The Law Society of British Columbia

Minutes

Benchers

Date: Friday, March 02, 2012

Present:
Bruce LeRose, QC, President
Art Vertlieb, QC, 1st Vice-President
Jan Lindsay, QC 2nd Vice-President
Rita Andreone, QC
Kathryn Berge, QC
David Crossin, QC
Thomas Fellhauer
Leon Getz, QC
Bill Maclagan
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Lee Ongman
Vincent Orchard, QC
David Renwick, QC
Phil Riddell
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Ken Walker
Tony Wilson
Barry Zacharias
Haydn Acheson
Satwinder Bains
Stacy Kuiack
Peter Lloyd, FCA
Ben Meisner
Claude Richmond

Absent: Greg Petrisor

Staff Present:
Tim McGee
Deborah Armour
Robyn Crisanti
Jeffrey Hoskins, QC
Su Forbes, QC
Michael Lucas
Jeanette McPhee
Doug Munro
Susanna Tam
Alan Treleaven
Adam Whitcombe
Rody van Vianen

Guests:
Abigail Atherton, Vice-President, Events & Sponsorship, BC Paralegal Association
Chris Axworthy, QC, Dean, Faculty of Law, Thompson Rivers University
Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Anne Chopra, Equity Ombudsperson
Ron Friesen, CEO, CLEBC
Donna Greschner, Dean, Faculty of Law, University of Victoria

Jeremy Hainsworth, Reporter, Lawyers Weekly
Drew Jackson, Director of Client Services, Courthouse Libraries BC
Azool Jaffer-Jeraj, President, Trial Lawyers Association of BC
Marc Kazimirski, First Vice-President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Carla Margach, Executive Director, Trial Lawyers Association of BC
Sharon Matthews, President, CBABC
Caroline Nevin, Executive Director, CBABC
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Jeremy Schmitt, Executive Director, Faculty of Law, UBC
Don Thompson, QC, Executive Director, Law Society of Alberta

OATH OF OFFICE

Bruce LeRose, QC, President of the Law Society of BC, administered the swearing of the Bencher's Oath of Office for the 2012-2013 term by Victoria Bencher Kathryn Berge, QC.

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on January 27, 2012 were approved as circulated.

The following resolutions were passed unanimously and by consent.

2. Rule amendments to implement the Quebec Mobility Agreement addendum to allow Quebec notaires to be Canadian Legal Advisors; Amendments to Rules 2-22.1, 2-22.2 and others

Prior to the meeting the corrected draft resolution was distributed to replace pages 2025 and 2026 of the Bencher Agenda package.

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

1. In Rule 2-22.1

(a) By striking "Canadian legal advisor***" in subrule (1) and substituting "***Canadian legal advisor who is a member of the Barreau du Québec***";***

(b) By adding the following subrule:

(1.1) A Canadian legal advisor who is a member of the Chambre des notaires du Québec may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law, or

(b) where expressly permitted by federal statute or regulation

(i) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(ii) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.***; and***

(c) By striking "under subrule (1)***" in subrule (2) and substituting "***under subrule (1) or (1.1)***".***

2. By rescinding Rule 2-22.2(2)(a) and substituting the following:

(a) be a member in good standing of the Barreau du Québec or the Chambre des notaires du Québec authorized to practise law in that Province,

3. In Rule 2-49.3

(a) By rescinding the preamble and paragraph (c) of subrule (1) and substituting the following:

(1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(c) a certificate of standing from the Barreau du Québec or from the Chambre des notaires du Québec and each other body regulating the legal profession, in any jurisdiction, in which the applicant is or has been a member of the legal profession;

(b) By rescinding subrule (3) and substituting the following:

(3) This Rule does not apply to a member of the Barreau du Québec or of the Chambre des notaires du Québec unless he or she has earned a bachelor's degree in civil law in Canada or a foreign degree and a certificate of equivalency from the Barreau or from the Chambre, as the case may be.

4. By rescinding Rule 3-25(6) and substituting the following:

(6) On an application under subrule (5), the Executive Director must grant the exemption, provided the Canadian legal advisor maintains the full mandatory professional liability insurance coverage required by the Barreau du Québec or by the Chambre des notaires du Québec that extends to the Canadian legal advisor's practice in British Columbia.

3. Key Performance Measures (KPMs) – Adjustment to the Second Lawyers Insurance Fund (LIF) KPM for 2011 and Forward

BE IT RESOLVED to amend the second LIF KPM approved by the Benchers at their December 2, 2011 meeting to read as follows:

"Suits under the Insurance Act by claimants are fewer than 0.5% of files closed."

14. Recommendation by Independence and Self-Governance Advisory Committee for New Name and Mandate

This item was added to the consent agenda at the meeting, with the approval of Ms. Berge as Advisory Committee Chair.

BE IT RESOLVED, effective immediately:

a. to re-name the Independence and Self-Governance Advisory Committee as the "Rule of Law and Lawyer Independence Advisory Committee"

b. to adopt the following statement as the mandate of Rule of Law and Lawyer Independence Advisory Committee:

- to advise the Benchers on matters relating to the rule of law and lawyer independence so that the Law Society can ensure
    - its processes and activities preserve and promote the preservation of the rule of law and the independence and effective self-governance of lawyers;
    - the legal profession and the public are properly informed about the meaning and importance of the rule of law and how a self-governing profession of independent lawyers supports and is a necessary component of the rule of law

- to monitor issues (including current or proposed legislation) that affect or might affect the independence of lawyers and the rule of law, and to develop means by which the Law Society can effectively respond to those issues;

REGULAR AGENDA – for Discussion and Decision

4. President's Report

Mr. LeRose briefed the Committee on various Law Society matters to which he had attended since the last meeting, including:

a) CBA National Mid-winter Meeting in Cancun, Mexico

Mr. LeRose reported on his attendance at the CBA Mid-Winter Meeting, providing highlights of the proceedings. In attendance were representatives from several other law societies, as well as the President and Executive Director of the Federation of Law Societies of Canada. Mr. LeRose commented that with the strengthening of the Federation as the national representative of legal regulators, the CBA has been able to clearly focus on advocacy issues for the profession. The benefit is that their limited resources can be put to the issues that most support their mandate, leaving regulatory matters to the regulators. Mr. LeRose concluded by saying that there is real value to having strong regulators and strong advocacy groups like the CBA, who recognize their separate and distinct roles but can come together and work for the common good of the public as well as the profession.

b) Canadian Association of Black Lawyers Dinner, in Vancouver

Attended with Susanna Tam, Law Society staff lawyer and liaison to the Equity and Diversity Advisory Committee, and Satwinder Bains, an appointed Bencher.

c) Canadian Mental Health Association Conference, in Vancouver

Attended at the invitation of the Honourable Judge Patricia Janzen. The topic was "Practical Steps to a Psychologically Healthy Workplace."

d) Welcoming Ceremony for the Honourable Madam Justice Anne MacKenzie of the BC Court of Appeal , in Vancouver

Represented the Law Society as a Bencher and President.

e) Kootenay Bar Association Meeting in Fernie

Represented the Law Society as a Bencher and President.

f) Canadian Society of Association Executives Symposium in Toronto

Attended with Tim McGee, CEO of the Law Society. The symposium was for chief executive and elected officers of Canadian non-profit associations, focused on their collaboration in delivering effective, effective leadership and management of their organizations.

g) Governance Review Task Force

Attended the task force's second meeting on February 28, and was interviewed by Liz Watson of WATSON Inc. More than sixty letters of invitation and interview guides have been sent to Benchers, Life Benchers, former Presidents, senior staff and external stakeholders. All Benchers are encouraged to engage vigorously in their interviews on Law Society governance issues and concerns of interest to them.

h) Government Green Paper on Justice Reforms

Mr. LeRose briefed the Committee on early developments in the review of BC's judicial system launched by the February 8 release of the provincial government's Green Paper, *Modernizing British Columbia's Justice System,* and by the appointment of Geoffrey Cowper, QC as chair of the review. Mr. LeRose noted that he has written to Mr. Cowper to affirm the Law Society's commitment to the enhancement of access to legal services for British Columbians, and to confirm the Society's desire to support and engage in the review process.

5. 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. 2011 Annual Financial Statements

b. 2011 Key Performance Measures (KPMs)

c. Continuing Professional Development (CPD) Update

d. Governance Review – Update

e. Enterprise Risk Management Plan - Privacy Review

f. BC Government Green Paper on Modernizing British Columbia's Justice System

g. Leo Project - Monthly Highlight

h. CSAE Conference for Chief Elected and Chief Staff Officers

i. Professional Responsibility – Thank You to Our Teachers

6. Review of the Law Society's Draft 2011 Financial Statements

Mr. Vertlieb reported as Chair of the 2012 Finance Committee, advising that on February 29, 2012 the Committee reviewed the Law Society's draft Financial Statements for 2011 with Chief Financial Officer Jeanette McPhee. Mr. Vertlieb confirmed the Finance Committee's comfort and introduced Ms. McPhee to present the draft 2011 Financial Statements (Appendix A to the CEO's Report to the Benchers for March 2012, at page 5004 of the meeting materials).

Ms. McPhee provided a brief overview of 2011 results for the General Fund, the Trust Administration Fee, the Special Compensation Fund and the Lawyers Insurance Fund. Ms. McPhee advised that the draft 2011 Financial Statements will be presented to the Audit Committee in May. She also updated the Benchers on the Law Society's financial results for early 2012.

Mr. Vertlieb noted that all Benchers are welcome to attend the Finance Committee's meetings as observers.

7. Federation of Law Societies Representative's Report

Mr. Hume reported as the Law Society's FLS Council representative. Mr. Hume advised that the Council's next meeting will be in Yellowknife, NWT (March 15-17) and that he will report on those proceedings and matters arising at the May Benchers meeting.

Mr. Hume updated the Benchers on three matters:

- National Discipline Standards Pilot Project
    - starts April 1, 2012
    - the Federation's 13 member societies are all participating
    - the Law Society's participation is being led by Chief Legal Officer Deborah Armour
- CanLII Board of Directors
    - the Law Society's Chief Executive Officer, Tim McGee, has been appointed to the Nomination Committee

- Federation Common Law Program Approval Committee
    - the Law Society's Director of Education and Practice, Alan Treleaven, has been appointed to this new Federation committee
    - UBC Law Dean Mary Anne Bobinski is one of three law deans serving on that committee

8. Report on Outstanding Hearing & Review Reports

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

Mr. LeRose reported that in 2011, 33 per cent of Law Society hearing reports were issued within 60 days of hearing: well below the target level of 90 per cent being monitored and evaluated by the Federation's National Discipline Standards Pilot Project in 2012. Mr. LeRose briefed the Benchers on plans for provision of email reminders to hearing panelists by Hearing Panel Administrator Michelle Robertson, regarding the importance of ensuring that panels submit their draft reasons within 40 to 45 days of hearing for review, editing and return by the Law Society's Tribunal and Legislative Counsel, Jeff Hoskins, QC, such that the panels may provide their final approval within 60 days of the hearing.

The ensuing Bencher discussion covered the following issues:

- early experience with hearing panels including non-lawyer members
- suggestion that the National Discipline Standards Pilot Project's target guidelines be shared with all Law Society hearing panelists
- request that Benchers provide feedback to Mr. Hoskins on their participation in hearing panels under the new rules
    - such feedback will be valuable to the two-year National Discipline Standards Pilot Project and its evaluation of more than 20 discipline performance targets, including the rendering of 90 per cent of hearing decisions within 60 days of the last date that the panel hears submissions

GUEST PRESENTATION

9. Federation of Law Societies: National Admission Standards Project Report

Mr. Hume introduced Don Thompson, QC, Executive Director of the Law Society of Alberta and Chair of the Federation's National Admission Standards Project Steering Group, and Alan

Treleaven, Director of Education and Practice for the Law Society, and a member of the project team.

Mr. Treleaven provided background and context for the project, noting its origin as an aspect of implementation of the 2003 National Mobility Agreement. Mr. Treleaven also noted the importance of national standards to national mobility, and outlined several of the Federation's national standards initiatives. He outlined two aspects of the National Admission Standards Project: the Good Character Working Group, with the Law Society's involvement led by Lesley Small, Manager of Member Services and Credentials; and the Competencies Working Group, with the Law Society's involvement led by Lynn Burns, Manager of the Professional Legal Training Course. Mr. Treleaven confirmed that the Lawyer Education Advisory Committee is engaged in a review of the Law Society's current admission program, as a strategic initiative flagged in the 2012-2014 Strategic Plan, and as an aspect of the Society's participation in this Federation project.

Mr. Thompson then compared the National Admission Standards Project's current stage of development to that of the National Mobility Agreement in 2002 and 2003. He referred to national mobility as an aspect of access to justice, facilitating the public's efforts to retain the lawyers they choose. Mr. Thompson noted that at present, law societies' admission standards vary widely across the country. He also noted that the federal Competition Bureau was critical of law societies in its review of Canadian self-regulated professions several years ago.

Mr. Thompson outlined the National Admission Standards Project's two goals:

- to articulate a national standards of competence and good character
- to develop an effective process for ensuring that each applicant for admission meets those standards country

Mr. Thompson reviewed the project team's working process and progress to date toward its first goal of articulating national admission standards for the legal profession, noting the abundance of "best practice" research and comparable national standards work done in other professions. Mr. Thompson confirmed that the process is intended to culminate in circulation of a national admission standards document to the Federation's member law societies in the fall of 2012 for review, approval and implementation.

Mr. Thompson outlined the approaches to implementing national standards taken by Canada's accounting and medical professions. He concluded by reviewing the project team's progress toward its goal of developing an effective implementation process, noting that the second goal will be considerably more challenging to achieve than the first.

STRATEGIC PLANNING AND PRIORITIES MATTERS – For Discussion and/or Decision

10. Strategic Plan Implementation Update

Mr. McGee confirmed that at this and future Bencher meetings throughout the year, he and Mr. LeRose intend to brief the Benchers on one or more aspects of implementation of the 2012 – 2014 Strategic Plan. He advised that the focus for the current update is outlining how the plan's various strategic initiatives will be operationalized.

Mr. McGee then reviewed a number of PowerPoint slides (Appendix 2 to these minutes), outlining the various initiatives set out in the 2012 – 2014 Strategic Plan—and related operational commitments—arising from the Law Society's three strategic goals, stated in the 2012 – 2014 Strategic Plan as:

1. The Law Society will be a more innovative and effective professional regulatory body.
2. The public will have better access to legal services.
3. The public will have greater confidence in the administration of justice and the rule of law.

OTHER MATTERS – For Discussion and/or Decision

11. Key Performance Measures – Report on 2011 Performance

Ms. Andreone reported on the Law Society's Key Performance Measures (KPMs) for 2011 as Chair of the Audit Committee. She referred the Benchers to the Report on 2011 Performance at page 11000 of the meeting materials, advising that the report was reviewed by the Audit Committee at its last meeting. Ms. Andreone noted that the report confirms generally satisfactory Law Society operational performance for 2011, measured against the KPMs and Bellwether Measures approved by the Benchers at their December 2011 meeting.

Mr. McGee confirmed that the 2012 Audit Committee will be evaluating the performance standards reflected in the current KPMs and Bellwether Measures, reporting to the Benchers later in the year with recommendations for adjustment and/or approval.

Mr. McGee also reviewed the concept of "Bellwether Measures", introduced by the Audit Committee in 2011. He advised that Bellwether Measures are not KPMs, but are intended to serve as indicators of potential profession-wide developments or trends. The 2011 Bellwether Measures selected by the Audit Committee are "Frequency of Complaints" and "Frequency of Insurance Reports."

Mr. McGee noted that "Frequency of Complaints" (number of complaints divided by the median number of practising lawyers) dropped slightly (1.4%) and "Frequency of Insurance Reports" (number of reports divided by the median number of practising lawyers) increased slightly (0.5%) from 2010. He confirmed that Management Board and the Audit Committee have not attributed those modest changes to any significant development or trend.

Mr. McGee reviewed a number of highlights from the 2011 performance results. He noted that the Professional Conduct Department reduced its number of current open files by 182 over the course of 2011, and that the department's year-end number of open files was a 10-year low by a significant margin.

There was discussion of possible causes for a number of changes in 2011 Discipline Results from the previous year (page 11009 of the meeting materials), notably:

- Citations down to 16.5% from 26%
- Conduct Reviews up to 54% from 27%
    - availability and application of the Discipline Conduct Guidelines and the practice of publication of summaries of results of Conduct Reviews were noted in both cases
- Referrals to the Practice Standards Committee down to 4% from 22%
    - relates to direct referrals by staff
    - reflects shift from referrals to the Practice Standards Committee by the Discipline Committee to referrals by staff

12. New BC Code of Conduct (Conflicts Provisions): Based on FLS Model Code of Conduct

Mr. LeRose invited Mr. Getz to address the Benchers as the new Chair of the Ethics Committee, thanking him for agreeing to take on that responsibility upon the appointment of former Chair Patricia Bond as a judge of the BC Provincial Court.

Mr. Getz referred to the Ethics Committee's memorandum (at page 12001 of the meeting materials) for a review of the background of this matter, including:

- the Benchers' adoption of the non-conflicts portion of the BC Code (the BC version of the Model Coded is called the "BC Code") at their April 2011 meeting

- the Benchers' authorization (at their May 2011) for the Ethics Committee to consult with the BC profession regarding the provisions of the conflicts portion of the BC Code

- further review of the conflicts portion of the Model Code by the Federation's Standing Committee on the Model Code, leading to the Federation's adoption of a small number of revisions to the Model Code conflict rules , including a revision to the definition of a conflict of interest, and the crafting of a new general conflicts rule that encompasses all situations, including those involving conflicts of interest between current clients

- confirmation that the Ethics Committee

    - has consulted with the BC profession regarding both the conflicts portion of the BC Code and the further revisions to the Federation Model Code's conflicts rules

    - has taken into account the comments received from the BC profession in both those consultations in its current memorandum and recommendations.

Mr. Getz commented on the Ethics Committee's recognition of the importance of seeking harmonization and consistency of the Model Code provisions adopted by the Federation's member law societies. He noted that in that spirit, the Ethics Committee will endeavor not to make further substantive revisions to the BC Code unilaterally, but rather to channel future substantive revisions to the Federation's Standing Committee on the Model Code as recommended amendments to the Model Code. Mr. Getz also noted the Ethics Committee envisions a significant Law Society effort to communicate with and educate the profession regarding the new BC Code, starting with its posting to the Law Society website upon adoption by the Benchers.

Mr. Getz moved, seconded by Mr. Crossin, that the Benchers adopt the Ethics Committee's recommendations (set out at page 12009 of the meeting materials) as follows:

(1) adopt for the BC Code the conflicts portion of the Federation of Law Societies Model Code with the changes we have identified (Attachment 3 to the Ethics Committee's memorandum / Appendix 3 to these minutes), and

(2) modify the definition section of the non-conflicts portion of the BC Code to coincide with the definition portion of the conflicts section of the Code (Attachment 4 to the Ethics Committee's memorandum / Appendix 4 to these minutes),

(3) set January 1, 2013 for implementation of the entire BC Code (both the conflicts and non-conflicts portions) to replace the current *Professional Conduct Handbook*.

In the ensuing discussion the following key points were raised:

- the concept of "undivided loyalty" might be expressed more strongly than by the current wording of the BC Code
- the duty of loyalty is fundamental to the rule on conflicts of interest in both the BC Code and the Model Code
- the Federation's Standing Committee on the Model Code added "loyalty" to the definition of "conflict of interest" and to other Model Code provisions, consistent with the concern expressed by the Benchers regarding the importance of loyalty to the foundation of the lawyer-client relationship
- the Model Code is intended to be a "living document" and arrangements are currently being made for submission of requests and recommendations for future amendment and revision via the Federation's website
- the Federation and its Council have no legislative power or regulatory authority over the Federation's member law societies
- the members of the current Federation Council have passed a resolution affirming the desirability of consistency in the approach to regulation of lawyers and the practice of law by the Federation's member law societies
- if adopted, it is hoped that the BC Code will be posted promptly to the Law Society website, as an element of appropriate education and information for lawyers prior to the BC Code's implementation date of January 1, 2013 The motion was carried, with one Bencher opposed.

FOR INFORMATION ONLY

15. Lawyers Insurance Fund – 2011 Report

Director of Insurance Su Forbes briefed the Benchers on the performance of the Lawyers Insurance Fund for 2011 over five areas:

- Insured lawyers
    - Total number and breakdown by practice areas
- Negligence claims
    - Number and breakdown by causes
- Theft claims under Part B Coverage
- Information on the annual insurance fee for 2011

- Feedback from insured lawyers

Ms. Forbes answered a number of questions from Benchers following her presentation. Mr. LeRose thanked Ms. Forbes on behalf of the Benchers for her informative presentation, and for LIF's strong performance in 2011.

16. CBA National Mid-winter Meeting (February 11-12, 2012)

Ms. Berge reported on her attendance at the CBA National Mid-winter Meeting in Cancun, Mexico as the Law Society's representative on the CBA National Council.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

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The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

March 2, 2012

Introduction

My report this month includes the annual report to the Benchers on the 2011 Financial Statements, our report on Key Performance Measures (KPMs) for 2011, and updates on several other items.

1. 2011 Annual Financial Statements

A copy of the draft 2011 Annual Financial Statements and Management's report thereon is attached to this report as Appendix A.

The draft statements will be reviewed by the Finance Committee prior to the meeting, and Art Vertlieb, QC, Chair of the Finance Committee, Jeanette McPhee, our Chief Financial Officer, and I will provide additional information and be available to answer any questions. The Audit Committee will be meeting on May 8, 2012 to receive the Report of the Auditors on the Financial Statements and to formally approve the statements for publication and distribution. In accordance with our governance policies, the draft statements are being presented to the Benchers for review and information.

2. 2011 Key Performance Measures (KPMs)

The 2011 Report on the KPMs has been distributed to the Benchers as part of the meeting agenda package. The report and results were reviewed by the Audit Committee at its last meeting and Rita Andreone, QC, Chair of the Audit Committee, will be introducing the report to the Benchers. I will be available together with the members of Management Board to answer any questions.

Overall, there were positive results in 2011 and we met or exceeded our targeted performance in all areas.

3. Continuing Professional Development (CPD) Update

In my January 2012 report, I reported on the number of members with outstanding CPD requirements. The following updates that information as of February 21, 2012.

10,249 lawyers had CPD requirements to complete in 2011, of that number, 671 members did not report completion by the December 31, 2011 deadline.

Since that time:

- 350 have now recorded completion;
- 229 have not yet recorded completion and are overdue; and

- 92 lawyers have a non-practicing status or ceased membership; they will be required to complete the CPD requirements if they return to practice.

Alan Treleaven, Director, Education and Practice, will be available at the meeting to discuss these results and to report on the efforts his department is making to follow up with members with absent or incomplete results.

Overall to date there is a compliance rate of approximately 98% with the CPD requirements for 2011.

4. Governance Review - Update

At the time of writing, an introductory letter from President LeRose, together with an Interview Guide, have been sent to all Benchers, recent past Presidents, selected Life Benchers and senior staff. Interviews with most Benchers and senior staff have now been scheduled as part of the first phase of the Governance Review and other stakeholder interviews will be scheduled in the weeks ahead. We expect approximately 60 individuals will be interviewed as part of Phase 1 of the Governance Review. A preliminary report of findings and observations will be made to the Benchers by Liz Watson at the Benchers' retreat in June. A Governance Review Task Force meeting is scheduled for February 28 (subsequent to writing) and we will provide additional updates at the Bencher meeting.

5. Enterprise Risk Management Plan - Privacy Review

One of the initiatives set out in the Law Society's Enterprise Risk Management Plan adopted by the Benchers last year is a review of our internal privacy policies and practices. Our goal is to be able to say at the conclusion of the review that we have identified any changes or enhancements which would be required to ensure that our approach to privacy issues, including our internal policies and practices, represents "best practice" for comparable organizations.

Jeff Hoskins, QC will lead this review with the assistance of a privacy consultant to be chosen pursuant to an RFP process, which is underway. We expect to complete the review and to be in a position to consider recommendations by midyear.

6. BC Government Green Paper on Modernizing British Columbia's Justice System

President Le Rose has written to Geoff Cowper, QC to express the Law Society's support for the government's Green Paper on modernizing the justice system in BC. In particular, Bruce has indicated that the Law Society has a particular strategic focus on improving access to legal services. We have heard back from

Mr. Cowper, who thanked us for the Law Society's willingness to assist and indicated that a meeting will be arranged shortly.

We note that Mr. Cowper's mandate and review appears to be focused on operational efficiencies particularly in the criminal justice system. While that is not an area specifically set out in our Strategic Plan, we will discuss with Mr. Cowper how we might best be of assistance. Given the tight timeframe for the delivery of his report, we think this approach will be the most useful.

7. Leo Project - Monthly Highlight

Because of the importance of this project to the Law Society's current and future operations, I will be providing you with a brief Leo activity highlight in my monthly Bencher report. Robyn Crisanti and her Leo project team are working very hard and have engaged the entire organization through consultations and informative and interactive web-based communications. Attached as Appendix B to this report is the February 2012 Leo newsletter posted on Lex, our intranet site, which provides highlights of the work completed on the project to date.

8. CSAE Conference for Chief Elected and Chief Staff Officers

President LeRose and I will be attending the CSAE conference in Toronto for Chief Elected and Chief Staff Officers at the end of February. This conference, which is now given several times a year throughout North America, has become the leading educational conference on how Chief Elected and Chief Staff officers can best work together. I have attended past conferences with our Presidents and I continue to find them very insightful and useful. We also use the opportunity to reconnect with our colleagues from several of the other Canadian Law Societies and to compare notes with those from other regulatory and association bodies. Bruce and I can share highlights from the conference at the Bencher meeting.

9. Professional Responsibility – Thank You to Our Teachers

I would like to thank the following Benchers and Life Benchers who recently taught Professional Responsibility to PLTC and UBC first year law students in February 2012.

Anna Fung, QC
Gavin Hume, QC
Bill Maclagan
Thelma O'Grady
Gordon Turriff, QC
Warren Wilson, QC

Timothy E. McGee
Chief Executive Officer

The Law Society of British Columbia

APPENDIX A

Report to the Benchers – March 2, 2012

CFO Financial Report – For the Year Ended December 31, 2011

Attached are the **draft** financial results and highlights for the year ended December 31, 2011. The 2011 financial statements will be finalized during the upcoming year-end audit in March/April and the Audit Committee meeting set for May.

General Fund

General Fund (excluding capital funding and TAF)

Overview

The overall result for the General Fund in 2011 was a deficit of $612,000 due to higher than expected external counsel fees and expenses authorized by the Benchers in 2011 relating to the new regulatory department plan and to costs associated with the establishment of the new hearing panel structure. Additional details are set out below.

Revenue

Revenue was $17,362,000, a positive budget variance of $226,000 (1.3%), due to:

- Electronic filing revenues, positive variance of $130,000
- CPD penalty revenues, positive variance of $100,000

Practicing membership was 10,564, very close to the 2011 budget of 10,575. PLTC revenue was on budget at 385 students.

Expenses

Operating expenses were $18,907,000, a negative budget variance of $659,000 (3.6%).

Of the $659,000 negative variance, $290,000 relates to expenses authorized by the Benchers after the 2011 budget was set.

- Approved hearing panel structure changes – recruitment, travel and training costs for the new hearing panel members - $135,000
- Approved regulatory department plan – increase in staffing costs in last six months of 2011 - $125,000
- Approved Canlii levy increase - $30,000

In addition, with the increased focus on our regulatory mandate and reducing timelines, external counsel fees were over budget by $420,000 due to the following:

- Additional files sent out in fall 2010 and first quarter 2011 due to staffing shortages
- A number of large, complex files, with specific expertise required
- A large number of conflict of interest files
- Two files with court applications
- Increases in external counsel rates to attract senior counsel
- Additional files sent out to close files and reduce timelines

There was $290,000 in savings achieved through a reduction in travel costs and a reduction in the use of paper, stationary, storage and printing through Greenwise initiatives. Offsetting these savings were additional costs of $240,000 related to additional recruiting fees and an increase in the staff vacation accrual.

845 Cambie

The 845 building net results were below budget $113,000, as a major tenant vacated the 835 heritage building during 2011. A search for new tenants is in process.

Net Assets

The General Fund net assets (before capital allocation), is $5.0 million at December 31, 2011. This is considered a reasonable level for net assets, equating to approximately 3 months of operating expenses.

In addition, there is $1.9 million allocated to the Capital Allocation within net assets. These monies are set aside for upcoming building capital projects, which include replacing the fire alarm, the emergency generator, the 845 parking shuttle, the 835 passenger elevator, and the implementation of an electronic document and records management system.

TAF-related Revenue and Expenses

TAF results are positive, with a net result of $18,000 for the year. TAF revenue is $2.3 million, $184,000 below budget. Operating expenses are very close to budget, with a positive variance of $30,000 for the year.

TAF-related net assets are $240,000 at December 31, 2011.

Special Compensation Fund

There was very little activity in the Special Compensation Fund during 2011.

The Special Compensation Fund completed the year with a negative variance against budget due to anticipated recoveries not yet being received. This is only a timing issue as these recoveries are expected to occur in 2012.

Special Compensation Fund net assets are $931,000 at December 31, 2011.

Lawyers Insurance Fund

LIF operating results were very close to budget. Assessment revenue was $13,437,000, $145,000 (1%) ahead of budget. Operating expenses (excluding the claims provision) were $5,594,000, $415,000 (7%) below budget. The savings is a result of two positions being vacant during the year and lower than budgeted professional fees and insurance costs.

The provision for claims liability is $52.9 million at year end, slightly below 2010 levels.

The investment markets were generally down during 2011, and volatility occurred throughout the year. Investment returns for 2011 were 1.3%, slightly below the benchmark of 1.6%, resulting in an increase in investment values and related net assets of $1.1 million.

Net Assets

LIF net assets are $43.8 million at December 31, 2011, with $17.5 million internally restricted for Part B claims.

The Law Society of British Columbia

DRAFT

Summary of Financial Highlights - DRAFT FOR THE YEAR 2011
($000's)

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

	Actual	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	14,098	14,086	12	0.1%
PLTC and enrolment fees	966	962	4	0.4%
Electronic filing revenue	726	596	130	21.8%
Interest income	336	375	(39)	-10.4%
Other revenue	1,236	1,117	119	10.7%
	17,362	17,136	226	1.3%
Expenses before 845 Cambie (excl. dep'n)	18,907	18,248	(659)	-3.6%
	(1,545)	(1,112)	(433)	
845 Cambie St. - net results (excl. dep'n)	933	1,046	(113)	-10.8%
	(612)	(66)	(546)	

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

Practice Fee Revenue	**Avg # of Members**
2008 Actual	10,035
2009 Actual	10,213
2010 Actual	10,368
2011 Budget	10,575
2011 Actual	**10,564**
2012 Budget	10,787

	Actual Variance
Revenue variance	
CPD penalties	100
Electronic filing revenue	130
Membership revenue	10
PLTC	20
Interest income	(40)
Other	6
	226
Expenses	
Additional external counsel fees	(420)
Regulation - new Staffing Plan - mid year implementation *	(125)
Implementation of Hearing Panels - advertising, selection, training & travel *	(135)
Increased CanLII Levy *	(30)
Increased vacation accrual	(100)
Additional recruiting costs	(140)
Travel savings	100
Savings related to Greenwise initiatives - paper, printing, stationary, file storage	120
Other net savings	71
	(659)
845 CAMBIE	
Leased space vacancy	(90)
Property Tax - Space Reclassification	20
Repairs & maintenance	(43)
	(113)
2011 General Fund Actual Variance	(546)
2011 General Fund Budget	(66)
2011 General Fund Actual	(612)

* Bencher approved

Trust Assurance Program - YTD December 2011

	2011 Actual	2011 Budget	Variance	% Var
TAF Revenue	2,316	2,500	(184)	-7.4%
Trust Administration Department	2,298	2,328	30	1.3%
Net Trust Assurance Program	18	172	(154)	

2011 Lawyers Insurance Fund Long Term Investments - YTD December 2011 *Before investment management fees*

Performance	1.3%
Benchmark Performance	1.6%

The Law Society of British Columbia
General Fund
Results for the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Membership fees **(1)**	15,956	15,947		
PLTC and enrolment fees	966	963		
Electronic filing revenue	726	596		
Interest income	336	375		
Other revenue	1,237	1,116		
Total Revenues	19,221	18,997	224	1.2%
Expenses				
Regulation	7,557	6,686		
Education and Practice	3,247	3,310		
Corporate Services	2,920	2,994		
Bencher Governance	1,493	1,555		
Communications and Information Services	1,964	2,006		
Policy and Legal Services	1,725	1,697		
Depreciation	297	349		
Total Expenses	19,203	18,597	(606)	-3.3%
General Fund Results before 845 Cambie and TAP	18	400	(382)	
845 Cambie net results	386	524	(138)	
General Fund Results before TAP	**404**	**924**	**(520)**	
Trust Administration Program (TAP)				
TAF revenues	2,316	2,500	(184)	
TAP expenses	2,298	2,328	30	1%
TAP Results	**18**	**172**	**(154)**	
General Fund Results including TAP	**422**	**1,096**	**(674)**	

(1) Membership fees include capital allocation of $1.859m (YTD capital allocation budget = $1.861m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at December 31, 2011

DRAFT

($000's)

	Dec 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	279	177
Unclaimed trust funds	1,848	1,682
Accounts receivable and prepaid expenses	1,131	1,243
B.C. Courthouse Library Fund	678	635
Due from Lawyers Insurance Fund	19,331	17,578
	23,267	21,315
Property, plant and equipment		
Cambie Street property	11,739	12,002
Other - net	1,362	1,372
	36,368	34,689
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	4,040	3,965
Liability for unclaimed trust funds	1,848	1,682
Current portion of building loan payable	500	500
Deferred revenue	17,491	16,014
Deferred capital contributions	70	81
B.C. Courthouse Library Grant	678	635
Deposits	27	20
	24,654	22,897
Building loan payable	4,600	5,100
	29,254	27,997
Net assets		
Capital Allocation	1,872	1,221
Unrestricted Net Assets	5,242	5,471
	7,114	6,692
	36,368	34,689

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 12 Months ended December 31, 2011
($000's)

DRAFT

	Invested in P,P & E net of associated debt	Unrestricted	Unrestricted Net Assets	Capital Allocation	2011 Total	2010 Total
	$	$		$	$	$
Net assets - December 31, 2010	7,777	(2,306)	5,471	1,221	6,692	5,575
Net (deficiency) excess of revenue over expense for the period	(974)	(463)	(1,437)	1,859	422	1,117
Repayment of building loan	500	-	500	(500)	-	-
Purchase of capital assets:						
LSBC Operations	380	-	380	(380)	-	-
845 Cambie	328	-	328	(328)	-	-
Net assets - December 31, 2011	8,011	(2,769)	5,242	1,872	7,114	6,692

The Law Society of British Columbia
Special Compensation Fund
Results for the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	53	53		
Recoveries	97	250		
Total Revenues	150	303	(153)	-50.5%
Expenses				
Claims and costs, net of recoveries	1	-		
Administrative and general costs	74	80		
Loan interest expense	(26)	-		
Total Expenses	49	80	(31)	-38.8%
Special Compensation Fund Results	**101**	**223**	**(122)**	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at December 31, 2011

DRAFT

($000's)

	Dec 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	949	895
	950	896
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	8	14
Deferred revenue	11	52
	19	66
Net assets		
Unrestricted net assets	931	830
	931	830
	950	896

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
For the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 $	2010 $
Unrestricted Net assets - December 31, 2010	830	364
Net excess of revenue over expense for the period	101	466
Net assets - December 31, 2011	931	830

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	13,437	13,292		
Investment income	12,841	659		
Other income	31	35		
Total Revenues	26,309	13,986	12,323	88.1%
Expenses				
Insurance Expense				
Provision for settlement of insurance claims	10,883	14,514		
Salaries and benefits	2,235	2,470		
Contribution to program and administrative costs of General Fund	1,516	1,526		
Office	533	657		
Actuaries, consultants and investment brokers' fees	428	482		
Allocated office rent	148	148		
Premium taxes	14	12		
Income taxes	7	3		
	15,764	19,812		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	713	711		
Total Expenses	16,477	20,523	4,046	19.7%
Lawyers Insurance Fund Results	**9,832**	**(6,537)**	**16,369**	

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at December 31, 2011

DRAFT

($000's)

	Dec 31 2011	Dec 31 2010
Assets		
Cash and cash equivalents	23,720	21,530
Accounts receivable and prepaid expenses	653	1,149
Due from members	72	25
Due from General Fund	-	-
General Fund building loan	5,100	5,600
Investments	102,895	108,287
	132,440	136,591
Liabilities		
Accounts payable and accrued liabilities	1,611	2,709
Deferred revenue	6,813	6,707
Due to General Fund	19,331	17,578
Due to Special Compensation Fund	950	895
Provision for claims	52,876	55,652
Provision for ULAE	7,065	7,618
	88,646	91,159
Net assets		
Unrestricted net assets	26,294	27,932
Internally restricted net assets	17,500	17,500
	43,794	45,432
	132,440	136,591

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 12 Months ended December 31, 2011
($000's)

DRAFT

	Unrestricted $	Internally Restricted $	2011 Total $	2010 Total $
Net assets - December 31, 2010	27,934	17,500	45,434	42,805
Excess (deficiency) of revenue over expenses for the year	9,832	-	9,832	(2,448)
Changes in unrealized gains and losses during the year:				
Unrealized gains on available-for-sale financial assets arising during the year	1,099	-	1,099	7,359
Realized (gain) on disposal of investments recognized in the statement of revenue and expense	(9,688)	-	(9,688)	(739)
Realized (gain) on pooled fund income distributions in the statement of revenue and expense	(2,883)	-	(2,883)	(1,543)
Net change in unrealized gains and losses on available-for-sale financial assets	(11,472)	-	(11,472)	5,077
Net assets - December 31, 2011	26,294	17,500	43,794	45,434

APPENDIX B

Leo

February 21, 2012
Issue 2

Information management product demos create excitement

The Leo project team invited project liaisons from each department to participate in information management product demonstrations by *Autonomy* and *Open Text* in early February. These two companies are considered to be leaders in document management software.

For liaisons that had experience with an information management software system at other organizations, this was familiar territory. However, these demos provided many of our liaisons with their first look at how an information management program works.

"The demos helped me to get a better understanding of what the end product will look like."

The liaisons were actively engaged in the demos and had lots of insightful questions for the software presenters. After the two demos, many liaisons summed up how they felt about the implementation of an information management program: "Very excited!"

"Looking forward to putting this in place – actually want it now!"

Here are some of the features of the two software products:

Interface – Systems can be accessed through Outlook and/or Windows Explorer.

Accessibility – Systems have the capability to be accessed from desktops, laptops, the Internet and mobile devices.

Check out/Check in – This process allows users to "check out" documents and work on them knowing that others will not be able to make additional edits until the document has been checked back into the system.

Version Control – Document updates are stored and different versions are easily identified.

Quick Search – Frequently-searched documents can be quickly retrieved.

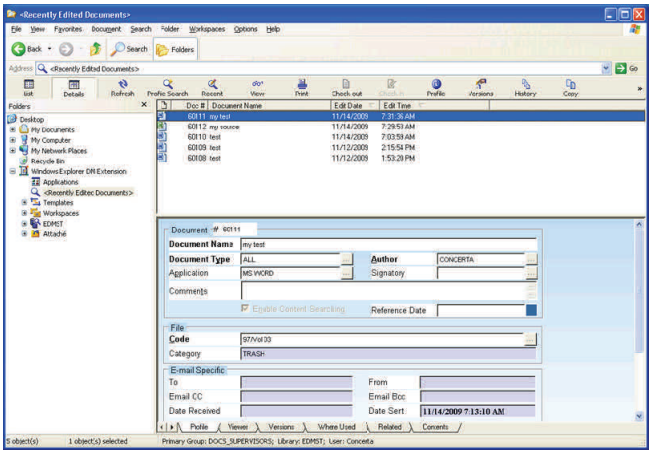
Recent Documents – Recently-used documents can be accessed without using the search feature.

For more details about the information management software products, visit the Project Leo site or talk to your department's project liaison.

Hungry to see what information management software looks like?

Feast your eyes on what an information management software program looks like!

The Project Leo site has been updated to share the knowledge from the information management product demonstrations. Make sure to roam around the site and check out the two products: Autonomy and OpenText.



Screenshot of OpenText start screen

Around the watering hole

- Liaisons have made great progress in determining department needs
- Missed your department information session? Contact a member of the project team to get the information you need
- Important project dates and milestones have been added to the calendar on Lex
- March 31:
  End of Project Phase 2
- April 18:
  Leo Project Room Open House 1-3 pm

What you can do now

- Make sure your electronic file naming conventions follow *Name It* guidelines
- Remove all Law Society related documents from personal folders
- Remove all Law Society related documents from miscellaneous folders and delete the folder
- Work with your liaison to make sure they know your electronic record keeping needs

Where we are on the hunt for a new information management program ...

Phase 1: Plan	Phase 2: Design	Phase 3: Procure	Phase 4: Implement	Phase 5: Pilot	Phase 6: Rollout
Complete	January 4 - March 31, 2012	April 1 - June 30, 2012	July 1 - September 7, 2012	September 8 - December 31, 2012	January 1 - June 30, 2013

Leo project team goes on the prowl to learn how other organizations manage information

In the last few weeks, the members of the Leo team have visited several other organizations with an eye to learn as much as we can about how to implement an information management program.

Not only did the team see other software systems in action, members also got the chance to ask questions about how programs have been rolled out.

"We were particularly interested to hear about 'lessons learned'", explained Robyn Crisanti, project manager. "These folks have been through the experience of launching an electronic document management program and they know what they would do differently if they had the chance."

The team visited the City of Richmond, the City of Vancouver, Powerex and the BC Securities Commission. All have approached information management in different ways, though the team heard similar advice at each location.

"We were particularly interested to hear about 'lessons learned'", explains Robyn Crisanti, project manager

For example, one of the common themes was to make sure that employees were ready for the new program by communicating frequently and providing appropriate training.

"We also heard at each location that we should try not to customize the software that we choose because it can make future upgrades a nightmare," added Robyn.

And as for the different software solutions, "there was no one system that stood out for us," said Robyn. "They all do different things well and it will be up to the team to pick the best one for the Law Society based on the requirements currently being gathered by the project liaisons."

The team may visit other locations in the future, but for now is focused on working with the liaisons to identify the Law Society's information management needs.

CEO introduces Leo to the Benchers

Tim introduced the Leo project to the Benchers at the Bencher meeting on January 27, 2012, stating:

"Project Leo is about transforming how we at this organization record, compile, share and maintain all of the information that we acquire and need to use in terms of doing all our regulatory activities. Today that is done through a patchwork of systems, and software, and processes and protocols which while adequate for today will not serve us well in the future, particularly when we look at our goals. One of our goals is to be a more effective and efficient regulator.

So Project Leo will, between now and 2013, allow us to design and analyze all of our user needs and more importantly to assess what is the best system, software, technology and otherwise, to do those things which I said we absolutely need to do and are at the heart of what we do. That is a big project and it will also necessarily involve significant capital investments at the right time once we know what we need here.

So that is a big priority for us this year."

Ask Leo

Q: Does being more efficient as a result of Leo mean that there could be layoffs?

A: No. Leo is about doing our work more efficiently which will allow us to be more responsive to our stakeholders and meet their expectations for a professional regulator in the public interest.

Q: Is the *Name It* program still in place?

A: Yes. The *Name It* program follows international file naming standards which will make it easier to migrate legacy documents into the new system. The *Name It* program will also continue once the system is rolled out early next year.

Have a question? Ask Leo

Kudos & Thank Yous

Kudos to Rebecca Miller! Rebecca has been helping the Records Department with entering the data from all the one-on-one session needs assessment forms. Her help has been greatly valued by the project team as this information will be used to create the overall needs assessment for the organization.

Thank you to Erika Nicklom who has helped Myshkaa with the one-on-one sessions as well as helping Bernice with information management and metadata research.

A big roar goes to Scott Cameron who has volunteered to be a tester with complex Excel spreadsheets. Scott will work with the team to test his complex spreadsheets in the potential system environments.

Leo Project Organization

Mission

The Leo project is developing a best practices, organization-wide information management program, including policies, procedures, governance and tools, which will allow collaboration, meet our record-keeping obligations and facilitate the Law Society's ability to meet current and future stakeholder expectations for an efficient, effective and innovative regulator.

Vision

Because of Leo, every Law Society employee will play a role in managing and protecting our information – one of our most important assets – and will be empowered to access information and work collaboratively using best practices, all of which will enhance the employment experience and our ability as regulators.

Values

- Collaborative
- Innovative
- Respectful (of users time, knowledge and needs)
- Best practices driven
- Goal oriented
- Committed to quality
- Accountable

The Law Society of British Columbia

IMPLEMENTATION OF THE STRATEGIC PLAN IN 2012

March 2, 2012

TBD 2013:

- Regulate law firms?
- Different qualifications for different service providers?

Access to Legal Services

Consider ways to improve affordability of legal services:
- paralegals
- articling students

Develop ways to improve rural articling opportunities (REAL)

Equity & Diversity

Support and retain Aboriginal and women lawyers

Goal 2:

The public will have better access to legal services

Staff

Work with other stakeholders to research economics of the profession

TBD 2013:

- Address changing demographics of the profession

Executive Committee

Build broader, strong relationships with stakeholders

Access to Legal Services / Executive

Working with G. Cowper, QC on Govt. Green Paper

Goal 3:

The public has greater confidence in the administration of justice and the rule of law

Staff

Identify methods of communicating about rule of law and role of Law Society through media

CONFLICTS (draft 22)

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

(conflicts provisions only)

Redlined to Model Code

February 21, 2012

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

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

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

"client" means a person who:

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

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

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

~~A~~ "**conflict of interest"** means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

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

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

“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~~ enrolled in the Law Society~~’s pre-call training p~~Admission 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 act or continue to act for a client where there is a conflict of interest, except as 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 conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. 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 conflicts of interest.

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

The general prohibition and permitted activity prescribed by this rule apply to a lawyer's duties to current, former, concurrent and joint clients as well as to the lawyer's own interests.

Representation

Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The fiduciary relationship, the duty of loyalty and conflicting interests

The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act ~~against the interests of the client.~~ in a

conflict of interest. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v, 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.

Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include:

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

Examples of ~~Conflicts of Interest~~**areas where conflicts of interest may occur**

Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest ~~and~~. The examples are not exhaustive.

1. A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

~~2. A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a~~

~~substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client.~~

~~3.~~2. A lawyer provides legal advice to a small business on a series of commercial transactions ~~to the owner of a small business~~ and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

~~4.~~3. A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

~~5.~~4. A lawyer has a sexual or close personal relationship with a client.

Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. 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. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. 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.

~~6.~~5. 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.

These two roles may result in a conflict of interest or other problems because they may

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

~~7.~~6. Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See subrules (44) and (45) on space-sharing arrangements.

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.

Consent

2.04(2) ~~Consent~~

A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

a) Express consent must be fully informed and voluntary after disclosure.

b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage

that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and in *Strother*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Lawyer belief in reasonableness of representation

The requirement that the lawyer reasonably believe that he or she is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

Dispute

2.04 (3) ~~Dispute~~

Despite ~~2.04~~subrule (2) a lawyer must not represent opposing parties in a dispute.

Commentary
A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with protection of confidential client information

2.04 (4) Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

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

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

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary
This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs. An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is

represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see ~~Rule 2.04 (26)).~~ subrule (25)).

Acting Against Former Clients

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

(a) the same matter,

(b) any related matter, or

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

Commentary

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

2.04 (6) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with subrule (20), that it is reasonable that it act in the new matter, 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 the partner or associate having carriage of the new matter will occur;

(b) the extent of prejudice to any party; and

(c) the good faith of the parties.

Commentary

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

Joint Retainers

2.04 (~~5~~7) Before a lawyer ~~acts~~is retained by more than one client in a matter or transaction ~~for more than one client~~, 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 (7).

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 (~~5~~7). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

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

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

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

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

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

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

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

2.04 (~~6~~8) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts a joint ~~employment for~~retainer from 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 (~~7~~9) When a lawyer has advised the clients as provided under subrules (~~5~~7) and (~~6~~8) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate ~~written communication~~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 ~~a~~an issue contentious ~~issue will arise~~ between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (~~8~~10) Except as provided by subrule (~~9~~12), if a contentious issue arises between clients who have consented to a joint retainer,

~~(a)~~ the lawyer must not advise them on the contentious issue and must:

~~i.~~(a) refer the clients to other lawyers; or

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

~~A.~~(i) no legal advice is required; and

~~B.~~(ii) the clients are sophisticated.

~~(b)~~ **2.04 (11)**~~if~~ If the contentious issue referred to in subrule (10) 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 (~~9~~12) 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 ~~conflict of~~conflicting interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

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

Limited representation

2.04 (13) In subrules (13) to (16) **"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 (14) 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 (15) 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 (16) 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.

Acting Against Former Clients

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

(a) the same matter,

(b) any related matter, or

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

Commentary
This rule 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 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 client if previously obtained confidential information is irrelevant to that matter.

2.04 (11) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

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

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the other lawyer 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 other lawyer having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

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

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 (5) to (9), 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 (5) to the lending client before accepting the retainer,

(b) provide the advice described in subrule (6), or

(c) obtain the consent of the lending client as required by subrule (7), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

~~Commentary~~

~~Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.~~

~~Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.~~

Conflicts ~~from~~Arising as a Result of Transfer Between Law Firms

Application of Rule

2.04 (17) In subrules (17) ~~– (26):~~

~~"**client**", includes anyone~~ to ~~whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;~~ (25):

~~(a)~~

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

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

Commentary

~~The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.~~Subrules (17) to (25) apply to lawyers sharing space. 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 (17) to (25) 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 (17) to (25) treat as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each such unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent.

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

2.04 (18) Subrules (17~~) (26~~) to (25) 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.

2.04 (19) Subrules (20) to (~~22~~23) do not apply to a lawyer employed by ~~the~~a federal, ~~a~~ provincial or ~~a~~ territorial ~~attorney general or department of justice~~government who~~,~~ continues to be employed by that government after transferring from one department, ministry or agency to another~~, continues to be employed by that attorney general or department of justice~~.

~~**Commentary**~~

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

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

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

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

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

~~Law~~ Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses confidential information relevant to a matter referred to in subrule (18~~) ()~~(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 ~~establishes~~can establish, in accordance with subrule (24), when called upon to do so by a party adverse in interest, that

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

~~(i)~~(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);

~~(ii)~~(B) the extent of prejudice to ~~any party;~~the affected clients; and

~~(iii)~~ the good faith of the ~~parties;~~

~~(iv) the availability of suitable alternative counsel; and~~

~~(v)~~(C) ~~issues affecting~~former client and the ~~public interest.~~client of the new law firm; and

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

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

(ii) ~~**2.04 (22)**~~it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

Commentary

Appendix D may be helpful in determining what constitutes "reasonable measures" in this context.

Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues identified may prejudice clients and may be considered sharp practice.

Continued Representation not to Involve Transferring Lawyer

2.04 (21) If the transferring lawyer actually possesses information relevant to a matter referred to in subrule (18)(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~~:~~, the new law firm must notify its client of the relevant circumstances and its intended action under subrules (17) to (25).

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

~~(b) the new law firm must~~

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

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

~~**Transferring Lawyer Disqualification**~~

2.04 (~~23~~22) Unless the former client consents, a transferring lawyer ~~referred~~ to ~~in~~whom subrule (20) or (~~22)~~21) 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~~23) Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer ~~referred~~ to ~~in~~whom subrule (20) or (~~22)~~ 21) applies.

Determination of Compliance

2.04 (~~25) Anyone who has an interest in, or~~ 24) Notwithstanding remedies available at law, a lawyer who represents a party in~~,~~ a matter referred to in subrules (6) or (17) to (~~26~~25) may ~~apply to a tribunal~~seek the opinion of ~~competent jurisdiction for a determination of any aspect~~the Society on the application of those subrules.

Due Diligence

2.04 (~~26~~25) A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

~~a)~~(a) complies with subrules (17) to (~~26~~25), and

(b) does not disclose ~~confidential information~~confidences of clients of

~~i.~~(i) the firm~~.~~ and

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

Conflicts with Clients

2.04 (26) 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 (27) 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 (26).

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~~28) In subrules (~~27~~28) to (~~41),~~

~~"**independent legal advice"** means~~43), when a ~~retainer in which:~~

~~(~~client is required or advised to obtain independent legal advice concerning a~~)~~ ~~the retained lawyer, who~~ matter, that advice may only be obtained by retaining a lawyer ~~employed as in-house counsel for the client, who~~ has no conflicting interest ~~with respect to the client's transaction,~~in the matter.

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

~~(i) another lawyer, or~~

~~(ii)~~

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

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

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

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

~~(f) the retained lawyer informed~~(c) 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~~on the ~~desirability or otherwise of a proposed investment~~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 lawyer retained ~~lawyer~~ 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~~

2.04 (~~28~~30) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary

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

(a) lending or borrowing money;

(b) buying or selling property;

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

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

(e) recommending an investment; and

(f) entering into a common business venture.

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

Investment by Client when Lawyer has an Interest

2.04 (~~29~~31) Subject to subrule (~~30~~32), 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 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~~34).

2.04 (~~30~~32) 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~~33) 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)~~34) 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~~35) Subject to subrule (~~31~~33), 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~~36) 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~~37) Except as provided by subrule (~~36~~38), 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~~38) A lawyer may give a personal guarantee in the following circumstances:

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

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

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

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (~~27~~28) to (~~36~~43) (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~~39) 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~~40) 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~~41) 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~~42) 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~~43) 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.

Space-sharing arrangements

2.04 (44) Subrule (45) applies to lawyers sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.

2.04 (45) Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:

(a) that an arrangement for sharing space exists,

(b) the identity of the lawyers who make up the firm acting for the client, and

(c) that lawyers sharing space with the firm are free to act for other clients who are adverse in interest to the client.+

Commentary

Like other lawyers, those who share space must take all reasonable measures to ensure client confidentiality. Lawyers who do not wish to act for clients adverse in interest to clients of lawyers with whom they share space should establish an adequate conflicts check system.

In order both to ensure confidentiality and to avoid conflicts, a lawyer must have the consent of each client before disclosing any information about the client for the purpose of conflicts checks. Consent may be implied in some cases but, if there is any doubt, the best course is to obtain express consent.

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 (7) to (12).

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 (17) to (25), "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 (20).

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 (24) 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 (20). Again, this process must be completed before the transferring lawyer is hired.

An application under Rule 2.04 (24) 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 (24) that is intended to provide informal guidance to applicants.

The circumstances referred to in Rule 2.04(20)(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(17) to (25).

Although Rule 2.04(21) 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(24) 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(20)(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.

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

(definitions only for both non-conflicts and conflicts portions)

Redlined Version

February 21, 2012

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" ~~includes~~means a ~~client of~~person who:

(a) consults a ~~lawyer's firm, whether or not~~lawyer and on whose behalf the lawyer ~~handles~~renders or agrees to render legal services; or

(b) having consulted the ~~client's work, and may include a person who~~lawyer, reasonably ~~believes~~concludes that ~~a lawyer-client relationship exists, whether or not that is~~ the ~~case at law;~~lawyer has agreed to render legal services on his or her behalf.

Commentary

A lawyer-client relationship ~~is often~~may be established without formality. ~~For example,~~

When an ~~express retainer~~individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or ~~remuneration~~other legal entity that the individual is representing;

For greater clarity, a client does not ~~required for~~include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship ~~to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually~~would be established~~, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship~~.

"**conflict of interest"** ~~or "conflicting interest"~~ means ~~an interest likely to affect adversely~~ the existence of a substantial risk that a lawyer's ~~judgment on behalf of, or~~ loyalty to~~,~~ or

representation of a client ~~or prospective~~would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client~~;~~, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

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

~~(b)~~ (b) orally, provided that each person consenting receives a separate ~~letter~~written communication recording the consent as soon as practicable;

"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) in an arrangement for sharing space;~~

~~(d) as a law corporation,~~

~~(e)~~ (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

(~~f~~e) in a corporation or other ~~body~~organization;

~~(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;

"Society" means the Law Society of British Columbia;

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