

# Conflicts of Interest Toolkit

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## Conflicts of Interest Toolkit

Welcome to the CBA Task Force on Conflicts of Interest Toolkit. These materials provide practical checklists and precedents that are intended to help lawyers to recognize, deal with and avoid conflicting interests. These documents complement and supplement the in-depth legal discussion and analysis that is in the final Report and recommendations of the Task Force.

### What are conflicting interests?

A conflict of interest is an interest that gives rise to a substantial risk of material and adverse effect on the representation. A conflicting interest can arise when:

- a lawyer's self-interest conflicts with the performance of a client retainer (a conflict of duty and interest),
- a lawyer's duty to another client conflicts with the performance of a client retainer (a conflict of duty and duty),
- a lawyer's duty to another client impairs the lawyer's relationship with a client and thereby impairs client representation (a conflict of duty with relationship).

What is it about a conflict of interest that is so bad? The answer is quite simple. Conflicts can impair effective representation of a client. It is fundamental to the lawyer-client relationship that a lawyer be free of conflicts other than those willingly accepted by the client. And if a client has reason to question the representation provided by his or her lawyer, the very functioning of our legal system is called into question.

Further, the consequences of a conflict of interest for the lawyer can be severe and costly. They can include:

- disqualification from representation of one or more clients;
- forfeiture of fees charged; and the inability to charge for work in progress and other time invested;
- a damage claim which may include punitive damages;
- embarrassment and cost in time and money of defending a malpractice claim or investigation.

The courts may disqualify a lawyer to protect a client's confidential information, which must be preserved whether or not there is a conflict of interest.

Checking for, identifying and avoiding conflicts of interest and ensuring that a client's confidential information is protected need to be a part of every lawyer's practice. In fact, every time you have a new client or a new matter for an existing client, and throughout the course of any active matter, you should be on the lookout for the existence of a real or potential conflict of interest and alert to the possibility that confidential client information you have about one client may bar you from acting for another.

The file management systems used by law firms usually catch conflicts, and most lawyers instinctively recognize a conflicts issue when it actually arises. Unfortunately, lawyers, in a rush to please a client, could get into trouble if they miss the early warning signals of a conflict.

The requirements for successfully managing conflicts of interest are quite basic: be aware of your obligations; exercise good judgment; and effectively communicate and document the decisions you make and actions you take when dealing with conflicts of interest. The guidelines, checklists and precedents in this Toolkit are designed to assist you in achieving this objective.

### Acknowledgement of Sources

Like most other lawyers working on drafting endeavours, the members of the CBA Task Force on Conflicts of Interest have drawn on the work others have done before us. We felt it better to rely on experience and tested approaches, knowing that our work will in turn be adapted and used by others who will follow us. We express our gratitude to everyone who directly and indirectly contributed to this resource. In terms of information and precedents for professional conduct matters, and in particular for dealing with conflict of interest issues, there was a wealth of material from the work of some people we would like to specifically acknowledge, including:

- The comments and precedents that came from various CBA member lawyers and law firms;
- Resources on the Law Society of British Columbia's website ([www.lsbcc.org](http://www.lsbcc.org));
- Resources on the LAWPRO ([www.lawpro.ca](http://www.lawpro.ca)) and practicePRO ([www.practicepro.ca](http://www.practicepro.ca)) websites, including the Managing Conflict of Interest Situations booklet by Karen Bell;
- Practice Management Advisors from various state and provincial bar associations; and
- an informal work group of Toronto law firm risk management counsel.

We greatly appreciate the assistance we received from three expert colleagues in the United States:

- Anthony E. Davis, Hinshaw Culbertson LLP;
- William Freivogel ([www.freivogelonconflicts.com](http://www.freivogelonconflicts.com)); and
- Professor Gary A. Munneke, Pace University Law School.

We would also like to recognize and thank Blakes (Toronto and Montreal offices) who were instrumental in the standardization and translation of this Toolkit.

## **Disclaimer**

The information, checklists, and model agreements and letters provided in this resource are for your consideration and use when you draft your own documents. They are NOT meant to be used “as is.” Their suitability will depend upon a number of factors, such as the current state of the law and practice in each area of law, your writing style, your needs and the needs and preferences of your clients. The model documents may require modifications to correspond to current law and practice. The information and documents provided in this Toolkit are not intended to report, establish or create the standard of care for lawyers.

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## How to analyze a potential conflict of interest

This diagram sets out the thought process required when opening a new matter. It is a graphical depiction of the four steps needed to consider conflicts and confidential information in a disciplined way, consistent with the recommendations of the Task Force. It is not a flow chart or decision tree that explicitly describes every step of this process.

### STEP 1 Information collection

The first step is to obtain the information you will need for the analysis. This is split into two rows. In the first row, you must identify the client, determine what the lawyer is retained to do and determine who may be affected by the work to be undertaken. All this information is needed to undertake the analysis (and to draft a proper engagement letter). Working through the steps in the second row, the lawyer must identify all three of the following: current matters for adverse parties; all current matters where the new client's interests may be adverse; and all related matters for former clients whose interests may be adverse in the new matter.

### STEP 2 Assess the issues raised by the information gathered

The three ovals at the start of Step 2 emphasize a key point: conflicts issues must be assessed from three perspectives: the perspective of the new client, the perspective of adverse parties who are or were clients and the perspective of the lawyer and law firm.

Note that a different analysis is required for current matters/clients (all boxes) and former matters/clients (the dark coloured boxes).

In each case where the lawyer/law firm has matters for adverse parties in the new matter and in each case where the lawyer/law firm has matters adverse to the new client, the lawyer must assess (follow all boxes):

- a) whether any of the three conflicting interests are present (performance conflicts, relationship issues, and personal interests), and
- b) whether there is a risk of misuse of confidential information.

In each case where the lawyer/law firm has former matters for adverse parties in the new matter, the lawyer must assess (follow dark coloured boxes):

- a) whether the new matter would require the lawyer to undermine the work done in the former matter, and
- b) whether there is a risk of misuse of confidential information from the former matter.

### STEP 3 Possible outcomes

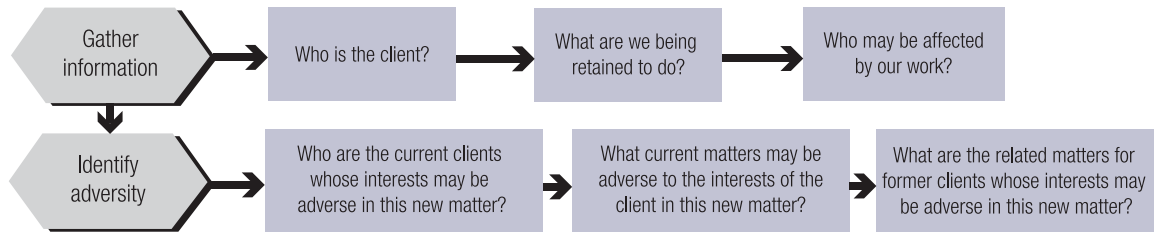
There are four potential outcomes depending on the results of your analysis. Some require further steps (erecting confidentiality screens or obtaining client consent).

### STEP 4 Be prepared to reconsider

Remember that facts and circumstances may change as a matter progresses, and that you must always be ready to re-do this analysis.

# HOW TO ANALYZE A POTENTIAL CONFLICT OF INTEREST

## STEP 1 Facts you will need



## STEP 2 Perspectives to be considered in answering the following questions

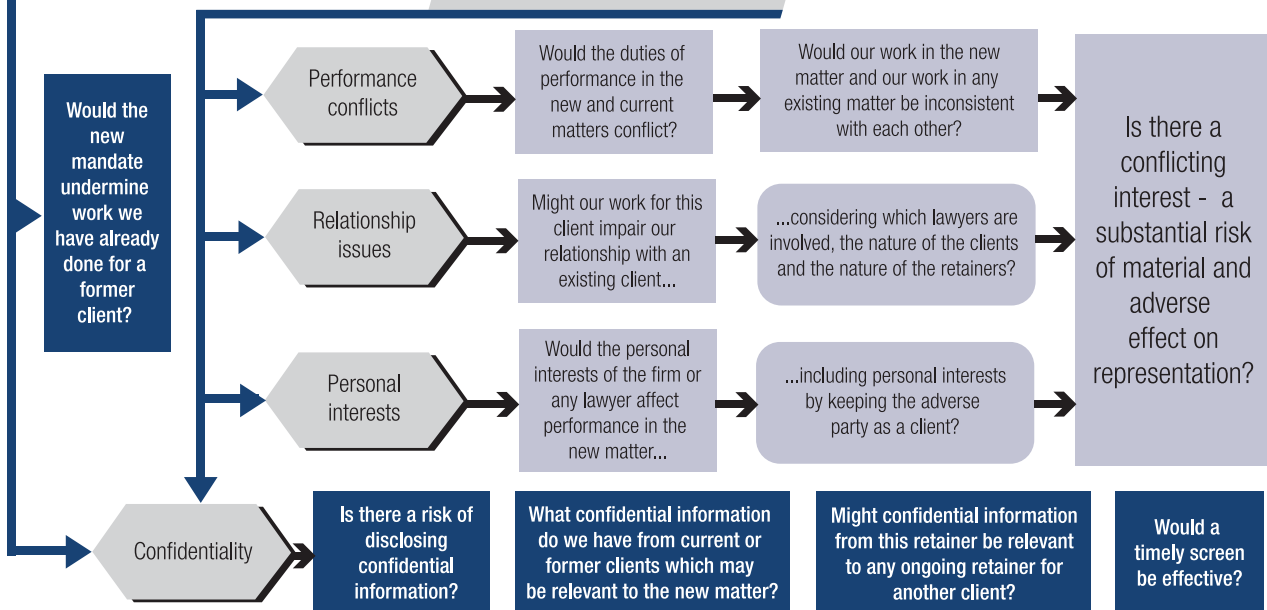
Consider issues from new client's perspective

Consider issues from other client's perspective

Consider issues from both lawyer's and firm's perspective

For former matters / clients follow steps in dark coloured boxes

For current matters / clients follow all steps



## STEP 3 Possible outcomes depending on the results of your analysis

Note - engagement letters are highly recommended

Go ahead - no problem

Go ahead, with timely screen, if appropriate

Go ahead, with informed client consent

Stop - do not act

## STEP 4 Reconsideration



## Conflicts of Interest Systems Checklist

This checklist is designed to help you evaluate your firm's procedures for detecting real and potential conflicts of interest and to raise questions that could help you to avoid conflicts problems.

	Yes	No
1. Do you have a system for discovering real or potential conflicts of interest?	<input type="checkbox"/>	<input type="checkbox"/>
2. Do you have routine procedures to obtain basic conflict of interest information before opening a file?	<input type="checkbox"/>	<input type="checkbox"/>
3. Do you check for any potential conflicts prior to receiving confidential information from a potential client?	<input type="checkbox"/>	<input type="checkbox"/>
4. Do you circulate information on the identity of new and prospective clients throughout the firm promptly?	<input type="checkbox"/>	<input type="checkbox"/>
5. Do you have a central file index, either in a file book, card system or computerized list of all files?	<input type="checkbox"/>	<input type="checkbox"/>
6. Does your central file index include the following information?	<input type="checkbox"/>	<input type="checkbox"/>
1. client name, including known aliases	<input type="checkbox"/>	<input type="checkbox"/>
2. affiliates or partners of client	<input type="checkbox"/>	<input type="checkbox"/>
3. "also known as" name(s)	<input type="checkbox"/>	<input type="checkbox"/>
4. directors, officers or shareholders of client	<input type="checkbox"/>	<input type="checkbox"/>
5. adverse parties	<input type="checkbox"/>	<input type="checkbox"/>
6. co-plaintiffs, co-defendants, third party defendants	<input type="checkbox"/>	<input type="checkbox"/>
7. known relatives of client and other parties	<input type="checkbox"/>	<input type="checkbox"/>
8. common law spouses of client	<input type="checkbox"/>	<input type="checkbox"/>
9. lawyers for any names in the index	<input type="checkbox"/>	<input type="checkbox"/>
7. If a potential conflict is detected, does your firm have one or more lawyers assigned the responsibility of determining whether a conflict does exist?	<input type="checkbox"/>	<input type="checkbox"/>



8. If a potential conflict is found, do you either decline to take the case or notify the client of the potential conflict in writing? ☐ ☐
9. Are your conflicts procedures expressed in writing so that all your staff are aware of them? ☐ ☐
10. Does your firm have one person responsible for maintaining the central file index? ☐ ☐
11. Are the lawyers and staff in your office aware of rules of professional conduct pertaining to conflicts of interest? ☐ ☐
12. Are you and the members of your firm aware of the legal principles established in the *MacDonald Estate v. Martin, R. v. Neil*, and *Strother v. 3464920 Canada Inc.*? ☐ ☐
13. If you share office space with a lawyer who is not a member of your firm, do you have a policy on acting for clients who have adverse interests? ☐ ☐
14. Do you have standard letters for dealing with disclosure of conflicts and conflict waivers? ☐ ☐
15. If you are asked to represent clients jointly, do you ask them to sign a consent letter? ☐ ☐
16. Do you review potential conflicts of interest when dealing with the lateral hire of a lawyer? ☐ ☐
17. Do you act for two or more clients in the same matter without their written informed consent? ☐ ☐
18. Do you act for a client in a matter in which you, your relative, friend, or partner has a financial interest which would reasonably be expected to affect your professional judgement? ☐ ☐
19. Do you represent opposing parties in "friendly" litigation or transactions where there seem to be no opposing interests? ☐ ☐

Your answers to questions 1-16 should be YES.

Your answers to questions 17-19 should be NO.

Failure to give the preferred answer does not necessarily mean you have a problem, but it does suggest you should evaluate your practice and procedures.

Source of document: Law Society of British Columbia website  
(with updates by CBA Task Force on Conflicts of Interest).

## Checklist for Avoiding Phantom Clients

Entering into a lawyer-client relationship imposes considerable obligations on you as a lawyer, and when it comes to conflicts of interest, those obligations can have repercussions for every other lawyer and client of your firm. For that reason, you should enter into a lawyer-client relationship only with full knowledge of the implications that the relationship may have.

In particular, you want to avoid the “phantom” or “ghost” client – the client you don’t even know you have.

Special care should be taken with e-mail and voicemail communications, both of which tend to be informal, and with websites, which reach a very wide audience.

Take the following steps to avoid having an unknown “phantom” or “ghost” client:

1. Don’t give legal advice over the phone or during casual social contacts to people whom you don’t intend to take on as clients. Invite prospective clients to come to your office and complete a client intake form and a full conflicts search.
2. In cases where you think doubt may exist, or it is otherwise important to disavow a lawyer-client relationship, have people whom you choose not to represent sign a non-engagement statement, or send them a non-engagement letter. Write to clients who come to you for summary advice to confirm the limits and qualifications of that advice.
3. When a current client asks about a new matter; clarify whether the client wants you to act or represent them on that new matter and, if so, complete a full conflicts check and open a new file.
4. Treat work you do for friends or family with the same formality as other work (including doing a full conflicts check and opening a file), even if you intend to charge them reduced fees, or no fees at all.
5. Be very clear in your file opening documentation and in correspondence with the client(s) whether you represent a legal entity, such as a corporation, a partnership or unincorporated association, as opposed to other affiliated or related persons, such as officers, shareholders or members. The same issue can arise in estate law and family law and in cases involving the elderly or minors. Send them letters confirming their status as clients (an engagement letter) or an “I am not your lawyer letter” to non-clients.

6. Avoid undermining the statement that you don't represent the person with phrases like 'but if you have questions, get back to me.'
7. Record the names of everyone (individuals and entities) you see, whether you accept them as a client or not, and include rejected clients' names in your conflicts-checking system. This ensures that all names necessary for checking for conflicts of interest are entered into the firm's list of past, current and rejected clients.
8. On your firm's general voicemail greeting, and if appropriate, on individual lawyers' voicemail greetings, include a warning for callers not to leave confidential information.
9. On your firm's website, include terms of use and disclaimer statements that warn site visitors that unsolicited information or materials sent to the firm or left on voicemail will not be guaranteed confidentiality, and that access to or use of the site or firm voicemail does not create a lawyer-client relationship.

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## Model Privacy Policy

[*Firm name*] is a firm that specializes in intellectual property law with offices in [*locations*]. The lawyers, patent and trade mark agents and staff at [*firm name*] (sometimes referred to as “we”) are committed to protecting your privacy. This Privacy Policy outlines how we handle your personal information to protect your privacy.

### Privacy Legislation

Since January 1, 2004, all Canadian organizations engaged in commercial activities have been required to comply with the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) and the Canadian Standards Association Model Code for the Protection of Personal Information incorporated by reference into PIPEDA. These obligations extend to lawyers and law firms, including [*firm name*].

In addition, an *Act respecting the Protection of Personal Information in the Private Sector* has been in force in Quebec since 1994 and sets out rules regarding the collection, use and disclosure of personal information within that province.

Lastly, as a professional services firm, we have professional and ethical obligations to keep confidential the information we receive in the context of a lawyer-client and agent-client relationship.

### Personal Information

Personal information is defined in PIPEDA as information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization. In other words, it does not include the information that one expects to find on a business card.

### Consent to Our Collection of Personal Information

In most cases, we obtain your consent to collect, use and disclose your personal information. Usually, if you retain our firm, we assume that we have your implied consent to our collection and use of your personal information, however, at times we may ask for your express consent, either verbally or in writing. Generally, we collect your personal information directly from you at the start of or during the course of your retainer with our firm. Sometimes we may obtain information about you from other sources such as a government registry or other professionals who serve you.

## Use of Personal Information at *[firm name]*

We use your personal information to provide legal advice and services to you, to issue invoices and to maintain our database of clients. In addition, if you apply for a position with *[firm name]*, we will use your personal information to assess your candidacy. Lastly, we may use your contact information (name, e-mail and postal address) so that we may communicate with you about recent developments in the law, keep you abreast of *[firm name]* news and invite you to our firm events.

## Withdrawal of Consent

You may withdraw your consent to our collection, use and disclosure of your personal information at any time, subject to legal and/or contractual restrictions and upon reasonable notice. Your withdrawal of consent to our collection, use and disclosure of your personal information may impact our ability to represent you and provide you with legal advice.

You can ask us not to send you marketing communications by following the opt-out instructions in each communication or you may let us know by contacting our marketing department at *[unsubscribe@firmname.com]*

## Disclosure of Personal Information

Generally, we do not disclose your personal information to third parties without your consent unless permitted or required by applicable laws or court orders. The following are some examples where we may disclose your personal information: such disclosure is necessary to collect fees or disbursements; we contract with a third party to provide us with certain services such as archival file storage or insurance. (In such cases, we will use contractual or other means to ensure the third party service provider is bound by obligations regarding privacy which are consistent with this policy); or we engage expert witnesses or other law firms on your behalf.

## Accuracy of Your Information

It is important that the information that we have on file be accurate and up-to-date. If, during the course of the retainer, any of your information changes, please inform us so that we can make any necessary changes. We may also ask you from time to time whether your personal information is up-to-date.

### Safeguards

[*Firm name*] uses various safeguards to ensure that your personal information is protected against loss, theft, misuse, unauthorized access, disclosure, copying or alteration. These include: security of our physical premises; our professional obligations; security software and firewalls to prevent unauthorized computer access or “hacking”; and internal passwords that restrict access to our electronic files.

### Access to your Personal Information

You have a right to challenge the accuracy and completeness of your personal information and to have it amended, as appropriate. You also have a right to request access to your personal information and receive an accounting of how that information has been used and disclosed, subject to certain exceptions prescribed by law. For example, if the requested information would reveal personal information about another individual, your request for access may be limited or denied. If your request for access is denied, [*firm name*] will notify you in writing of the reason for the denial.

To request access or to amend your personal information, please contact the lawyer or agent with whom you normally correspond or write to our Privacy Contact at the address below. [*Firm name*] will respond within thirty (30) days of receipt of your written request.

### Challenging Compliance

[*Firm name*] will respond to inquiries about its policies and practices relating to its handling of your personal information. Inquiries should be directed to [*firm name*’s] Privacy Contact using the contact information below. [*Firm name*] will investigate all complaints and will respond within 30 days of receipt of a written inquiry. If the complaint is found to be justified, [*firm name*] will take appropriate measures to resolve it, including, if necessary, amending this Policy and its procedures.

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Like most other commercial websites, we may monitor traffic patterns, site usage and related site information to optimize your visit to our website.

We do not use cookies or any electronic means to collect personal information from you or your computer; however, our website server will automatically collect IP addresses. We may view the IP log from time to time, for example, to maintain the security of our website. We do not link the IP addresses to other personally identifiable information.



## Privacy Contacts

If you have any questions or complaints about this Policy or the handling of your personal information, if you wish to withdraw your consent to our use of your personal information, or to request access to or update any information we have on file, please contact the lawyer or agent with whom you are dealing, or contact:

[*contact person*]

[*law firm*]

[*address*]

If any complaint or inquiry is not handled to your complete satisfaction, you may contact:

Privacy Commissioner of Canada  
112 Kent Street  
Ottawa, Ontario  
K1A 1H3

Telephone: 613.995.8210  
Toll free: 1.800.282.1376.

Commission d'accès à l'information du Québec  
480 St. Laurent  
Suite 501  
Montreal, Quebec  
H2Y 3Y7

Telephone: 514.873.4196  
Toll Free: 1.888.528.7741

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We may change this Privacy Policy from time to time. Any changes will be posted on our website at [*www.lawfirm.com*] and will be made available upon request through your contact at [*firm name*]. Please check from time to time to ensure you are aware of our current policy. This Privacy Policy is effective [*date*].

## Avoiding Tactical Conflicts

On occasion a party will intentionally contact or attempt to meet with one or more lawyers for the sole purpose of creating a conflict that will prevent the lawyer(s) from acting for another party on a pending matter. Despite the bad intentions of the individual making these contacts, the lawyer(s) contacted may not be able to act for the other party, especially if confidential information was disclosed.

This behaviour occurs quite frequently in the family law area, and in specialized areas of the law where there are a limited number of experts. In smaller communities this can be very frustrating as such behaviour can make it difficult or even impossible for someone to retain a local lawyer. And when a client is looking for lawyers with specialized expertise, choices may be limited. In both cases it means that a lawyer or firm must turn away a matter that they could otherwise have handled.

To prevent these tactical conflicts from occurring, law firms should have clear and established procedures to screen all incoming calls and enquiries for potential conflicts. Staff and lawyers should be on the lookout for these types of calls, especially on family law matters. They should be trained to collect enough information to evaluate potential conflicts, while at the same time being sensitive not to ask for or collect confidential information. An intake conflicts screening form can help ensure that the appropriate information is collected to identify possible conflicts. .

When it appears that a caller may be trying to create a tactical conflict, this should be carefully confirmed and if so, a non-engagement letter should be sent to the caller.

On your firm's general voicemail greeting, and if appropriate, on individual lawyers' voicemail greetings, consider including a warning for callers not to leave confidential information. And on your firm's website, include statements that warn site visitors that unsolicited information or materials sent to the firm or left on voicemail will not be guaranteed confidentiality, and that access to or use of the site or firm voicemail does not create a solicitor-client relationship.

## First Contact Conflicts Screening Form

*This form is intended to ensure that any lawyer or staff person having an initial conversation or communication with a potential client collects all information necessary for a conflicts of interest search while at the same time avoiding any disclosure to the firm of any confidential information that would trigger conflicts of interest issues with current or future clients.*

**Please use this form to screen incoming calls for potential conflicts of interest. In particular this form is intended to help prevent clients from intentionally creating a conflict of interest that would disqualify one of the lawyers at the firm from action on a matter.**

### Instructions to user:

- Please use this form for the purpose of collecting information from a potential client for the purposes of conducting a conflicts of interest search prior to conferring or meeting with the client.
- **PLEASE DO NOT COLLECT ANY CONFIDENTIAL INFORMATION WHEN COMPLETING THIS FORM.**
- Please use the attached list of potentially relevant people or entities to make sure you collect all relevant information so that the firm can complete a proper search for a conflicts of interest search

Date: \_\_\_\_\_

Person taking call: \_\_\_\_\_

Responsible lawyer if matter is opened: \_\_\_\_\_

Person making contact: \_\_\_\_\_

### Contact information

Phone number: \_\_\_\_\_

E-mail: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

*(Continued)*

Potential Client(s) (people and entities)

☐ New client ☐ New matter for existing client

---

---

Brief description of matter

---

---

All other people or entities involved in the matter and their roll/status\*

---

---

Conflicts search information: 

---

Done by: 

---

Steps taken: 

---

Date completed: 

---

Search results: ☐ No conflicts ☐ Confirmed conflicts ☐ Possible conflicts

Details on confirmed/possible conflicts:

---

---

Refer to conflicts person/committee: ☐ Yes ☐ No

Retainer declined: ☐ Yes ☐ No

**\*Potentially relevant people or entities for a conflicts of interest search by matter type:**

Litigation: insured, plaintiffs, defendants, guardian ad litem, spouse, expert witness(es), lay witness(es), opposing counsel

Corporate/Business/Real Estate: owner/spouse, partner(s), shareholder(s), director(s), officer(s), subsidiaries/affiliates, key employees, buyer(s), seller(s), property address, any opposing party in transaction, property PIN number.

Estate Planning: executor, spouse or partner/children/heirs/devisees, personal representative, testator

Probate: deceased, personal representative, spouse or partner/children/heirs/devisees, trustees/guardian/conservator

Family law: client, spouse, prior married names, maiden name, children, grandparents

Criminal: client, witness(es), victim(s), co-defendant(s)

Worker's Compensation: injured worker, employer, insurer

Bankruptcy: client, spouse or partner, creditor(s)

## Beware the Dangers of Acting for Family and Friends

At one time or another, every practising lawyer has been approached by a friend or family member for legal advice. For most, the natural inclination is to help. However, acting for friends and family is risky business: You should think twice before doing so.

Due to the closeness of the relationship, the help offered by lawyers acting for family or friends tends to be informal, or is at a level that is less formal than it would be for a regular client. This lack of formality can result in the cutting of corners, or a failure to obtain consents or written instructions. Misunderstandings as to the scope and nature of the services to be provided are more likely due to the informal handling of the matter. Lastly, standard procedures may not be followed, including completing a conflicts check, opening a file, signing a retainer agreement, sending correspondence, etc. All these standard procedures are supposed to be followed for good reason, and should occur on every matter that you handle, regardless of your relationship to a client.

For several reasons family and friends can be the most difficult and awkward of clients:

- They can be extremely demanding clients. They can (and will) ask you questions 24 hours a day.
- It is more difficult to give them honest, objective, independent and professional advice. No matter how hard you and they try, your personal relationship will cloud your judgment and their ability to listen to the advice that you are giving.
- They can be the most unreasonable of clients. An inability to properly listen to and accept the advice you are giving makes for unreasonable expectations.
- Family members and fees don't mix. The discussion of fees is more difficult with family members, and often you will find yourself doing the work on a *pro bono* basis, or at a reduced hourly rate.
- If the matter doesn't go as expected, the consequences for the relationship can be disastrous. A malpractice claim is often the result, notwithstanding the family or personal relationship. The inevitable hurt feelings may affect your relationship with that person, and with other family members.
- Similarly, changes in family relationships or circumstances – such as separation or divorce – can also colour how family members view your earlier legal advice or services.

Be aware that *dabbling* (working outside your usual area of expertise) is also dangerous. Lawyers are more inclined to dabble when they are trying to help a family member or friend. In all cases you should avoid acting on a matter that is outside your area or areas of expertise, and this is especially true in the case of matters for family or friends. Don't be a dabbler!

What do you do when a family member or friend approaches you for help on a legal matter? Politely and firmly explain to them that it would be better to have someone else in the firm or an even an outside lawyer handle the matter for them. Explain that by doing this they can better ensure that the lawyer acting on their behalf has the right expertise and is able to offer independent and objective advice. Using outside counsel ensures that errors do not affect personal relationships, things are more likely to be documented, family members are more likely to be more realistic in their expectations, and the acting lawyer can more easily give the client the advice they would prefer not to hear (e.g. "you don't have a case").

## Guidelines for Non-Engagement Letters

Whenever you decline to represent someone, you should send a non-engagement or non-representation letter. The point of sending such letter is four-fold:

- To document that you are not representing a particular person;
- To advise the party to seek other representation; and
- To confirm that you have not received any confidential information regarding his or her interests in the matter. (If this is true).
- To confirm the client's circumstances as explained to you, and the advice that you gave to the client, in the case of a consultation.

Without such a letter, the person can later allege that he or she relied on you for legal representation even though you provided none, or that you received confidential information which could prevent you from acting against the interests of that person in the future.

Routinely using non-engagement letters for all matters the firm cannot or does not wish to accept will help to avoid these problems. Your non-engagement letters should be clearly worded and address the following issues:

- Confirm that the representation is declined and that there is no lawyer-client relationship.
- Include the date of the interview and, if possible or appropriate, why the firm cannot or will not represent the individual, although you need not give reasons.
- Return any documentation or other property obtained during the consultation.
- Advise the person to seek other legal counsel as soon as possible to pursue his/her rights.
- Refer to the fact that statutes of limitations may apply to bar recovery if steps are not taken promptly to pursue rights or remedies. If a specific statute of limitations poses as an immediate problem, specific reference should be made to a need for the person to take urgent action.
- Take care not to express an opinion on the merits of a claim or other legal position, unless, after completing an initial consultation, you have a full and clear understanding of the client's circumstances and gave the client advice specific to those circumstances.
- Where possible, ask the client to countersign and return the non-engagement letter.

Maintain a file for the non-engagement letters you send out so that you have a clear record of what was done in the event questions arise in the future. Put the names of clients or matters that did not engage the firm in your conflicts system so that appropriate flags are raised in the event of a future conflicts search.



## Model Non-Engagement Letter

*This is a general non-engagement letter that confirms to a potential client, after a consultation or phone conversation, that the firm is unable to act on the matter. Reasons for declining the retainer may or may not be stated. It contains a warning about limitation periods. Although perhaps impractical for some types of matters, if you have done the consultation without receiving confidential information confirm this in the letter so that you are protected from future allegations of a conflict of interest.*

[Firm letterhead]

[Delivery method]

[Date]

[Potential client address]

**Re: Potential Engagement Regarding** [Describe potential mandate]

Dear [Potential client name]:

Thank you for your visit [call] today regarding [describe matter]. I appreciate the confidence you have expressed in our firm, but for various reasons the firm has decided it cannot represent you in this matter.

In declining to undertake this matter, the firm is not expressing an opinion on the likely outcome of the matter. Please note that since we are not expressing an opinion in this instance, no charge is being made.

**[Where potential client is a claimant:** There are statutes of limitations or deadlines that may apply to prevent you from pursuing your claim if you do not take action on a timely basis to protect your rights or remedies.] **[Where a specific statute of limitations poses as an immediate problem:** Please note that there is a statute of limitation that applies with respect to you pursuing your claim. You must commence a court action by [date]. If you fail to do so, you will not be able to pursue a claim for damages against [name of defendant]. For this reason, we recommend that you immediately contact another lawyer/law firm for assistance regarding your matter].

**[Where you completed an initial consultation:** From my consultation with you, I understand [set out details of client's circumstances as explained to you]. In your circumstances, I would advise you to [set out the advice you gave the client]. I do not charge fees for initial consultations].

(Continued)

**[If there is a local lawyer referral service:** If you do not have another lawyer in mind to represent you, we suggest contacting the *[name of local lawyer referral service]* which maintains a list of lawyers who may be available to represent your interests in this matter. They can be reached at *[insert telephone number]*.

**[Where communications with the potential client involved document or property exchange:**

We are returning with this letter documents we reviewed regarding this matter and confirm that we are not in possession of any further documents or property received from you.]

**[If you did not receive any confidential information when meeting with the client:** Finally, we confirm *[if you, ideally, agreed when the appointment was set-up, as was agreed when we initially set-up our appointment,]* that you did not reveal any confidential information to us at the meeting today, and as such, there can be no objection on a conflict of interest basis to our firm acting in this or related matters for any other current or future client.]

*[In Quebec only (required by The Charter of the French language):* This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

We appreciate your having approached us regarding this matter. If you ever have need of legal assistance in the field of *[practice concentration]*, we hope that you will think of us again in that context.

**[If appropriate, add:** We enclose a copy of our brochure describing our practice in *[practice area]*.]

Sincerely,

*[Signature]*

I, \_\_\_\_\_ hereby acknowledge receipt of the above letter and my agreement with all that is stated in it.

*[Signature]*

*[Date]*

Source of document: Law Society of British Columbia website  
(with updates by CBA Task Force on Conflicts of Interest).

## Model Termination of Mandate Letter

*The purpose of this letter is to make clear that the engagement has ended and to avoid the inference that the firm has a continuing obligation to the former client. The purpose is also to make clear that the former client is not a current client for conflict of interest purposes. In plain language it states to the client: the matter is over, you have paid our fees, and you are no longer a client of the firm. That means we have no further duty to look after your interests. That also means we are free to sue you when we act for other clients on matters that are not related to the completed matter.*

[Firm letterhead]

[Delivery method]

[Date]

[Client address]

### **Re: Final reporting letter and termination of retainer**

Dear [client]:

We are writing to provide you with our final report and account on your matter.  
We confirm that [set out details of work that was done].

As there is nothing left to be done on your matter, we enclose our final account and confirm that our representation of you has ended. We appreciate your having retained us regarding this matter.

*[Ideally you have had the language in the following paragraph in your retainer agreement, and reviewed it with the client at the time of retainer]*

Please note, as you are no longer our client, under applicable professional rules we may represent another client in any matter that is directly adverse to your immediate interests provided that (i) the other matter is not the same as or related to the matter in which we previously represented you and (ii) we protect your relevant confidential information. [You acknowledge that the timely establishment of a confidentiality screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

(Continued)

*[Note that how you protect confidential information will depend on the circumstances of each matter. If you would like your client to consent to the firm's future use of confidentiality screens to protect confidential information, include the last sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the last sentence.]*

*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]*

If you ever have need of legal assistance in the field of *[practice concentration]*, we hope that you will think of us again in that context. *[If appropriate, add: We enclose a copy of our brochure describing our practice in [practice area].]*

Sincerely,

*[Signature]*

I, \_\_\_\_\_ hereby acknowledge receipt of the above letter and my agreement with all that is stated in it.

*[Signature]*

*[Date]*

## Model Engagement Letter - Long

[Firm letterhead]

[Delivery method]

### Privileged & Confidential

[Client address]

**Re: Retainer With Respect to** [Describe mandate]

Dear [client]:

We write to confirm that you wish to retain [firm name]. We are pleased to represent you on the basis set out below:

#### 1. Description of Mandate

- (a) You have retained us to provide you with legal services in connection with [•].

*[Provide as much detail as possible about the specific work contemplated by the matter. Identify clearly any restrictions or limitations on the retainer. If the retainer is limited to certain areas of practice, identify such limitations in order to ensure that there will be no subsequent misunderstanding as to the extent of your responsibilities. For example, specify whether or not tax advice is included as part of the retainer. Describe the retainer in such a way that the scope of work does not carry on indefinitely but will come to a definite and identifiable end.]*

- (b) We will provide you with legal services which in our professional judgment are reasonably necessary and appropriate to carry out this mandate.
- (c) We confirm that (i) we are not providing legal advice or services except as described above, and (ii) once our work on this matter has been completed (see Section 9 below), we will not advise you as to subsequent legal developments relating to this matter.

(Continued)

## 2. Description of Client

We will be representing [*name(s) of person(s) or entity(ies)*] (“you”) in this matter. **[If another entity will be paying the fees, add: *even though in certain instances the payment of our fees may be the responsibility of [•] [specify arrangements].*** Our representation of you does not include the representation of related persons or entities, such as the individuals or entities that are shareholders, directors or officers of a corporation, its parent, subsidiaries or affiliates; partners of a partnership or joint venture; or members of a trade association or other organization. In acting for you, we are not acting for or taking on any responsibilities, obligations or duties to any such related persons or entities and no lawyer-client or other fiduciary relationship exists between us and any such related persons or entities.

*[Consider tailoring this paragraph to the circumstances of your client(s). Where you are acting for more than one client, you must include provisions on the joint representation – See Section 7 below.]*

## 3. Instructions

We will accept instructions from anyone in your organization who has apparent authority in connection with this matter, unless you instruct us otherwise.

*[or]*

We will accept instructions for this engagement from [*name of person*] or such other person as [*name of person*] advises us is authorized to instruct us.

*[Consider whether the person designated to provide instructions has or might have a conflict given the subject matter of the engagement.]*

## 4. Undertaking to Preserve Confidentiality

- (a) We undertake not to disclose or misuse your confidential information, subject only to applicable law and our professional and ethical obligations.
- (b) Because we owe this duty to all of our clients, we will not disclose to you information we hold in confidence for others (even where such confidential information would be relevant to our representation of you) or disclose to others information we hold in confidence for you (even where such confidential information may be relevant to our representation of those others).

*[Consider whether to expand this sentence in circumstances where it is anticipated that the firm may have information from another client that is material to this client. This could require, for example, the establishment of a confidentiality screen.]*

## 5. Identification of Potential Conflicts

- (a) We undertake not to take on any matter that would create a substantial risk that our representation of you on this matter would be materially and adversely affected (a “conflicting interest”).
- (b) We have conducted a review of our records and we confirm that we have not identified a conflicting interest in representing you in this matter. We searched your name as well as the following names that you have provided to us as being relevant:

*[List all names searched.]*

*[If the conflict search reveals a conflicting interest, the firm requires the informed consent of both clients to the firm acting. This paragraph should be amended to reflect the conflicting interest. In addition, this may be an appropriate place to describe the conflicting interest and confirm the consent of this client.]*

- (c) Please let us know immediately if there are any other names that we should search in connection with this matter or if there are any changes or additions to these names in the future. We are relying on you to let us know of any other parties who become involved in this matter, including any parties whose interests may be adverse to yours.
- (d) Please note that we do not normally consider ourselves to have a conflicting interest because we represent another client who is a business competitor, customer or supplier of yours; or is asserting through us legal positions or arguments that may be inconsistent with those you are asserting or may wish to assert; or is adverse in interest in another matter to an entity with which you have a relationship through ownership, contract or otherwise. Unless you have asked us to perform a search against particular entities described in one of the above categories, our conflict search will not identify any issues arising from our representation of them.

## 6. Representation of Other Clients

We wish to avoid any circumstances in which you would regard our representation of another client to be inconsistent with our duties to and understandings with you.

**[Option 1:** normally for long-standing clients of the firm]

- (a) While you are our client, we will not act for another client in a matter which creates a conflicting interest.

*(Continued)*

- (b) We are not aware of any current matters where we act on behalf of other clients which create a conflicting interest.

*[If a conflict search reveals a matter in which there is a conflicting interest and both clients consent to the firm acting, this paragraph should be amended to reflect that fact. In addition, this may be an appropriate place to describe the conflict and confirm the consent of this client.]*

- (c) If we learn, while we are representing you, that we are engaged in a matter which creates a conflicting interest, we may ask for your agreement to our continuing to act on terms satisfactory to all concerned.
- (d) *[Consider including the following clause which addresses the firm's obligations to the client when it becomes a former client.]*

When you are no longer our client, under applicable professional rules we may represent another client in any matter that is adverse to your interests provided that (i) the other matter is not the same as or related to the matter in which we previously represented you and (ii) we protect your relevant confidential information. [You acknowledge that the timely establishment of a conflict screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

*[Note that how you protect confidential information will depend on the circumstances of each matter. If you would like your client to consent to the firm's future use of confidentiality screens to protect confidential information, include the second sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the second sentence.]*

**[Option 2:** Consider for limited mandates, agency retainers and other one-off matters where you want to be free to act against the client in other matters.]

- (a) While you are our client, we will not act for another client in a matter which creates a conflicting interest unless you consent. Our acceptance of this matter is on the basis that you now consent to our representation of other clients in other matters that may be adverse to your interests and to our representation in other matters of the party that is adverse to you in this matter provided that (i) the other matter is not the same as or related to any matter in which we are then representing you and (ii) we protect



your confidential information. [You acknowledge that the timely establishment of a conflict screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

*[Note that how you protect confidential information will depend on the circumstances of each matter. If you would like your client to consent to the firm's future use of confidentiality screens to protect confidential information, include the second sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the second sentence.]*

- (b) Your consent means that while we are representing you in this matter, we could represent another client in an unrelated matter that is adverse to your interests including a lawsuit, negotiation, financing transaction, auction or other acquisition transaction, regulatory proceeding, insolvency/restructuring or other matter.

*[This consent will permit you to act against an Option 2 client in unrelated matters, but does not extend to your acting against an Option 2 client in a related matter. If you want to do this, you should obtain an express consent from each client.]*

- (c) When you are no longer our client, under applicable professional rules, we may represent another client in any matter that is adverse to your interests provided that (i) the other matter is not the same as or related to the matter in which we previously represented you and (ii) we protect your relevant confidential information. [You acknowledge that the timely establishment of a conflict screen will be sufficient protection of the confidentiality of such information so that our firm may represent another client in such other matter.]

*[If you would like this client to consent to the firm's future use of confidentiality screens to protect confidential information, include the last sentence. Note that ultimately, the appropriateness of a confidentiality screen will always turn on the particular facts. If you are not requesting that consent in advance, delete the last sentence.]*

We are relying on the consents described above in agreeing to represent you in this matter and we will not be seeking any further consent from you or consulting with you before advising, acting for or representing another client with interests adverse to yours. We therefore recommend that you seek advice from independent legal counsel (*which may include your in-house counsel*) if you have any questions concerning the implications of providing this consent.

**7. Joint Representation** *[Delete this paragraph if you are acting only for one client in this matter or transaction]*

*[Consider whether these are appropriate circumstances for a joint retainer under the Rules. For example, it is permissible (with client consent) to act for multiple parties on the same side of a transaction but a lawyer must not advise them on any contentious issues or act on more than one side of a dispute. It is important that your joint clients understand that there can be “no secrets” as between them. Note that this paragraph may not reflect the rules relating to joint representation in Alberta or the required form in British Columbia.]*

- (a) We have been asked by each of you to jointly represent you in this matter. We understand from you that there are currently no contentious issues between you. However, because of the potential for conflict that arises whenever we are representing more than one client in the same matter in which each client has separate and potentially conflicting interests, we can only accept such an engagement if (i) we believe that we can provide competent and diligent representation to each client, and (ii) we have the informed consent of each client to the terms of the joint retainer as they relate to conflicts and confidentiality.

*[Ensure that the informed consent is being given independently by each client and not by a person who is subject to a conflict of interest.]*

- (b) We believe that we will be able to provide competent and diligent representation to each of you in a joint retainer because

*[List the reasons why you believe a joint retainer is appropriate. Include any assumptions you are making about the potential for conflict, the sophistication of the parties, limitations on the engagement, the representation of third party interests (such as minority shareholders) and any other considerations that might be relevant, such as information the client has given you and on which you are relying to satisfy yourself as to the appropriateness of the joint representation.]*

- (c) Because we are jointly representing each of you under this engagement, under our professional and ethical obligations:
  - (i) No information received by us from either [any] of you in connection with this matter can be treated as confidential insofar as each other is concerned.

- (ii) If a conflict develops between *[among]* you that cannot be resolved, **[include one of the following options:]** we will be unable to act for all of you and may be required to withdraw completely.

*[or]*

you have agreed that we may continue to act for *[•]*, including against *[•]* (which will seek other counsel to represent *[it/them]*). *[•]* recognizes that we are permitted to continue to use all information obtained from *[it/them]*. *[•]* *[agrees/agree]* that *[it/they]* will not assert that our prior representation of *[it/them]* prevents us from acting for *[favoured client]*.

- (iii) **[In appropriate circumstances, you may wish to include the following.]**  
*[[•] acknowledge that our firm has a long-standing and continuing relationship with [•].]*
- (d) We recommend that you take the opportunity to consult with independent legal counsel *[which may include your in-house counsel]* regarding the terms of this joint representation.

## 8. Terms

The attached Schedule sets out the financial terms of our engagement on this matter including, where appropriate, an identification of the personnel who will be working on the matter and their standard rates.

## 9. Termination

- (a) You may terminate your engagement of us for any reason prior to the completion of this engagement by giving us written notice to that effect. On such termination, all unpaid legal fees and disbursements will become due and payable. Subject to our professional and ethical obligations, we may terminate our legal representation of you prior to the completion of this engagement for any reason including as a result of conflicts of interest that arise or unpaid legal fees or disbursements.
- (b) Unless our engagement has been previously terminated, our representation of you will cease upon receipt by you of our final account for services rendered. If, upon termination or completion of this engagement, you wish to have any documentation returned to you, please advise us. Otherwise, any documentation that you have

*(Continued)*

provided to us and the work product completed for you will be dealt with in accordance with our records retention policies and practices. Please note that our records retention policies and practices may not be synchronized with yours. If you have any concerns about what we retain in our records or dispose of, you must alert us to your concern. Absent written agreement with you to the contrary, we are free to retain or destroy the records we possess with respect to this engagement as we determine to be appropriate.

The fact that we may subsequently send you information on legal developments without charge or that we may include you in general mailings will not change the fact that our engagement has been terminated.

#### 10. Electronic Communications

During the course of our engagement, we may exchange electronic versions of documents and e-mails with you using commercially available software. Unfortunately, the available technology is vulnerable to attack by viruses and other destructive electronic programs. As a result, while we have sought to take countermeasures, our system may occasionally reject a communication you send to us, or we may send you something that is rejected by your system. Accordingly, we cannot guarantee that all communications and documents will always be received, or that such communications and documents will always be virus free, and we make no warranty with respect to any electronic communications between us. In addition, we make no warranty with respect to the security of any electronic communication between us and you consent to our exchange of electronic communications, including confidential documents, unencrypted.

#### 11. Privacy

In the course of acting for you, you may provide to us (and we may collect) personal information that is subject to applicable privacy protection laws. On your behalf, we will collect, use or disclose that personal information for the sole purpose of providing our services to you [*all in accordance with our Privacy Policy*].

#### 12. Governing Law

Our engagement with you is governed by the laws of the province of [•] and the federal laws of Canada. Any dispute between us will be dealt with exclusively in the courts of that province.

[*The governing law should normally be the law of the place in which the partner in charge of the matter practices.*]

## Schedule of Fees, Costs and Payment Terms

### Staffing

Unless you instruct us otherwise, our staffing of this matter will be to draw on the necessary resources of the firm in order to handle this matter properly. If it is appropriate to do so, we will involve different lawyers, articling students or legal assistants to deal with different aspects of the matter.

Our legal assistants include law clerks, law students, research librarians and technical specialists.

*[The person(s) primarily responsible for handling this matter and reporting to you is/are: [•].]*

### Legal Fees

#### [Option 1: hourly-based retainer]

Our fees are based on our assessment of the reasonable value of our services. To assist us in determining that value, we assign hourly billing rates to each of our lawyers and legal assistants, and record the time spent and services rendered by them on the matter. Currently, the hourly billing rates for the lawyer[s] who will be involved in this matter *[is/are]*:

- \$ [•] per hour
- \$ [•] per hour

It may be necessary to involve other lawyers, articling students and legal assistants to work on this matter, in which case their time will also be recorded and billed at their current hourly rates.

Our rates may change to reflect increases in our costs, the increased experience and abilities of our lawyers and legal assistants and other factors. If our rates change before this matter has been completed, the new rates will apply to the balance of the engagement.

[We would be pleased to provide an estimate of legal fees and costs and expenses that we anticipate will be incurred, and to provide updated estimates as the matter progresses. Because of the inherent difficulty of predicting the amount of time a particular matter will require and the course the engagement will take, the estimate will be an approximation only. Our actual fees and costs and expenses may vary, possibly significantly, from the estimate. Estimates are based on the circumstances as we understand them at the time and on assumptions about events that will affect the scope and nature of our work.]

*(Continued)*

**[Option 2: fixed fee retainer]**

Given the nature of this engagement, we agree that our fee, *[excluding/including]* costs and expenses, will be \$ [•] assuming the following:

[•],

[•], and

[•].

We will revisit this fee if these assumptions prove incorrect, or in the unlikely event that we can complete the matter without having to perform all of the work assumed to be involved.

**Costs and Expenses**

Our legal fees do not include costs and expenses that we incur in connection with this matter. These costs and expenses will be billed in addition to our fees for legal services. They typically include long distance telephone charges, messenger and express delivery charges, postage and courier charges, computer research charges, word-processing charges, printing and reproduction costs, overtime costs for administrative staff, facsimile transmission costs, travel expenses, filing charges, *[court reporter fees for examinations and transcripts, witness fees, fees for service of legal process]* and other costs and expenses.

Where we obtain these services directly from outside suppliers, we bill you the amount billed to us. Where the amounts charged for these services are significant, we may forward the invoices from these outside suppliers directly to you, in which case, you will be responsible to pay the invoices, in accordance with their terms, directly to the outside supplier. Certain costs and expenses are incurred in-house, and are billed at an amount intended to cover our direct costs and associated overhead.

[It may be necessary for us to engage outside experts, *[such as accountants, economists, appraisers or investigators]* to assist in this matter. We will consult with you before retaining any experts.] [It may *[also]* be necessary for us to retain lawyers and others as agents in other jurisdictions. Fees for *[outside experts]* *[and]* *[agents in other jurisdictions]* are not included in our legal fees. You will be responsible for payment of all fees and costs and expenses of all *[experts]* *[and]* *[agents in other jurisdictions]* retained on your matter. Ordinarily, you will be asked to pay the invoices, in accordance with their terms, directly to these parties.]

## Payment

Our statements of account for fees and costs and expenses will be sent to you monthly [*and at the closing of the file*] and are payable [*on receipt/at closing*]. Interest is charged at the prejudgment rate of interest on amounts outstanding greater than 30 days. [*Each statement will provide a detailed summary of the services provided.*] [*You will appreciate that our continued work on this matter is contingent on the timely payment of our statements of account [and the honouring of the financial retainer arrangement discussed below].*]

## Financial Retainer

For us to accept this matter, we ask that you provide us with an advance retainer payment on account of fees, costs and expenses in the amount of \$ [●]. [This retainer will be held in trust and credited against the final statement of account—but not against any interim statements of account—and any amount remaining after final payment will be returned.] [This retainer will be held in trust. We will render our monthly statements of account against this retainer, on the basis that you will refresh the retainer to this level on receipt of each statement of account.] [We may request an increase in the amount of the retainer before any period of significant activity.]

[*In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.*]

Please confirm the terms of the Retainer by signing this letter and returning a copy to my attention.

Yours truly,

[Signature]

We hereby acknowledge and agree to the terms of the Retainer, as set forth above.

By:  
Name:  
Title:

## Model Engagement Letter (Short) [Model Legal Services Agreement]

**Please make changes to this sample to suit the circumstances of your client and your firm. It is a model for you to adapt.**

[Firm letterhead]

### **Privileged and Confidential**

[date]

[name of client, address]

This is a legal services agreement concerning [briefly describe client matter].

Our file number: [#]

Dear [name of client]:

Thank you for choosing our firm to work for you on [specify legal matter that is the subject of the retainer]. As we discussed, you are retaining us to [identify scope of work being undertaken on behalf of client].

The steps involved include [consider listing all the usual steps in this type of legal work so that the client has a full understanding of everything involved].

[With a limited scope retainer, and as appropriate otherwise, specify the work that you will not be undertaking under the terms of this mandate – You are not engaging us to ...]

### **Communications**

We will keep you informed about developments on your file. There may, however, be times when we are waiting for actions or information from others and you will not hear from us. Please remember that part of the costs of our legal services for you is the time we spend replying to your phone calls and e-mail messages. You will save money by limiting these contacts to important and urgent matters.

[My assistant/clerk X] may be able to answer many of your questions. You can reach [X] at [#], e-mail]. If you need to reach me urgently, let [X] know. I will reply as promptly as I am able.



### Confidentiality

The information you give to us and the advice we give to you is confidential. The law protects communications between lawyers and clients to make sure that clients are able to talk frankly and freely with their lawyers and get the best advice based on all the facts. We will not disclose your confidential information unless we are required to do so by law or lawyers' professional rules of conduct.

To protect your interests, we advise you to keep our correspondence, including e-mails, in a secure location. You can lose the protected confidential status of our communications to you if you distribute them to other people.

### Fees and expenses

I will be the lawyer responsible for your file. My hourly rate is [\$ #]. The hourly rate for work done by X [paralegals, support staff, senior partner, etc.] is [\$ #]. Hourly rates are reviewed annually and may change during the period we are acting for you. If that is the case, changes to hourly rates will be noted in our [monthly, quarterly] bill to you.<sup>350</sup>

In addition to legal fees, you will have to pay the expenses (disbursements) related to our work for you. These disbursements will include [court filing fee charges, document registration fees, photocopies, courier charges, etc.] We will provide you with a list of these disbursements in our [monthly, quarterly, final] bill to you.

[The cost of our work for you is \$ X.] [or] [The cost of our work for you will range between \$ X and \$ Y. The final amount will depend on [the legal issues involved; the response received from X, at what stage this matter is settled, etc.].

**Before we begin work, we will need to receive a retainer of [\$ #] from you.** We will deposit this amount in our trust account and will use it to pay the fees and disbursements on your file. We may ask you to add to this retainer from time to time.

We will let you know promptly should we see that our estimate of the costs of our work for you is too low and will ask you for your instructions about how you want to proceed.

If our total fees and disbursements for you are less than the amount you have paid us as a retainer, we will return the remaining money to you.

*(Continued)*

<sup>350</sup> In some Canadian jurisdictions, changes in hourly rates based on an annual review by the firm must be communicated to the client.

### Other clients

As we discussed, our firm may work for other clients who are [your business competitors, taking a different legal position from yours on a similar matter, have an interest that is similar to yours]. You understand that we are able to work for these clients, too, unless their interests are directly in conflict with your interests in the subject matter of this legal services agreement. At this time, we have checked our files and, to the best of our knowledge, we do not have another client whose interests are in conflict with your interests as we understand them today.

We will not take on new work for a client who has an interest that is in conflict with your interests unless you agree to allow us to do so.

### End of our work for you

This legal services agreement ends when the work you asked us to do, as set out at the start of this letter, has been completed, or you instruct us to stop working on it. You must pay for all work done for you up until that time. We may also end the agreement as allowed by lawyers' professional rules of conduct.

After the end of our work for you, you will no longer be considered our client and we will be able to take on work for other clients who may have interests that are in conflict with yours.

We always have an obligation to protect your confidential information, even when you are no longer our client.

### Joint retainers

*[in situations in which you are representing two or more clients with a shared interest –*

You have asked me to represent you [both] [or] [all] because you have the same interest and you feel it is desirable to work together on this matter. I am only able to take on this joint retainer when I believe that I can provide you with competent and diligent representation and when you have consented to this arrangement with an understanding of the following limitations.

First, I am not allowed to keep information that I receive from one of you confidential from the [other] [or] [others]. I am representing you jointly and have a duty of undivided loyalty to [both] [or] [all] of you.

Secondly, there is a possibility that as my work for you goes forward something will happen and you will develop separate and conflicting interests. In that case, choose one of these options as appropriate

- I will no longer be able to represent you and you will [both] or [all] have to find another lawyer.
- I will continue to represent X as we have agreed and [name all the other joint clients] will have

to find another [lawyer] or [lawyers].

I understand that you [both] [or] [all] received independent legal advice before agreeing to this joint retainer.

I confirm that I believe that I am able to provide you [both] [or] [all] with competent and diligent representation.

You have directed me to take instructions from [X] on your behalf and I will continue to do so until [both] [or] [all of you] instruct me differently. ]

### **Our legal relationship**

The legal obligations we outlined in this letter are our duties to you and not to [other family members, related corporations]. [Include if corporation, or family, or multiple clients – With respect to this file, we will only take our instructions from you unless you tell us in writing to take instructions from someone else.]

### **Language of retainer letter**

In Quebec only, as required by The Charter of the French language: [This legal services agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

### **Next steps**

To confirm that you want me to go ahead to act for you as set out in this letter, please sign below and return it to me along with the retainer of [\$ #]. I have included a second copy of this letter for your files.

I would be pleased to answer any questions you may have.

I look forward to working for you on this matter.

Sincerely,

[lawyer's signature]

\_\_\_\_\_  
[client's name], please sign here

\_\_\_\_\_  
Date

## Elements to Include in a Legal Services Agreement/Letter

*This backgrounder identifies the key elements to include in a legal services agreement letter, and includes brief explanatory information. We use the term “legal services agreement” because it is clear language clients can readily understand.*

*The model legal services agreement is suggested for legal matters that are neither overly complex nor expected to be lengthy.*

*You may wish to use this outline to draft your own legal services agreement or you may prefer to adapt the sample legal services agreement letter.*

### **Privileged and Confidential**

- Protect client interests. The legal services agreement includes personal client information including the reasons for seeking your services. It should be labeled to protect client confidentiality and as a reminder to the client of the special nature of the lawyer/client relationship.

### **Client**

- Identify the client by name. This is especially important when another party is paying your legal fees, when you are representing multiple people or entities, or when you are interacting with, but not representing, an employee or other client representative. You should specify that your representation of the client does not extend to related persons such as shareholders, partners, or other family members. Clarifying with whom you have a lawyer/client relationship is key to protecting you from conflict of interest disputes, as you cannot assess potential conflict situations without knowing the identity of the client to whom you owe a duty.

### **Scope of the retainer**

- Detail the client’s instructions and the scope of the work that you will be undertaking. Include an identifiable end point to the retainer. Consider including a breakdown of the steps that you will be taking to give your client a better understanding of the work involved. It is also important to identify what you will *not* be doing, especially when you have a limited scope retainer. A clear statement of your mandate helps to manage client expectations, minimizes the possibilities of misunderstandings, and limits conflict situations.

### **Confidentiality**

- Define your legal responsibility to maintain client confidentiality, except when required by law or professional and ethical obligations to do otherwise. Let your client know that their actions can destroy the confidential nature of your communications and that they should protect your advice, letters, e-mails, etc. by keeping them private and secure.

**Legal fees**

- Set out your flat fee. Or, your hourly rate along with the hourly rate of other firm members who may work on the file and the estimated cost range of your work (minimum and maximum expected fees). Explain your billing practice, for example, 5 minute billing increments.
- Explain what might affect the fees, for example, the stage at which the matter is settled, the complexity of legal issues, increases in fees to reflect an annual fee review, etc. Clarity now avoids disputes about money later.

**Disbursements (Costs and expenses)**

- Describe the type of disbursements that are likely to be made on behalf of the client, for example, document registration, court filing fees, photocopy charges, courier services. Make it clear that these costs are in addition to your fees so that there are no misunderstandings.

**Retainer required**

- Ask the client to pay a set retainer amount and explain that payment is required before you begin work. Clarify that the retainer is held in trust and that it is used to cover off disbursements and fees. When clients understand that a retainer is an advance on your services it helps them to understand the professional and business nature of a lawyer/client relationship.

**Billing arrangements**

- Describe your billing approach (for example, monthly, quarterly, at certain stages) and the interest rate you charge on late payments.

**Communications**

- Tell the client when they can expect to hear from you, your preferred method of communication, and how they may get in touch with you. Provide contact information for key staff in your office. You may want to encourage contact with your support staff as a better, less costly option for the client. You can use this opportunity to manage client expectations concerning your availability and the timeframes in which you will likely be able to answer their phone calls and e-mails.

**Representation of other clients**

- Clarify your duty of loyalty to the client and your obligation to avoid conflict of interests.
- Note that during your retainer with the client your firm may not represent other clients whose interests are in direct conflict with this client's interests unless the client consents. You could note your representation of a business competitor of the client or another family member is not necessarily a conflict of interest and that you may represent someone else and make arguments for that client that are opposite to the ones you are making for this client.

- Note that after the work agreed to in legal services agreement retainer has been completed, your firm may represent other clients with conflicting interests but that your obligation to protect your client's confidential information continues forever.
- For more on conflicts of interest and other helpful precedent documents and checklists, see the Conflicts of Interest Final Report, Recommendations and Toolkit [ [www.cba.org/conflicts](http://www.cba.org/conflicts) ]

### **Joint retainers**

- Explain that you can only represent two or more clients on the same matter when (1) you believe you will still be able to provide these clients with competent and diligent representation, and (2) the clients have all consented to the joint retainer, understanding that they might develop separate and conflicting interests and that if that happens your legal representation will have to change.
- Explain that amongst the joint clients you may not keep information from one client confidential from the other client(s).
- Set out what will happen if a conflict among the clients arises. For example, you will no longer be able to represent any of them. Or, one of them will remain your client and the other(s) will have to find another lawyer.
- Advise them to get independent legal advice before they agree to a joint retainer. See the <ILA Checklist> in CBA's Conflicts Toolkit.

### **End of work**

- Define the terminating event for the legal services agreement. For example, the client notifies you in writing of the decision to end the retainer; the completion of the mandate; the sending of the final bill. (Note that you may also have addressed this in the "Scope of the retainer" section.)
- Make sure that the agreement clarifies that further communication from your office about legal developments, for example in a client newsletter, or an invitation to firm events is not a continuation of the lawyer/client relationship. When the end of the lawyer/client relationship is clear, it narrows the possibility of conflict of interest situations arising later.

### **Instructing client**

- Identify the person from whom you will take instructions about the matter covered by the agreement. Clarify that you will not take instructions from, for example, other family members, related corporations, partners, etc.

**Language of agreement**

- Include the required clause concerning the language of the agreement if you are practicing in Québec. “This legal services agreement has been drafted in English at the express request of the parties. Cette lettre d’entente a été rédigée en anglais à la demande expresse des parties.”

**Signatures**

- Make sure the client signs the legal services agreement to confirm the terms of your lawyer/client relationship as set out in the agreement.

## Model “I am not your lawyer” Letter

*On occasion you will meet with people who are connected with a matter but not otherwise your client. For example, where you have met with several people during the creation of a business and will end up acting for the business but not for one or more of the individuals. Or, where you meet with the children of an elderly couple in the course of doing estate planning work. In these cases an “I am not your lawyer” letter can serve to make it crystal clear for which individuals you are and are not acting.*

*[Firm letterhead]*

*[Delivery method]*

*[Date]*

*[Non-client address]*

Dear sir/madam:

Re: *[Subject]*

We are writing further to our meeting on *[insert date]*. We want to confirm that we will be representing *[Name the party or parties the firm will represent]* in connection with *[Provide details regarding the nature of the firm’s mandate or the transaction]*.

We will not, however, be representing you personally. Although we understand your personal involvement in this matter and anticipate having much contact with you throughout our mandate, please understand that you, personally, are not our client. For this reason, we strongly recommend that you consult with your own lawyer regarding issues which have an impact on your personal interests in this matter.

We further confirm that we have not received any confidential information regarding your interests in the matter. **[Where communications with the non-client involved document or property exchange:** We return herewith those documents we reviewed regarding this matter and confirm that we are not in possession of any documents or property belonging to *[non-client]*]



*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d’entente a été rédigée en anglais à la demande expresse des parties.]*

Please confirm your receipt of this letter by signing and returning a copy to my attention.

Thank you very much, and we look forward to working with you.

Yours truly,

*[Lawyer signature]*

I, \_\_\_\_\_ hereby acknowledge receipt of the above letter and my agreement with all that is stated in it.

*[Signature]*

*[Date]*

Source of document: Adapted by the Task Force from portions of a precedent letter by William Freivogel, an American expert on conflicts matters and precedent from the Law Society of British Columbia website.

## Guidelines for Multiple Representations

Multiple client representation can involve interests which are either divergent from the outset or will become so at some stage. Whether or not the proceeding or matter is contentious, the fact that the interests are divergent means that you will not be able to commit your loyalty and judgment in favour of each of the interests as is required of you. The reality is that it may be difficult to show that each client received the best possible advice that he or she would have received if the lawyer was acting for that party alone and did not have any responsibility to the other client or clients with the divergent interest. In the end, one or more of the clients may complain.

Therefore, you should not act! If in doubt, consult with a colleague, your firm management or conflicts person/committee, outside counsel, or your Law Society's practice advice hotline.

Questions to help identify a multiple interest conflict:

- What are all of the interests that must be considered during the representation?
- Is there anyone else who has anything to do with the subject matter of the representation?  
If so, what is his/her interest?
- Is more than one person relying on your advice? If so, for what advice?
- If someone attends with a relative or friend, does the relative or friend believe that you are representing his/her interests as well?
- Is someone other than the person affected by the subject matter of the representation paying your fees?
- Where people are contributing to create a business, are their contributions different? Are their rights and obligations different?
- Where people have a joint interest, are their bargaining positions unequal?
- To maximize the interest of one of the persons involved, will the interests of another person be compromised or negatively affected?
- Will you have to keep secret any information from one of the participants that is material to your representation of the other(s)?
- Is there real potential for the parties to have a falling out in the future?

Examples of multiple interest situations to avoid:

- Interests between spouses regarding:
  - family law matters e.g. marriage contracts, separation agreements, divorce, custody, property disputes, assets and obligations
  - financial obligations e.g. loan or line of credit guarantees, mortgage for other than a joint benefit
  - wills and estate planning matters e.g. imbalance in asset holdings or both are very wealthy or previous marriage and family relationships.
- Interests among family members regarding:
  - financial obligations e.g. loans, guarantees, security interests
  - motor vehicle accidents e.g. involving a combination of negligent driver, owner and passenger
  - estate and administrator
  - guardian and ward
  - trustee and beneficiary
  - shareholders of a closely held company
  - partners in a partnership.
- Commercial interests regarding:
  - trustee and beneficiary
  - landlord and tenant
  - partners in a partnership
  - the partnership and one or more partners
  - general partner and limited partner
  - securities issuer and underwriter
  - debtor and creditor e.g. mortgagor/mortgagee; assignor/assignee
  - buyer and seller
  - parties attempting to collect from one fund
  - shareholders of a closely held corporation
  - the corporation and one or more individuals with an interest in the corporation
  - individuals involved in a joint venture
  - competitors

## Checklist for Client Waiver of Conflict

### The need for informed consent

To elicit an informed consent to waive a conflict of interest, you are obliged to explain to the client, in plain language, the circumstances of the conflict. The explanation should include the following:

- ☐ a description of the subject matter of the service to be performed
- ☐ the nature of the conflict
- ☐ the factors that create the conflict
- ☐ the clients or other parties affected by the conflict
- ☐ whom you will represent and not represent
- ☐ the implications of the representation on each of the clients
- ☐ the reasons for proceeding with the representation notwithstanding the conflict
- ☐ the things you will do and not do
- ☐ the potential, if any, for the interests to diverge in the future
- ☐ if a confidentiality screen is used, explain the intended process and how it is intended to protect the confidential information.

### Document the consent in writing

The consent should take the form of a clearly worded letter and should include the disclosure suggested above.

### The letter should also include the following:

- ☐ an acknowledgment by each client that even though the representation may be potentially adverse, they are prepared to proceed with the representation;
- ☐ an outline of the process to be followed if the interests cannot be represented together in the future. Include whether your representation will continue for at least one of the parties in the future as well as your entitlement to retain fees and provision for the additional costs involved in the event that one of the clients has to seek alternative representation;
- ☐ a statement that the clients have been asked to obtain independent legal advice with respect to the waiver. If obtained, include a copy of the certificate; if not obtained, reference the client's election to proceed without independent legal advice.

### Maintain file copies of the consent

Copies of the signed consent to waive should be kept by the person in the firm responsible for monitoring conflicts and in the file.

## Model Letter Confirming Consent of Clients to Proceed Despite Possible Conflict

*Where there is a potential conflict between two or more clients, this letter, jointly addressed to them, confirms their consent for the law firm to act.*

[Date]

[Name and address of ABC]

Attention: [Name and Title]

[Name and address of XYZ]

Attention: [Name and title]

**Re:** [Subject]

[Salutation]:

This letter confirms our recent [add telephone conversation or e-mail exchange, if and as appropriate] when we advised you that [firm or we] have been asked to represent [ABC Inc.] and/or related entities [ABC] in connection with [insert description of ABC mandate] (the “Subject Matter”). We have advised [ABC] that our firm [Select one of: has acted in the past, or currently acts] and may in the future act for [XYZ Ltd.] and/or related entities [XYZ], and that as a result, various Firm lawyers may have acquired confidential information regarding [XYZ].

[Firm] has not, and will not be, representing [XYZ] in connection with Subject Matter [**and, where applicable, add:** and, to our knowledge, we have no confidential information from [XYZ] that is relevant to the Subject Matter.] Having said that, in acting for [ABC] in the Subject Matter, we may be required to act adverse to the interests of [XYZ]. That is why we sought your consent for us to act in connection with the Subject Matter.

We confirm that each of [ABC] and [XYZ] has consented to our firm acting for the other, and in particular, has waived any conflict of interest that could result from our firm acting as counsel to [ABC] in the Subject Matter.

(Continued)

You acknowledge and agree that all confidential information and any documents that either [ABC] or [XYZ] has provided, or may provide, to our firm relating to the Subject Matter will be treated by us as both confidential and privileged insofar as the other client is concerned. For greater certainty, any information which we may have as a result of our firm's representation of [XYZ] or [ABC] will not be disclosed to the other client or its representatives without prior authorization.

[ABC] and [XYZ] each acknowledges and confirms that our firm reserves the right to decline to continue to act for one or both of you if litigation or any other irresolvable contentious issues arise between you. Further, you each agree that if our firm exercises its right to decline to continue to act for one of you, the client for whom we have refused to continue to act will not challenge our firm's ability to continue to represent the other.

We ask that you kindly sign and return the attached duplicate copy of this letter. By doing so, you confirm your agreement of the terms set out above, and waive any claim that you might have against our firm relating to the conflict or potential conflict of interest that we have disclosed. You each also confirm that you have been advised by us to obtain independent legal advice before signing this letter, and have had a reasonable opportunity to do so.

This letter may be executed by facsimile and in counterparts, each of which so executed shall be deemed to be an original and all such counterparts together shall constitute one and the same letter.

*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]*

Yours very truly,

[Firm]

**Acknowledged and Agreed:**

[Location], [Date]

**[ABC INC.]**

**[XYZ LTD.]**

Per: \_\_\_\_\_  
Authorized Representative

Per: \_\_\_\_\_  
Authorized Representative

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

## Guidelines for Giving Independent Legal Advice

A person seeking independent legal advice is as much your client as any other. Resist the temptation to rush or take shortcuts. A lower standard of service is not warranted just because your meeting is brief and you may not see the client again. Remember that a modest \$150 independent legal advice (ILA) consultation can leave you exposed to a significant malpractice claim.

Giving independent legal advice is never routine, not even if the person seeking advice has already made a decision and just wants it rubber stamped. Your consultation may be the client's only opportunity to consider objectively a transaction that exposes the client to significant liability or prejudice while primarily benefiting some other party. It is essential that you diligently interview the client, gather information, analyze the issues, and formulate your advice.

To ensure that the client receives adequate ILA, and that your advice is clearly understood and documented, follow these steps:

1. Give independent legal advice only if you are competent in the area of law in question.
2. Check the identification of the person for whom you are giving independent advice.
3. If the client needs an interpreter, have a neutral party interpret rather than a member of the family.
4. Gather enough information about the circumstances surrounding the transaction to be able to explain them to your client and predict problems. In particular, gather information on the client's age and level of experience, the client's motivation, the relationship of the parties, and their relative bargaining power. Find out enough about the client's financial situation to know the financial impact of the transaction.
5. Ensure that your client understands not only the nature and effect of the document, but also the client's underlying rights and entitlements.
6. Rather than ask clients if they understand the document in question, have them explain in their own words their understanding of the transaction.
7. Ensure clients are exercising their own freewill. Be especially diligent if a guarantor is a relative of the borrower, subservient to the borrower, or an unsophisticated party.
8. Be sure the document is complete in all respects before you or the client sign.

## Independent Legal Advice Checklist – Generic

Record the following information:

- Date, start time and finish time
- Client's name
- Client's address
- Telephone
- Client ID checked
- Referred by
- Other parties to the agreement, transaction or course of action
- Background facts and circumstances and why independent legal advice is necessary
- List the documents reviewed:
- List everyone present at the meeting:

If language or understanding the client is an issue:

- Client's spoken languages
- Written languages
- The client has limited facility with English, so I obtained an interpreter whose name was:

### Part A - The Client

- ☐ I reviewed the current state of the client's relevant personal/health/family/business circumstances.
- ☐ I reviewed the background facts and circumstances for the subject agreement, transaction or course of action.
- ☐ The client said that the reason for his or her consent to this agreement, transaction or course of action was [•].
- ☐ I satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents or proceeding with the planned course of action freely and voluntarily.
- ☐ I accepted payment from the client only, and not from anyone adverse in interest to the client.



## Part B - If the independent legal advice relates to a contract or agreement

- ☐ I obtained relevant disclosure (personal, financial, other) from both my client and the other side.
- ☐ I determined that documents were sufficiently well-drafted to accomplish my client's objectives.
- ☐ I ensured that the terms of the agreement were both certain and enforceable.
- ☐ I explained the final nature of the agreement.
- ☐ I reviewed the risks and consequences of the agreement.
- ☐ I carefully explained all the clauses of the agreement and the client indicated that he or she understood same.

## Part C - When client signs or proceeds contrary to advice

- ☐ I advised the client against signing the documents or pursuing the intended course of action, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was [•].
- ☐ The client signed an acknowledgement, in the presence of this witness, that he or she was signing the documents or proceeding against my advice.

## Part D - File management

- ☐ I opened a file.
- ☐ I placed this form, a copy of the document and my notes in the general independent legal advice file.
- ☐ I took notes of my meeting(s) with the client and retained these.
- ☐ I docketed the time spent advising the client.
- ☐ I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account.
- ☐ My advice was verbal only and I sent no reporting letter.

Source of document: Adapted by the CBA Task Force on Conflicts of Interest from an ILA Checklist prepared by Philip Epstein, a specialist in family law practicing in Ontario, for the Lawyers' Professional Indemnity Company

## Independent Legal Advice Checklist – Family Law Matter

Record the following information:

- Date, start time and finish time
- Client's name
- Client's address
- Telephone
- Client's spoken languages
- Written languages
- Family status
- Age
- Referred by
- Reason for independent legal advice
- Client's net worth
- Spouse's net worth
- Security requested by lending institution
- The client has limited facility with English, so I obtained an interpreter whose name was:
- Also present during our meeting was:
- I reviewed the following documents:

Part A - I explained the following to the client

- ☐ The nature and consequences of a mortgage
- ☐ The nature and consequences of a guarantee
- ☐ The effect of power and sale/judicial sale and foreclosure
- ☐ The effect of an action on the covenant and the liability for any insufficiency

- ☐ The consequences of his or her spouse's default
- ☐ The possible consequences of failure to honour the financial obligations (loss of his or her house, business and all other property)
- ☐ The possibility of obtaining security for the financial obligations
- ☐ That an indemnity will be worthless if the spouse declares bankruptcy
- ☐ The risks to the client if there is a breakdown of the marriage

#### Part B - The Client

- ☐ I reviewed the current state of the client's marriage.
- ☐ I reviewed the current state of the client's health.
- ☐ I asked about domestic violence and was told [•].
- ☐ The client said that the reason for his or her consent to this transaction or agreement was [•].
- ☐ I satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents freely and voluntarily.
- ☐ I accepted payment from the client only, and not from anyone adverse in interest to the client.

#### Part C - If the independent legal advice relates to a domestic contract

- ☐ I obtained complete financial disclosure from both my client and the other side.
- ☐ I determined that the document was sufficiently well-drafted to accomplish my client's objectives.
- ☐ I ensured that the terms of the agreement were both certain and enforceable.
- ☐ I ensured that, if the agreement is to be filed against property or as an order of the court, the statutory requirements for filing have been met.
- ☐ I explained the final nature of the agreement.

*(Continued)*

- ☐ I reviewed the risks and consequences of the agreement.
- ☐ I discussed the effect of the agreement upon the client if his or her spouse dies first.
- ☐ I carefully explained all the clauses of the agreement and the client indicated that he or she understood same.

### Part D - When client signs contrary to advice

- ☐ I advised the client against signing the documents, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was [•].
- ☐ The client signed an acknowledgement, in the presence of this witness, that he or she was signing the documents against my advice.

### Part E - File management

- ☐ I opened a file.
- ☐ I placed this form, a copy of the document and my notes in the general independent legal advice file.
- ☐ I took notes of my meeting(s) with the client and retained these.
- ☐ I docketed the time spent advising the client.
- ☐ I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account.
- ☐ My advice was verbal only and I sent no reporting letter.

Source of document: This ILA Checklist was prepared by Philip Epstein, a specialist in family law practicing in Ontario, for the Lawyer's Professional Indemnity Company.

## Hints on the Construction of Confidentiality Screens

As the CBA 1993 Task Force Final Report noted, “a proper screen is not a rote set of procedures and affidavits, but rather a ‘specific set of institutional mechanisms’ designed to prevent inadvertent disclosure of client confidences.” The case law shows that in order to survive judicial scrutiny, a confidentiality screen must be unimpeachable in two respects: “its components” and “its implementation.” Case law in Canada, England and elsewhere suggests many practical hints for sound confidentiality screen construction (*Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 27 O.R. (3d) 181 (Gen. Div.), and *Prince Jefri Bolkiah v. KPMG* [1992] 1 All E.R. 517 (H.L.)), including the following:

1. Do not wait until conflicts arise. To be effective, the confidentiality screen must be part of the firm’s institutional fabric. Management should circulate among all firm members (not just lawyers) a general memorandum reminding firm members of their ethical obligations concerning screens and revise it regularly.
2. When you face a potential conflict, start planning early. Do not wait until work has actually started on a retainer to construct the confidentiality screen. More importantly, do not wait until confidential information has been exchanged. As soon as you have any indication that you might need a screen, examine the structural requirements.
3. Have an independent firm member assess the conflict, and design and construct the confidentiality screen. The independent lawyer, outside the immediate client service team, must be available to monitor the screen’s effectiveness and address any difficulties.
4. Identify the nature, sources and current location of confidential information.
5. Consider obtaining well-worded client consents. Although the law does not clearly state whether such consents are always effective, they do not hurt. Any consent should be clear, freely given and ideally confirmed by independent legal advice.
6. Ensure that the confidentiality screen and other screening mechanisms are universal and respected firm-wide.
7. Segregate all files whose access is limited to authorized team members.
8. Extend file precautions to computer systems. Precautions must cover word processing files, e-mail, spreadsheets, databases and transcript archives. Although a separate computer network offers the best protection, using network security to partition access also provides significant protection.

(Continued)

9. If files must be deleted from computer systems, ensure that back-up copies and archives are also deleted using a file-wiping software program. For fail-safe security, place one back-up on CD-ROM or USB flash drive in escrow, to be released only with the opposing party's authorization.
10. If the confidentiality screen is likely to be challenged, consider selecting an independent systems auditor to ensure that all computer systems comply with the screen. It might be prudent to ensure that the other party finds the auditor acceptable.
11. Ensure that authorized team members do not discuss the case with anyone outside the team.
12. Ensure that no disclosure of confidential client information or the team's working documents is made to anyone outside the confidentiality screen.
13. If the firm has different offices or multiple floors, consider locating the screened members of the firm physically apart from team members.
14. Ensure that all members involved affirm the protective measures under oath by executing appropriate affidavits or acknowledgements.
15. Remind firm members that the firm will enforce compliance through sanctions.
16. Develop procedures to deal with Court-approved practices. For example, in Ontario, the success of Davies Ward Beck in defending their screens before the Ontario Court of Appeal in *Davies, Ward & Beck v. Baker and McKenzie*, (1998), 40 O.R. (3d) 257; (1998), 164 D.L.R. (4<sup>th</sup>) 423; (1998), 111 O.A.C. 352 led many Bay Street firms to construct barriers using their barriers as models or templates.
17. File and retain any undertakings, waivers and affidavits. Fully document the confidentiality screen.
18. Institute a regular mandatory review of existing confidentiality screens and their effectiveness. This might involve an objective audit.
19. Be prepared for the worst – and the unexpected. Experience shows that confidentiality screens will be challenged and may have to be dismantled.

## Model Confidentiality Screen Memorandum to Team Members

### Memorandum

[Date]

To: [Client A Team members]

and

[Client B Team members]

From: [Sender]

Re: [[Client A]] Re: [Describe [Client A's] Matter]  
[File no.]

and

[[Client B]] Re: [Describe [Client B's] Matter]  
[File no.]

The firm has been retained by [Client A] in a matter involving [describe retainer].

The firm also acts for [Client B] in a matter involving [describe retainer and, if not obvious, the nature of the conflict].

In order to protect the interests and with the consent of both clients, a confidentiality screen is hereby established as set out below:

1. Legal and other staff involved in representing [Client A] in connection with [Client A's] Matter will not discuss their representation of [Client A] in respect of [Client A's] Matter with anyone who is not a member of the [Client A] Team including, without limitation, members of the [Client B] Team as hereinafter defined. The following staff (the "[Client A] Team") have been identified as being involved in representing [Client A] in connection with [Client A's] Matter:

[List staff and lawyers involved]

(Continued)

2. Legal and other staff involved in representing [Client B] in connection with the [Client B's] Matter will not discuss their representation of [Client B] in respect of [Client B's] Matter with anyone who is not a member of the [Client B] Team including, without limitation, members of the [Client A] Team. The following staff (the "[Client B] Team") have been identified as being involved in representing [Client B] in connection with [Client B's] Matter:

*[List staff and lawyers involved]*

3. While this screen is in effect, no one may be a member of both the [Client A] Team and the [Client B] Team.

In order to provide complete protection for each client's confidential information, we have decided to erect this information barrier in accordance with the provisions of **[insert as required: the Code of Ethics of Advocates, in the Province of Quebec, and the Rules of Professional Conduct of the respective law societies in the other Provinces or Territories]** and to take all actions necessary to ensure that no confidential information concerning either matter is disclosed, directly or indirectly, to any lawyer, articling student, summer student, paralegal or assistant who is not specifically mentioned in this memorandum.

To implement the measures necessary to ensure that no confidential information concerning either the [Client A] Team or the [Client B] Team files is disclosed either directly or indirectly between the members of the [Client A] Team and the [Client B] Team, the following measures will be taken immediately:

1. There will be no direct or indirect communication about the respective matters between the members of the [Client A] Team and the [Client B] Team, including their respective assistants.
2. Hard copy documents concerning the [Client A] files shall be distributed among the members of the [Client A] Team only.
3. Hard copy documents concerning the [Client B] files shall be distributed among the members of the [Client B] Group only.
4. Those working with the [Client A] Team files shall take appropriate measures to protect the confidentiality of [Client A] documents.
5. Those working with the [Client B] Team files shall take appropriate measures to protect the confidentiality of [Client B] documents.



6. No electronic information concerning either the [Client A] Team files or the [Client B] team files shall be kept on the Firms' computer network unless protected by strong passwords or confidential access codes.
7. All electronic storage media containing information about the [Client A] Team files or the [Client B] Team files shall be kept locked in a secure location.
8. All hard copy documentation concerning the [Client A] Team files and the [Client B] Team files, including memoranda, opinions, exhibits, correspondence, proceedings and other documents shall be placed, when no longer needed, in the shredding containers designed to receive confidential documents identified for destruction, once the Firm's partner in charge of professional liability insurance matters has given approval.
9. All information about the [Client A] Team files and the [Client B] Team files contained on electronic storage media shall be destroyed once the information is no longer needed to provide legal services or to protect the Firm's rights.
10. There shall be no substantive discussion about matters subject to confidentiality screens at any practice group meeting, any committee meeting, any partners meeting or any general retreat meeting.

All members of the [Client A] Team and the [Client B] Team must acknowledge they have read and accepted the measures set out above.

If a person needs to be added to a particular group, the principal lawyer for such group shall advise the [Coordinator of the Conflicts Committee] and obtain clearance from [a member of the Conflicts Committee] before any confidential information is given to the new member of the group and before any work is performed by this new member. The new member must also confirm to the Conflicts Committee that he or she has read this memorandum and accepts the measures set out above.

The procedures outlined above are, of course, in addition to the obligation which all personnel have to maintain the confidentiality of client information for all clients. As far as lawyers are concerned, these procedures are in addition to the professional obligation respecting confidentiality of client information. Any violation of the above policy should be immediately reported to [lawyer].

**Please note that the measures implemented to safeguard the confidentiality of a matter may carry sanctions in the case of a breach. All facts, circumstances or complaints regarding a possible breach of such measures must be reported immediately to [lawyer, conflicts partner/committee or managing partner] who must enquire into the matter and**

**decide on the appropriate sanctions, in accordance with this memorandum. Depending on the seriousness of the breach, the sanctions may include dismissal or, in the case of a partner, expulsion from the partnership in accordance with the Firm's rules on governance.**

*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]*

**Team A**

We are all members of Team A and acknowledge having read and accepted the measures set out above.

*[Members to sign memorandum and return it to the conflicts committee]*

**Team B**

We are all members of Team B and acknowledge having read and accepted the measures set out above.

*[Members to sign memorandum and return it to the conflicts committee]*

## Model Memorandum

### Re: Potential Conflict Arising from Former Mandate

#### Memorandum

[Date]

To: [Persons who will be working on the mandate for [Client X]]

[Persons who worked on the former mandate for [Client Y]]

From: [Sender]

Re: **Confidentiality Screen Procedures: Potential conflict between [Client X] and [Client Y]**

[The firm] has recently accepted a mandate to act on behalf of [Client X] in a matter involving [describe the retainer (the "Matter")].

There exists a potential conflict of interest between [Client X] and [Client Y]. We have acted in the past and may currently be acting for [Client Y], but not in the Matter. The potential conflict arises because we have acted for [Client Y] in respect of [•] and may have received confidential information potentially relevant to the Matter.

Because of this potential conflict, it is appropriate to put into force immediately a confidentiality screen to ensure that the information disclosed to us by [Client Y] and relevant to the Matter remains confidential and is not disclosed to the members of the firm working on the Matter.

Accordingly, the following measures will be taken immediately:

1. Any person who worked for [Client Y] in respect of [•] (as identified in Schedule A and referred to herein as the [Y Team]) must not participate in any manner in the Matter for [Client X].
2. (a) Any person working on the mandate for [Client X] or who has any confidential information relating to [Client X] (as identified in Schedule B and referred to herein as the [X Team]) must not disclose any confidential information with respect to [Client X] to any person not on Schedule B, and in particular shall not disclose any such information to any person on the [Y Team].

(Continued)

(b) Any person on the [Y Team] must not disclose any confidential information with respect to [Client Y] to any person not on Schedule A, and in particular shall not disclose any such information to any person on the [X Team].

3. Any person on the [Y Team] should not share an assistant with any person on the [X Team].

4. (a) All files relating to the mandate for [Client X] shall be labelled “RESTRICTED CLIENT FILE – THE ONLY PERSONS PERMITTED TO HAVE ACCESS TO THIS FILE ARE THOSE PERSONS WORKING ON THIS MATTER FOR [CLIENT X]” and kept in a secured cabinet. No person shall give access to any such file to anyone on the [Y Team].

(b) All files relating to the mandate for [Client Y] in respect of [•] shall be boxed and sent off site or kept in a secured cabinet on site. Each box on file shall be labelled “RESTRICTED CLIENT FILE –THE ONLY PERSONS PERMITTED TO HAVE ACCESS TO THIS FILE ARE THOSE PERSONS WORKING ON THIS MATTER FOR [CLIENT Y].” No person shall give access to any such file to anyone on the [X Team].

5. (a) Access to all documents in the computer system relating to the mandate for [Client X] shall be limited to the author of the document, his or her assistant, and any other person that [the lawyer responsible for the matter] may authorize. No person shall give access to any such document to anyone on the [Y Team].

(b) Access to all documents in the computer system relating to the mandate for [Client Y] in respect of [•] shall be limited to the author of the document, his or her assistant, and any other person that the lawyer responsible for the matter may authorize. No person shall give access to any such document to anyone on the [X Team].

Each person currently on the [X team] or [Y team] is required to sign a copy of this memo and to return it to [person responsible]. If a person needs to be added to either team, [principal lawyer for Client X matter] or [principal lawyer for Client Y matter] shall advise [person responsible] and obtain clearance before any confidential information is given to the new member of the team and before any work is performed by this new member. Furthermore, each person who, in the future, works on the mandate for [Client X] or [Client Y] shall be given a copy of this memo and shall be asked to sign and return it with a copy to [person responsible].

The procedures outlined above are in addition to the obligation on all personnel respecting maintenance of confidentiality of client information for all clients. As far as lawyers are concerned, these procedures are in addition to the professional obligation respecting confidentiality of client information. Any violation of the above policy should be immediately reported to [lawyer].

**Please note that the measures implemented to safeguard the confidentiality of a matter may carry sanctions in the case of a breach. All facts, circumstances or complaints regarding a possible breach of such measures must be reported immediately to [person responsible] who shall enquire into the matter and decide on the appropriate sanctions, in accordance with this memorandum. Depending on the seriousness of the breach, the sanctions may include dismissal or, in the case of a partner, expulsion from the partnership in accordance with the Firm’s rules on governance.**

*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d’entente a été rédigée en anglais à la demande expresse des parties.]*

I acknowledge having read and accepted the measures set out above.

Signed at [place] this [date].

## Model Litigation “Beauty Contest” Pre-meeting Letter

[Firm letterhead]

[Date]

[Potential client address]

**Re: Proposed Action against [party or parties on other side of litigation].**

Dear [Contact of potential client]:

This is to confirm that you will visit this firm on [date]. You wish to hire a law firm to [bring an action against / defend an action by] [party or parties on other side of litigation] with respect to [brief description of matter]. The purpose of your visit will be to evaluate the ability of this firm to handle this matter for you. We understand that you will be interviewing other firms, as well.

On the telephone, we discussed the possibility that if you do not hire us, [party or parties on other side of litigation] or some other party in the action may seek to hire us to represent them in this dispute. We have agreed that at our meeting on [date] you will not reveal any confidential information to us. We have further agreed that nothing that is said or revealed at the meeting will form the basis for an objection on your part to our representing one or more of the other parties in the action.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Thank you very much, and we look forward to our meeting.

Yours very truly,

[Signature]

## Model Pre-RFP Meeting and Review Letter

[Firm letterhead]

[Date]

[Potential client address]

**Re: Meeting to review Request for Proposals for Legal Services**

[briefly describe nature of the mandate]

Dear [Contact of potential client]:

This is to confirm that you will visit this firm on [date] with respect to your Request for Proposals for Legal Services. You wish to hire a law firm to [describe nature of the mandate], and the purpose of your visit will be to review the RFP and discuss the ability of this firm to handle this matter for you. We understand that you will be interviewing other firms, as well.

On the telephone, we discussed the possibility that you may not hire us. We have agreed that you will not reveal any confidential information to us in your Request for Proposal for Legal Services or at our meeting on [date]. We further agreed that nothing said or revealed at the meeting or in your RFP will form the basis for an objection on your part to our firm acting for any other current or future client.

[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]

Thank you very much, and we look forward to our meeting.

Yours very truly,

[Signature]

## Model RFP Response Letter

[Firm letterhead]

[Date]

[Potential client address]

**Re: Request for Proposals for Legal Services** [*describe nature of the mandate*]

Dear [Contact of potential client]:

We are responding to your request for proposals for legal services. We understand that you wish to hire a law firm to [*describe general nature of the mandate or transaction for which the firm is solicited*] (the “Retainer”).

We do not believe that we have any conflicts of interest which would prevent us from accepting the Retainer or fully representing your interests. However, we would like to note that, similar to virtually all other law firms, we often represent [*describe the industry/sector in which the firm is involved with other clients which may have adverse interests to those of the potential client*]. We also act for a variety of clients on matters in which their interests may be adverse to those of [*potential client*]. As best as we can ascertain at this time, we believe that none of these others matters concerns [*potential client*], or any other matter which would be material to the present RFP.

Consistent with our professional obligations, we cannot abandon our representation of such other clients on [*describe matters in which the firm is involved which may conflict with the RFP and the potential client*]. Accordingly, we wish to confirm that the [*current clients which would have adverse interests to those of the potential client*] would be prepared to accept the firm’s proposal to act for [*potential client*] on the understanding that such representation will not interfere with our obligations to these other clients.

We confirm that we do not believe that our firm is in receipt of any confidential information relevant to the matter contemplated by the RFP. In addition, the firm undertakes that it will take all appropriate measures to protect the [*current clients which would have adverse interests to those of the potential client*] confidential information.

We also wish to confirm that we do not believe that the firm’s other mandates in any way affect or diminish our ability to fully represent [*potential client*].



Finally, we wish to confirm that prior to reviewing and responding to your RFP, we discussed the possibility that you may not hire us. We confirm that, as initially agreed, you did not reveal any confidential information to us in your RFP. We further agree that nothing that has been said or revealed in the process of us reviewing and responding to your RFP will form the basis for an objection on your part to our firm acting for any other current or future client.

*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]*

Thank you, and we look forward to working with you, should we be selected.

Yours very truly,

*[Signature]*

bcc: *[Chair, Firm Conflicts Committee]*

## Checklist for Interviewing Transferring Lawyer

Lateral hires of partners or associates occur at firms of every size. In addition to reviewing the transferring lawyer's credentials, firms will need to identify and deal with potential conflicts that may arise with respect to clients at the transferring lawyer's previous firm, and in particular, clients for whom the transferring lawyer worked.

The hiring firm must have sufficient information to complete an internal conflicts check, while at the same time making sure that no confidential client information is disclosed by either the transferring lawyer or the hiring firm.

Take these steps to identify potential conflicts of interest when dealing with a lateral hire:

- Ask for a current curriculum vitae so that you can review the background of the transferring lawyer. You will want to look back at least 5 years, or to the time of articling if this was less than 5 years ago.
- Check with the lawyers in your firm, or search within your conflicts system if it has the data to identify any matters on which the transferring lawyer's previous firm was on the other side.
- Ask the transferring lawyer for list of major clients and the matters he or she worked on (but not any confidential information, including the identity of clients if that is confidential) and have your firm's conflicts person run these names through your firm's conflicts database.
- In an interview (not in writing) ask the transferring lawyer if he or she is aware of any potential conflicts due to work done while at his or her previous firm.
- Ask the transferring lawyer if he or she sat on any boards, and if so, have your firm's conflicts person run this information through your firm's conflicts database (including the name of the entity, the directors and officers).

It is critical that both the firm and the transferring lawyer take an honest and critical look at any potential conflicts situations.

A strong desire to hire a transferring lawyer should not lessen the need to identify and fully assess potential conflicts, and to take appropriate steps to deal with them if necessary. This may include erecting confidentiality screens or seeking client consents. In some cases, it may mean that the transferring lawyer cannot be hired or that the hiring firm may have to send existing clients to another firm.

Resist any temptation to overlook or ignore any real conflicts that arise when a lawyer transfers firms. A failure to deal appropriately with these conflicts only delays the inevitable: in all likelihood the firm will have to refer any clients with a conflict to another firm.

## Model Lateral Hire Memorandum

### Memorandum

[Date]

**To:** All lawyers, articling students, students, paralegals, and law clerks

**c.c.:** [Partner in charge of file]

[Lateral hire]

**From:** [Person responsible for the screen]

**Re:** Confidentiality Screen Procedures Concerning [Lateral Hire and [Client X]]

[Lateral hire], formerly a lawyer with [law firm], will join [the Firm (office location)] on [date]. [Lateral hire's] former firm is acting for [Client Y] in a matter where [The firm] is acting for [Client X].

In light of the fact that [Client X] and [Client Y] have adverse interests, it is appropriate for [the firm] to put into place immediately a confidentiality screen in accordance with the provisions of [insert as required: the Code of Ethics of Advocates, in the Province of Quebec, and the Rules of Professional Conduct of the respective law societies in the Provinces or Territories] to ensure that there is no disclosure by [lateral hire] of any confidential information which [he/she] has and no appearance of any disclosure of confidential information which [he/she] has or may be presumed to have. These procedures will remain in force until the matter involving [Client X] and [Client Y] is finally resolved.

To implement the measures necessary to ensure that [lateral hire] does not disclose confidential information concerning [Client Y], either directly or indirectly, to members of [the firm], the following measures will be taken immediately:

1. [Lateral hire] must not participate in any manner in [the firm's] representation of [Client X].
2. (a) [Lateral hire] must not disclose any confidential information with respect to [Client Y] to any person, and in particular shall not disclose any such information to any person working on the mandate for [Client X]. At present, the following persons are considered to be working on the mandate for [Client X]:

[List persons involved in Client X file]

(Continued)

- (b) *[Lateral hire]* must not discuss the matter involving *[Client X]* and *[Client Y]* or any question of fact or law related directly or indirectly to the matter involving *[Client X]* and *[Client Y]* with or in the presence of any person, and in particular any person working on the mandate for *[Client X]*.
3. The persons working on the mandate for *[Client X]* must not discuss the matter involving *[Client X]* and *[Client Y]* or any question of fact or of law related directly or indirectly to the matter involving *[Client X]* and *[Client Y]* with *[lateral hire]* or in the presence of *[lateral hire]*.
4. *[Lateral hire]* will not share an assistant with anyone working on the mandate for *[Client X]*.
5. All files relating to *[Client X]* in respect of [●] should be labelled “RESTRICTED CLIENT FILE – THE ONLY PERSONS PERMITTED TO HAVE ACCESS TO THIS FILE ARE THOSE PERSONS WORKING ON THIS MATTER” and kept in a secured cabinet. No person shall give access to any such file to *[lateral hire]*.
6. Access to all documents in the firm’s network relating to *[Client X]* in respect to *[describe matter]* shall be limited to the author of the document, his or her assistant, and any other person that the lawyer responsible for the matter may authorize. No person shall give access to any such document to *[lateral hire]*.
7. *[Lateral hire]* must not bring with *[him/her]* to *[the firm]* any file or document relating to *[Client Y]*.
8. All electronic storage media containing information about *[Client X]* or *[Client Y]* shall be kept locked at the desk of an assistant to a group manager.

*[Lateral hire]* and each person currently working on the mandate for *[Client X]* are required to sign a copy of this memo and to return it to *[person responsible]*. If a person needs to be added to a confidentiality screen, *[lateral hire]* or *[principal lawyer for Client X matter]* shall advise *[person responsible]* and obtain clearance from the firm’s conflicts person before any confidential information is given to the new member of the group and before any work is performed by this new member. Furthermore, each person who, in the future, works on the mandate for *[Client X]* shall be given a copy of this memo and shall be asked to sign and return it with a copy to *[person responsible]*.

The procedures outlined above are, of course, in addition to the obligation on all personnel respecting maintenance of confidentiality of client information for all clients. As far as lawyers are concerned, these procedures are in addition to the professional obligation respecting confidentiality of client information. Any violation of the above policy should be immediately reported to *[lawyer]*.

**Please note that the measures implemented to safeguard the confidentiality of a matter may carry sanctions in the case of a breach. All facts, circumstances or complaints regarding a possible breach of such measures must be reported immediately to [person responsible] who must enquire into the matter and decide on the appropriate sanctions, in accordance with this memorandum. Depending on the seriousness of the breach, the sanctions may include dismissal or, in the case of a partner, expulsion from the partnership in accordance with the Firm's rules on governance.**

*[In Quebec only (required by The Charter of the French language): This letter of agreement has been drafted in English at the express request of the parties. Cette lettre d'entente a été rédigée en anglais à la demande expresse des parties.]*

I acknowledge having read and accepted the measures set out above.

Signed at [place] this [date].

## Guidelines to Identify Conflicts Involving Lawyer's Personal Interest

Lawyers who act for clients in any situation where there is a personal interest, financial (other than fees) or otherwise, are in a conflict of interest. The exposure to a malpractice claim is inevitable if the client becomes unhappy about any aspect of the transaction. Even with a written waiver from the client in hand, the burden of proof regarding adequacy of disclosure and demonstrating exercise of good judgment will be most challenging.

Therefore, in situations where there is a real or likely personal conflict of interest, you should not act! If in doubt, consult with a colleague, your firm management or conflicts person/committee, outside counsel or your Law Society's practice advice hotline.

Questions to help you identify whether you have a personal interest conflict:

- What is the client's interest?
- What is your interest?
- Will maximizing your interest negatively affect the client's interest? If so, you should not act.
- Will you always be able to place the interests of your client first? If not, you should not act.
- Is there potential for a falling out between the client and you in connection with the matter? If so, you should not act.

Examples of personal interest situations to avoid at all costs:

- Participating in a business transaction with a client;
- Having a personal or business relationship with another party interested in the representation or transaction;
- Acquiring an ownership or other interest in a matter adverse to a client;
- Purchasing real estate from a client;
- Taking a financial interest in a client matter other than reasonable fees;
- Creating a legal document wherein the lawyer is entitled to a beneficial interest e.g. being a beneficiary under a client's will which you have drafted;
- Having a personal, social or political interest in a client matter; or
- Borrowing money from a client at the same time as providing legal advice and drafting documentation evidencing the loan and security therefrom.

## Serving as a Director of a Client Corporation

Over the last several years there have been increasing concerns about the potential liabilities to partners and firms as a result of lawyers serving as directors and/or officers of corporate clients. Conflict of interest concerns also arise where the lawyer is involved as a director, officer and/or shareholder in a client company. Many firms carry outside director and officer's liability insurance and require an indemnity from the client. However, there may be situations where the insurance will not cover the partner or the firm, and the indemnity will be of little value. Many firms have implemented policies that limit their lawyers from serving as directors or officers for clients, and the trend is that more and more firms are preventing their lawyers from doing so.

There can be situations where there are positive benefits to a firm and/or the community in having its professionals serve as directors or officers. To properly assess and minimize the risk, firms should implement controls to ensure that directorships are taken on only in situations where there is a positive benefit to the firm, and where there are safeguards in place to ensure that exposure to liability is minimized.

The following information can help a firm evaluate risks and benefits of having a lawyer serve as a director or officer of a client corporation:

1. Name of Corporation
2. Jurisdiction of Incorporation
3. Address
4. Principal Contact
5. Office to be held by the firm's lawyer
6. Brief description of business
7. Description of involvement of firm's lawyer
8. Publicly traded, private or not-for-profit
9. Fees billed to company by the firm annually (estimate)
10. Will any benefits or remuneration come from the office other than legal fees?
11. What is the benefit to the firm in holding this position?
12. Attach a copy of the last financial statements received

13. Are annual meetings held or annual resolutions passed in writing?
14. Do we maintain the minute book?
15. If the corporation has employees or an active business, how is it confirmed that there are no arrears in the filing of tax returns or the remittance of required taxes or payroll withholdings?
16. Is the company involved in any environmental issues?
17. What director's and officers liability insurance does the firm have and will it cover the lawyer serving this client?
18. What general or other liability insurance does the client have and is there an indemnity from the client?

The above information should be obtained prior to approving any request to serve as a director or officer, and it should be updated and reviewed annually.



## Ongoing Assessment of Conflicts

Lawyers need to be aware that conflicts can develop during an engagement, and that they need to assess situations for conflicts throughout the representation. Because these conflicts are outside the initial screening process, they often appear unexpectedly. Some, however, are foreseeable at the outset of the retainer.

### Unexpected Conflicts

Subsequent conflicts typically arise unexpectedly. Common triggers are the addition of a new party to a transaction or lawsuit, or a lateral hire who has acted for a party opposed in interest to the current client.

These types of conflicts should be managed in the same way as suggested for initial conflicts.

### Previously Foreseeable Conflicts

In some instances, subsequent conflicts were foreseeable. Typically, this type of conflict was identified prior to the engagement but did not involve a contentious matter; the conflict was managed with documented disclosure to the clients and their written waiver based on informed consent. Later, the conflict materializes and requires further management. The typical situation involves previously aligned interests diverging, such as the individual interests of partners in a partnership.

Depending on just how contentious the matter has become, continued representation of some or all of the clients affected may or may not be possible. The Checklist for Managing a Subsequent and Previously Foreseeable Conflict may be helpful.

## Checklist for Managing a Subsequent and Previously Foreseeable Conflict

The approach suggested for managing conflicts identified before the representation begins is equally appropriate for conflicts which arise unexpectedly and subsequent to the commencement of an engagement. However, when managing a previously foreseeable conflict consider these additional questions:

- Review the disclosure document and written consent which was prepared in light of the acknowledged potential for conflict; it may be that you already determined a plan of action that you will now implement.
- Consider whether the matter has become contentious, making representation impossible at least for some of the parties affected.
- Discuss with all clients and parties affected that the possible conflict previously identified has now materialized; review the nature, extent and implications of this conflict.
- If it is still appropriate to continue the representation, prepare a new consent in writing which outlines your disclosure and have it executed by all affected parties.
- If representation becomes limited to only one or two of the parties, prepare non-representation letters for those who are no longer being represented and direct them to obtain independent representation for the remaining portion of the matter.
- Suggest that the parties obtain independent legal advice with respect to the consent being executed.
- Be alert to future signs that the representation of one or all of the parties is no longer appropriate.
- Re-examine conflicts policies and procedures and incorporate any changes that might have become apparent as being necessary to avoid subsequent conflicts.

## Action Plan to Manage a Conflicts Situation

The failure to identify and manage a conflict when it arises whether initially, prior to the start of the engagement, or subsequently, can result in a conflicts situation that must be addressed. These situations include:

- You find yourself representing more than one interest;
- At least some of the interests have or are about to become adverse and even contentious;
- At least one of the clients' interests is being preferred or is perceived as being preferred by another of the clients.

It can be even more of a problem when one (or more) of the clients is not aware of these circumstances. At this point it is likely too late to manage the conflict through the disclosure and consent approach.

If you find yourself in this situation, your reaction may be to try to fix it yourself, or alternatively, to simply ignore the problem. Stop – doing this will most likely create an even greater problem. Instead, follow these three steps:

- **Recognize it is not too late to react.** Recognize that although adverse effects may already be in play, you may be able to minimize them. The earlier you address the situation, the better.
- **Consult with someone.** Recognize that the independent objectivity of another lawyer is essential to understanding the circumstances you are in and the proper course of action to follow. Review the situation with a colleague, your firm management or conflicts person/committee, outside counsel or your Law Society's practice advice hotline. Carefully listen to, and follow, the advice you receive.
- **Do not continue to act.** Finally, recognize that you cannot continue to act. It is a huge mistake to try to deal with the conflict yourself. No matter how good your intentions or how objective you think you are, you will be challenged by the competing interests inherent in the conflict itself. Once people become adverse in interest, you will very quickly find yourself in a contentious and possibly acrimonious situation.

It is almost a certainty that at least one of the clients will blame his or her loss on your conflict of interest and an alleged failure to safeguard their interest. You should inform all of the affected clients of the conflict, that it may affect your ability to act in their interests, and that they each should seek their own independent counsel. By doing these things, the clients will get the independent advice and direction they need and you have done something to contain the damage.

