2-32.01 (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:

…

(iii) *a proceeding on an indictable offence, unless the offence is within the absolute jurisdiction of a provincial court judge.*

The motion to amend was carried.

Mr. Van Ommen moved (seconded by Mr. Crossin) to postpone the main motion pending clarification regarding the availability of a supervising lawyer's Part B insurance coverage in a negligence claim arising from the provision of legal services by an articled student.

Ms. Forbes advised that she does not envision gaps in insurance coverage arising as a result of the proposed expansion of legal services permitted to be provided by articled students. She noted that to her knowledge, there has never been a denial of coverage of a claim under a supervising lawyer's policy of insurance arising from services provided by an articled student on the ground of inadequate supervision. Ms. Forbes also advised that the issue under discussion is more a matter of communication with current and potential principals and supervising lawyers regarding the importance of supervision and the potential consequences of failure to provide supervision, than a question of availability or administration of insurance coverage.

The motion to postpone was defeated.

The main motion (as amended) was carried by a majority of greater than two-thirds of the Benchers who voted.

Mr. Hume confirmed that the Credentials Committee and Law Society staff will work together in managing communications to the profession and the public regarding the September 1, 2011 implementation of the approved Rules amendments.

6. Review Conflicts Portion of the Model Code of Professional Conduct

Professor Blom briefed the Benchers as Chair of the Ethics Committee. He provided background for the process followed by the Committee in developing the draft BC Code of Conduct (Conflicts Provisions) (the BC Code) as an adaptation of the Federation of Law Societies of Canada's Model Code of Professional Conduct (the Model Code). Professor Blom reminded the Benchers that last month they approved the Ethics Committee's proposed non-conflicts portion of the BC Code, with implementation to be delayed pending the Committee's further advice to the Benchers regarding the conflicts provisions.

Professor Blom expressed the Committee's view of the importance of a unified national framework for standards of professional conduct for lawyers, and noted the connection between that view and the Committee's decision to apply the structure and content of the Federation's Model Code wherever possible. The draft BC Code follows the Model Code as closely as possible, deviating from it only in instances where the Ethics Committee concluded that BC's current Profession Conduct Handbook is clearly superior, or where the BC context demands a different approach.

Professor Blom also noted that

- the Federation has asked its Standing Committee on the Model Code (chaired by Mr. Hume) to review its conflicts provisions

- the Ethics Committee proposes to circulate the draft BC Code to the profession in early summer for comment and then report back to the Benchers in the fall

    - taking into account the profession's feedback and the status of the conflicts review being conducted by the Federation's Standing Committee.

Professor Blom highlighted key provisions of the draft BC Code, referring the Benchers to the redlined draft (at page 6061 of the meeting materials, Appendix 3 to these minutes) for detailed depiction of its

points of departure from the Model Code. He also circulated a re-drafted version of Section 2.04 (4), included as Appendix 3a to these minutes.

Professor Blom moved (seconded by Ms. Bond) that the draft BC Code be approved, and that the Ethics Committee be authorized to consult with BC's legal profession regarding its provisions.

The key points raised in the ensuing discussion were:

- national consistency is important
- the principle of undivided loyalty is important
- large firms are pushing for moderation of the conflicts rules to permit multiple representation if the clients agree
- The term "Code" may be misleading because it suggests a set of general principles
    - whereas the Model Code includes both general principles and, on certain topics that frequently arise, detailed guidelines"
- Neither the general nor the specific provisions are binding rules; they are only the Law Society's best advice to the members as to their ethical obligations

The motion was carried.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

WKM
2011-05-31

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

May 13, 2011

Introduction

My report this month includes our financial results for the first quarter ending March 31, 2011, as well as a review of the timeline for the strategic planning process and other items of interest.

1. Financial Report – Q1 Operating Results

Highlights of the financial results to March 31, 2011 are summarized in Appendix 1. Jeanette McPhee, our CFO, and I will be available to answer any questions you may have on the results at Friday's meeting.

2. 2012 - 2014 Strategic Plan – Planning Process

The process for reviewing and restating the Law Society's current 2009 - 2011 Strategic Plan will formally begin in early July and run through the balance of this year. Preparatory work at the policy staff and Advisory Committee levels has already begun. I am attaching a brief timeline as Appendix 2, which shows the key proposed dates and activities for this process. Please let me know if you have any comments or questions.

3. Government Relations Plan – Meeting with the Attorney General

The main objective of the Law Society's Government Relations Plan ("GR Plan") adopted by the Benchers in 2006 is to establish and maintain a consultative relationship with government, with effective channels for communication and cooperation. The desired outcomes of the plan are twofold; first, government consults with the Law Society in advance on matters within our mandate, and second, the Law Society has effective and responsive channels to communicate our key messages and issues to government.

2010 was an "off" year in many respects under our GR Plan. This was mainly because of mega issues during the year, such as the HST, absorbing much of the government's time (not to mention the interest of the opposition) and the subsequent focus on the leadership changes for both of the main parties. As a result, we weren't able to engage with government in the year as much as we would have liked, such as through our successful caucus receptions events, lawyer MLA outreach and briefing sessions with the Attorney General.

We have refocused our efforts to get our GR Plan back in gear for 2011 even though we realize that a provincial election may disrupt those efforts. With this in mind, Gavin and I met with the Attorney General, the Honourable Barry Penner, QC, and members of his staff in his Victoria office on May 9. The main purpose of the meeting was to familiarize the Attorney with the major features of our requests for changes to the *Legal Profession Act*, which are

designed to make us a more effective regulator in the public interest. The meeting was also a good opportunity to introduce the Attorney to additional features of our ongoing efforts to be more transparent and accountable in pursuing our mandate. A copy of our presentation entitled "Improving Self-Regulation – A Collaborative Approach" is attached as Appendix 3. We welcome any suggestions or comments you may have about this material.

4. Recruiting for New Hearing Panel Pools

One of the recent Bencher initiatives designed to enhance the transparency and accountability of our regulatory processes was the decision to include members of the public and non-Bencher lawyers on hearing panels for discipline and credentials matters. Below is an update on the implementation of those decisions.

A call for applications from non-Bencher lawyers was posted on the Law Society website in March with a closing date of April 30, 2011. Notices were also sent to members by email and published in the Benchers' Bulletin. The response has been very good with over 120 applications received to date and more arriving daily. The working group, which has been established to vet the applications and to consider the size of the pool constructed, will meet on May 11 to commence its work. The members of that working group are Messrs Hume, Vertlieb and Acheson and Ms Lindsay.

An advertisement for non-lawyer applicants is being drafted and will soon be finalized and posted on the Law Society website, with an anticipated closing date of June 30, 2011. This will be supported by advertising in daily papers across BC. Our Communications group is also considering arranging radio or TV interviews of a Law Society spokesperson to bring attention to this initiative to include members of the public in the hearing process, and to the call for applications specifically.

5. BencherNet Update

Changes are underway to simplify and update content and access to BencherNet. In addition to formatting changes, the major change is to discontinue the use of BencherNet as a separate web entity. Instead, when Benchers log in to the general Lawyer login section, they will be given access to all content to which they are entitled as Benchers, including committee and task force materials. Life Benchers will also have access to some content available to Benchers, as defined by their profiles. We expect this change to be implemented before July 2011.

6. Management Group Retreat

All managers at the Law Society will be participating in a one and a half day retreat in Vancouver on June 23 and 24, 2011. The purpose of the session is to examine our "culture" and to learn more about what we believe that culture is, how it is helping us achieve our goals and what aspects of our culture we should strengthen or change. This retreat will be a first for this management team and we are enlisting the help of facilitators who have assisted us in the past with our employee survey and leadership development programs. I look forward to reporting on the results of our retreat, and how this can be extended to include all staff, at a future Bencher meeting.

Timothy E. McGee
Chief Executive Officer

Appendix 1

CFO Quarterly Financial Report – First Quarter 2011

Attached are the financial results and highlights for the first quarter of 2011.

General Fund

General Fund (excluding TAF)

The General Fund operating results has a positive variance of $148,000 to March 31, 2011.

Revenue

Revenue is $6,430,000, $134,000 (2.1%) ahead of budget due to the following:

- PLTC will have 400 students this year, 15 ahead of budget,$30,000 of additional revenue
- CPD penalty fees were much higher than expected, actual collection was $130,000, compared to a budget of $30,000

Operation Expenses

Operating expenses for the first quarter were $4.36 million, very close to budget. The regulation area incurred a negative variance of $90,000, mainly due to unbudgeted external counsel fees. This was offset by savings in other areas.

2010 Forecast - General Fund (excluding TAF)

Revenue

Practicing membership is expected to be at budget this year, with 10,575 members. There will be additional PLTC and CPD revenue of $130,000, as noted above. We will not expect to re-lease the VOA space until 2012, so lease revenue will be reduced by $85,000 in the fourth quarter of the year. The net result is $45,000 positive variance for total revenue.

Expenses

With an increased focus on our regulatory mandate and reduced timelines, there are a number of initiatives this year. These are expected to increase costs in the regulatory area by approximately $650,000. As the 2011 budget was set in May 2010, these costs would not have been known at that time.

- Additional external counsel costs in regulation - $470,000

  - Additional files sent out in fall 2010 and first quarter 2011 due to staffing shortages (*Note: In the first quarter, there was $130,000 in regulation vacancy savings, which is applied to the 2011 Salary Vacancy budget)*
  - Additional files sent out to close files and reduce timelines
  - A number of large, complex files, where specific expertise was required
  - Two files with court applications
  - Increases in external counsel rates to attract senior counsel
- Regulation Staffing Plan – increased costs in last half of 2011 - $125,000
- Hearing Panels – advertising for new hearing panel membership - $50,000

At this time, we expect operating cost savings of $230,000 to year end. This consists of general operating expense savings, along with 'green' initiatives instituted by various departments at the Law Society. Some of the positive variances are noted below:

- Reduced usage of stationery and paper supplies - $40,000
- Electronic distribution of annual report – $20,000
- Reduced file storage costs, with reduced rates through renegotiation file storage contract and a focus on file destruction - $35,000
- One less Bencher meeting - $20,000

Forecast

Although it is early in the year, with the above noted changes, the current General Fund year end projection is a $370,000 negative variance to budget.

TAF-related Revenue and Expenses

The first quarter TAF revenue is not received until the April/May time period. The revenue received to date is tracking to budget.

The 2011 budget is $2.5 million, 6% over 2010 revenue. The BC Real Estate Association market projection for 2011 real estate unit sales is 8% increase over 2010, so the 2011 revenue budget appears reasonable.

TAF operating expenses had a positive variance in the first quarter.

Special Compensation Fund

The Special Compensation Fund is on track. There was little activity in the Fund during the first quarter.

Lawyers Insurance Fund

For the first quarter, LIF operating results were very close to budget. LIF assessments were $3.5 million in the first quarter, very close to budget. LIF

operating expenses had a $72,000 positive variance, due to an unfilled position and lower investment management fees.

The market value of the LIF long term investments increased $1.9 million in the first quarter. The year to date investment return was 2.0%, slightly better than the benchmark 1.7%.

The Law Society of British Columbia

Summary of Financial Highlights - First Quarter 2011
($000's)

2011 General Fund Results - YTD March 2011 (Excluding Capital Allocation & Depreciation)

	Actual	Budget	$ Var		% Var
Revenue					
Membership fees	3,570	3,568	2	*	0.06%
PLTC and enrolment fees	273	237	36	**	15.19%
Electronic filing revenue	152	171	(19)		-11.11%
Interest income	137	132	5		3.79%
Other revenue	468	322	146	***	45.34%
	4,600	4,430	170		
Expenses including 845 Cambie	3,982	3,977	(5)		-0.13%
	618	453	165		

* Membership numbers are 10,401 to date, tracking to budget
** 15 Additional PLTC students
*** CPD late fees over budget by $100k

2011 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**	**Forecast Variance**
2008 Actual	10,035	
2009 Actual	10,213	
2010 Actual	10,368	
2011 Budget	10,575	
2011 YTD	10,401	
Revenue		
CPD late fees over budget		100
PLTC - 15 additional students		30
Leased space vacancy - Oct to Dec 2011		(85)
2011 General Fund Forecast		45
Additional Costs		
Regulation - external counsel costs		(470)
Regulation - Plan		(125)
Hearing Panels - advertising		(50)
Savings		
Custodianship - file storage		35
IT - servers now offsite		35
ERDMS - maintenance cost - delay until 2012		30
Stationery & supplies		40
Bencher travel		20
Annual report distribution		20
Miscellaneous		50
		(415)
2011 General Fund Forecast Variance		(370)
2011 General Fund Budget		-
2011 General Fund Forecast		(370)

Trust Assurance Program Forecast

	2011 Forecast	2011 Budget	Variance
TAF Revenue	2,500	2,500	-
Trust Administration Department	2,405	2,394	(11)
Trust Assurance Program	95	106	(11)
Use of TAF Reserve	-	-	-
Net Trust Assurance Program	95	106	(11)

Most recent Real Estate Association projection predicts an 8% increase in unit sales from 2010 to 2011.

First quarter revenue not yet received. Preliminary estimate shows that we are tracking to budget on revenue.

2011 Lawyers Insurance Fund Long Term Investments - YTD March 2011

Market Value	
March 31, 2011	97,915,411
December 31, 2010	96,026,006
Performance	2.0%
Benchmark Performance	1.7%

The Law Society of British Columbia
General Fund
Results for the 3 Months ended March 31, 2011
($000's)

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Membership fees **(1)**	5,340	5,434		
PLTC and enrolment fees	273	237		
Electronic filing revenue	152	171		
Interest income	137	131		
Other revenue	528	323		
Total Revenues	6,430	6,296	134	2.1%
Expenses				
Regulation	1,597	1,506		
Education and Practice	764	777		
Corporate Services	669	700		
Bencher Governance	468	444		
Communications and Information Services	438	444		
Policy and Legal Services	358	386		
Depreciation	66	87		
Total Expenses	4,360	4,344	(16)	-0.4%
General Fund Results before 845 Cambie and TAP	2,070	1,952	118	
845 Cambie net results	161	131	30	
General Fund Results before TAP	**2,231**	**2,083**	**148**	
Trust Administration Program (TAP)				
TAF revenues	3	-	3	
TAP expenses	523	572	49	9%
TAP Results	**(520)**	**(572)**	**52**	
General Fund Results including TAP	**1,711**	**1,511**	**200**	

(1) Membership fees include capital allocation of $1.831m (YTD capital allocation budget = $1.866m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at Mar 31, 2011
($000's)

	Mar 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	197	177
Unclaimed trust funds	1,740	1,682
Accounts receivable and prepaid expenses	1,113	1,243
B.C. Courthouse Library Fund	1,867	635
Due from Lawyers Insurance Fund	11,602	17,578
	16,519	21,315
Property, plant and equipment		
Cambie Street property	11,848	12,002
Other - net	1,299	1,372
	29,666	34,689
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	2,675	3,965
Liability for unclaimed trust funds	1,740	1,682
Current portion of building loan payable	500	500
Deferred revenue	10,874	16,014
Deferred capital contributions	78	81
B.C. Courthouse Library Grant	774	635
Due to Lawyers Insurance Fund	-	-
Due to Special Compensation Fund	-	-
Deposits	22	20
	16,663	22,897
Building loan payable	4,600	5,100
	21,263	27,997
Net assets		
Capital Allocation	2,539	1,221
Unrestricted Net Assets	5,864	5,471
	8,403	6,692
	29,666	34,689

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 3 Months ended Mar 31, 2011
($000's)

	Unrestricted Net Assets	Capital Allocation	2011 Total	2010 Total
		$	$	$
Net assets - December 31, 2010	5,471	1,221	6,692	5,627
Net (deficiency) excess of revenue over expense for the period	(119)	1,830	1,711	1,065
Repayment of building loan	500	(500)	-	-
Purchase of capital assets:				
LSBC Operations	-	-	-	-
845 Cambie	12	(12)	-	-
Net assets - March 31, 2011	5,864	2,539	8,403	6,692

The Law Society of British Columbia
Special Compensation Fund
Results for the 3 Months ended March 31, 2011
($000's)

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	13	13		
Recoveries	65	65		
Total Revenues	78	78	-	0.0%
Expenses				
Claims and costs, net of recoveries	-	-		
Administrative and general costs	16	20		
Loan interest expense	(7)	-		
Total Expenses	9	20	(11)	-55.0%
Special Compensation Fund Results	**69**	**58**	**11**	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at Mar 31, 2011
($000's)

	Mar 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	953	895
	954	896
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	16	14
Deferred revenue	39	52
	55	66
Net assets		
Unrestricted net assets	899	830
	899	830
	954	896

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
For the 3 Months ended Mar 31, 2011
($000's)

	Unrestricted $
Net assets - December 31, 2010	830
Net excess of revenue over expense for the period	69
Net assets - March 31, 2011	899

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 3 Months ended March 31, 2011
($000's)

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	3,544	3,535		
Investment income **(1)**	1,272	165		
Other income	5	-		
Total Revenues	4,821	3,700	1,121	30.3%
Expenses				
Insurance Expense				
Provision for settlement of insurance deductibles	3,628	3,628		
Salaries and benefits	602	617		
Contribution to program and administrative costs of General Fund	363	394		
Office	125	157		
Actuaries, consultants and investment brokers' fees	94	97		
Allocated office rent	37	37		
Premium taxes	6	4		
Income taxes	-	-		
	4,855	4,934		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	167	160		
Total Expenses	5,022	5,094	72	1.4%
Lawyers Insurance Fund Results before 750 Cambie	(201)	(1,394)	1,193	
750 Cambie net results	100	85	15	
Lawyers Insurance Fund Results	**(101)**	**(1,309)**	**1,208**	

(1) There is an unrealized gain of $553k for the three month period recognized through net assets (not through income statement). See Statement of Changes in Net Assets.

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at Mar 31, 2011
($000's)

	Mar 31 2011	Dec 31 2010
Assets		
Cash and cash equivalents	13,491	21,530
Accounts receivable and prepaid expenses	1,337	1,149
Due from members	29	25
Due from General Fund	-	-
General Fund building loan	5,100	5,600
Investments	108,054	108,287
	128,011	136,591
Liabilities		
Accounts payable and accrued liabilities	2,239	2,709
Deferred revenue	3,277	6,707
Due to General Fund	11,602	17,578
Due to Special Compensation Fund	953	895
Provision for claims	56,413	55,652
Provision for ULAE	7,643	7,618
	82,127	91,159
Net assets		
Unrestricted net assets	28,384	27,932
Internally restricted net assets	17,500	17,500
	45,884	45,432
	128,011	136,591

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 3 Months ended Mar 31, 2011
($000's)

	Unrestricted $	Internally Restricted $	Total $
Net assets - December 31, 2010	27,932	17,500	45,432
Net deficiency of revenue over expense for the period	(101)	-	(101)
			-
Unrealized gains on available-for-sale financial assets arising during the period	553	-	553
Net assets - March 31, 2011	28,384	17,500	45,884

Appendix 2

Timeline – Strategic Planning Process, 2011

July 15, 2011

- Benchers receive memo from Policy Department:
    - describing where the organization is at present with respect to the current Plan, and what has been accomplished;
    - outlining considerations for creating the next Strategic Plan. Describes for purposes of debate what the ongoing goals of the Law Society might be for strategic planning purposes, and how to develop strategies and initiatives in a Strategic Plan to achieve aspects of those goals over a period of time. Definition of "strategies" and "initiatives" provided.
- Benchers receive mid-year reports from Advisory Committees identifying topics for consideration for Strategic Planning purposes.

September 9, 2011

- Benchers debate and set Law Society goals to give the Plan its overarching structure.
- Benchers receive any additional information from committees, task forces or individuals that may identify topics for consideration as strategies or initiatives for Strategic Planning purposes.

October 21, 2011

- Follow-up work as required and preparation for November (December) meeting.

December 2, 2011

- Benchers receive a package compiled by staff categorizing strategies and initiatives that have been proposed through which to achieve the goals that the Law Society aims to achieve as identified by the Benchers. Benchers debate and prioritize the strategies and initiatives.

December/January

- 2012 – 2014 Strategic Plan approved.

The Law Society of British Columbia

Improving Self-Regulation
A collaborative approach

May 2, 2011

Overview

- The Law Society of BC regulates 10,000+ lawyers
- Canadian Bar Association is lawyer advocacy body
- The Law Society is seeking amendments to *Legal Profession Act* to enhance ability to regulate by:
  - Improving ability to investigate, act and enforce
  - Simplifying regulation
  - Increasing accountability and transparency
  - Adopting best-practices of other self-regulating professions
  - Modernizing the Act in regards to privacy and proceedings
  - Removing any suggestion of lawyer advocacy

Mandate

- The Law Society of BC was created in 1869 and incorporated by provincial statute in 1884
- Through the *Legal Profession Act*, the provincial government has given the Law Society the task of upholding and protecting the public interest in the administration of justice by:
  i. Preserving and protecting the rights and freedoms of all persons
  ii. Ensuring the independence, integrity and honour of lawyers in BC
  iii. Establishing standards for the education, professional responsibility and competence of registrants and applicants

Current public perception research (2010)

- Confidence in Law Society has been trending up in recent years
- Ability of Law Society to:
  - handle complaints: 66% somewhat or very confident
  - discipline lawyers who are in violation of standards and practices: 63% somewhat or very confident
  - ensure lawyers operate with ethical standards: 72% somewhat or very confident
- Gratified to see higher results, but ongoing improvement requires enhanced ability to regulate

Importance of public confidence

- Heightened awareness and expectations in recent years regarding self-regulating professions
- From the Law Society's perspective, public confidence is best improved by ensuring that its actions are worthy of public confidence
- When it comes to self-regulation, justice must not only *be* done, it must be *seen* to be done in a manner that can be understood by the general public

Law Society initiatives

a) Proactive transparency and accountability

- Aggressive steps have been taken to ensure regulatory programs are transparent and accountable to the public
- Many initiatives represent best practices among self-regulating professions
  - Including the public and non-elected lawyers on hearing panels for discipline and credential matters
  - Discipline and credential citations and decisions posted to website
  - Discipline hearings, credential hearings and director meetings open to the public
  - Practice restrictions posted to website through Lawyer Lookup service
  - Completely redesigned website focused on transparency and usability launched in March 2011
  - Developing changes to current Rules that will allow greater disclosure

Law Society initiatives (cont'd)

b) Key performance measures

- Created to answer the question "How does the public know we are doing a good job?"
- Implemented in 2008 to evaluate capability with respect to complainant satisfaction, timeliness of responses and other aspects of public confidence
- Results are communicated annually to all lawyers and posted to website
- Currently refining key performance measures to more effectively evaluate regulation in the public interest

Law Society initiatives (cont'd)

c) Core process review

- Significant project completed in December 2010 to assess and redesign all major regulatory processes to improve efficiency and effectiveness
- Solutions now being implemented, including enhancements to complaint intake and investigative processes

Legislative Changes

Suggested changes to *Legal Profession Act* will enhance ability to regulate in the public interest and improve public confidence

1. Improve ability to investigate, act and enforce the statute
   - Clarifying definition, prohibitions and exceptions to the practice of law will improve enforcement and better protect the public from unauthorized practice
   - Adding express authority to compel a lawyer or others to provide documentation will enable Law Society to be proactive in investigating complaints
   - Provision for summary suspension of a lawyer convicted on indictment will allow Law Society to move quickly and treat an offence as seriously as the Crown treats it
   - Allowing the order of a Law Society tribunal to be filed in the Supreme Court and enforced as a judgment of the court will provide ability to enforce orders and be a better deterrent.
   - Permitting Benchers to set maximum fines (which haven't been altered since 1992 and are seen as insufficient) will provide an increased deterrent

Legislative Changes (cont'd)

2. Simplify regulation while increasing accountability

   For example, by creating the ability to regulate law firms directly, the Law Society will be able to more effectively oversee trust accounting

3. Adopt best practices of other self-regulating professions

   For example, registrants of the Law Society still have fee setting powers, which could unduly hamper investigation budgets

4. Modernize the Act in regards to privacy and proceedings

   Clarify language and deal more effectively with electronic records and protection of privacy

5. Ensure Law Society is focused entirely on regulation of lawyers

   For example, the current statute allows for a two-tiered mandate that includes advocacy for the profession in addition to protection of the public

Discussion and next steps

- As the organization mandated by the provincial government through the *Legal Profession Act* to uphold and protect the public interest in the administration of justice, the Law Society of BC believes that improving public confidence in the justice system is of paramount importance
- The Law Society looks forward to working with the government to achieve this goal and welcomes any comments or suggestions from the government as to how this goal might best be achieved

THANK YOU

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

(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) 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.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

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:

(ba) ~~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~~,~~;

(db) ~~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

Draft Code of Professional Conduct for British Columbia Conflicts Provisions

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 materially adversely affecting the representation of the other.