

Model Rule on Conflicts Arising as a Result of Transfer Between Law Firms

Definitions

(1) In this Rule:

"client" includes anyone to whom a member owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

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

"law firm" includes one or more members practising:

(a) in a sole proprietorship

(b) in a partnership,

(c) in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners,

(d) as a professional law corporation,

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

(f) in a corporation or other body;

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

"member" means a member of this Society, and includes an articulated law student registered in this Society's pre-call training program.

Application of Rule

(2) This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that:

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

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

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

(3) Subrules (4) to (7) do not apply to a member employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Firm Disqualification

(4) Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client, or (b) the new law firm establishes, in accordance with subrule (8), that:

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

(A) the adequacy of the measures taken under (ii),

(B) the extent of prejudice to any party,

(C) the good faith of the parties,

(D) the availability of alternative suitable counsel, and

(E) issues affecting the national or public interest, and

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

Transferring lawyer disqualification

(5) Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client:

- (a) the member should execute an affidavit or solemn declaration to that effect, and
- (b) the new law firm shall:

- (i) notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

- (ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

(6) A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents:

- (a) participate in any manner in the new law firm's representation of its client in that matter, or
- (b) disclose any confidential information respecting the former client.

(7) No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4) or (5) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of compliance

(8) Anyone who has an interest in, or who represents a party in, a matter referred to in this Rule may apply to the Society or to a court of competent jurisdiction for a determination of any aspect of this Rule.

Due diligence

(9) A member shall exercise due diligence in ensuring that each member and employee of the member's law firm, and each other person whose services the member has retained:

- (a) complies with this Rule, and (b) does not disclose:
 - (i) confidences of clients of the firm, and
 - (ii) confidences of clients of another law firm in which the person has worked.

Commentary

1. Application of this Rule

a. Lawyers and support staff

This Rule is intended to regulate members of the Society and articulated law students who transfer between law firms. It also imposes a general duty on members to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the Rule and with the duty not to disclose:

- confidences of clients of the member's firm, and
- confidences of clients of other law firms in which the person has worked.

b. Government employees and in-house counsel

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

c. Law firms with multiple offices

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

d. Practising in association

The definition of "law firm" includes one or more members practising in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners. This recognizes the risk that lawyers practising in association, like partners in a law firm, will share client confidences while discussing their files with one another.

2. Matters to consider when interviewing a potential transferee

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

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

- i. the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client,
- ii. the interests of these clients in that matter conflict, and
- iii. the transferring member actually possesses relevant information respecting that matter.

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

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

If this element exists, then the transferring member is disqualified unless the former client consents, and the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the public interest.

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

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

3. Matters to consider before hiring a potential transferee

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

a. Where a conflict does exist

If the new law firm concludes that the transferring member does actually possess relevant information respecting a former client which is confidential and which, if disclosed to a member of the new law

firm, may prejudice the former client, then the new law firm will be prohibited, if the transferring member is hired, from continuing to represent its client in the matter unless:

- i. the new law firm obtains the former client's consent to its continued representation of its client in that matter, or
- ii. the new law firm complies with subrule (4)(b), and in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

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

Alternatively, if the new law firm applies under subrule (8) for a determination that it may continue to act, it bears the onus of establishing the matters referred to in subrule (4)(b). Again, this process must be completed before the transferring person is hired.

An application under subrule (8) may be made to the Society or to a court of competent jurisdiction. The Society has developed a procedure for adjudicating disputes under this Rule, which is intended to provide an informal and economical procedure for the speedy disposition of disputes.

The circumstances enumerated in subrule (4)(b)(i) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (B) to (D) are self-explanatory, clause (E) addresses governmental concerns respecting issues of national security, Cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

b. Where no conflict exists

If the new law firm concludes that the transferring member actually possesses relevant information respecting a former client, but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client, then:

- the transferring member should execute an affidavit or solemn declaration to that effect, and
- the new law firm must notify its client and the former client/former law firm "of the relevant circumstances and its intended action under the Rule", and deliver to them a copy of any affidavit or solemn declaration executed by the transferring member.

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

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

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

A transferring member who possesses no such confidential information, by executing an affidavit or solemn declaration and delivering it to the former client, puts the former client on notice. A former client who disputes the allegation of no such confidential information may apply under subrule (8) for a determination of that issue.

c. Where the new law firm is not sure whether a conflict exists

There may be some cases where the new law firm is not sure whether the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member

of the new law firm, may prejudice the former client.

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

4. Reasonable measures to ensure non-disclosure of confidential information

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

- a. where the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client, and
- b. where the new law firm is not sure whether the transferring member actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring member did in fact possess such confidential information.

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

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

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

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client which, if disclosed to a member of the new "law firm", may prejudice the former client, the interests of the new client (ie. Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (E).

Guidelines

1. The screened member should have no involvement in the new law firm's representation of its client.
2. The screened member should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the prior representation with the screened member.
4. The current client matter should be discussed only within the limited group which is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and

support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened member any documents relating to the current representation.

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

8. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.

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

a. that the screened member is now with the new law firm, which represents the current client, and
b. of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened member should not participate in the fees generated by the current client matter.

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

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

END OF RULE