

CONFLICTS OF INTEREST: TRANSFERRING LAWYERS
REVISED RULES 3.4-17 to 3.4-26
ADD RULE 3.3-7

3.3 CONFIDENTIALITY

3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

Commentary

[1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

[3] This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

[4] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[5] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

- (a) limit access to the disclosed information;
- (b) not use the information for any purpose other than detecting and resolving conflicts; and
- (c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

[6] The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

[...]

3.4 CONFLICTS

[...]

Conflicts from Transfer Between Law Firms

Application of Rule

3.4-17 In rules 3.4-17 to **3.4-23**,

“matter” means a case, a transaction, or other client representation, but within such representation does not include offering general “know-how” and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

3.4-18 Rules 3.4-17 to **3.4-23** apply when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or

(b)

(i) the new law firm represents a client in a matter that is the same as or related

to a matter in which a former law firm represents or represented its client (“former client”);

- (ii) the interests of those clients in that matter conflict; and
- (iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

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

[3] Law firms with multiple offices — This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

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

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm has:
 - (i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm;
 - (ii) advised the lawyer's former client that measures have been taken; and
 - (iii) advised the lawyer's former client of the measures taken.

Commentary

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

[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[3] The guidelines that follow 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.

Guidelines: How to Screen/Measures to be taken

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.
2. The screened lawyer should not discuss the current matter or any information relating to

the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.
5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.
6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to Determine If a Conflict Exists Before Hiring a Potential Transferee

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

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

[6] A lawyer’s duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these Rules.

Transferring Lawyer Disqualification

- 3.4-21** Unless the former client consents, a transferring lawyer referred to in rule 3.2-20 must not:
- (a) participate in any manner in the new law firm’s representation of its client in the

matter; or

- (b) disclose any confidential information respecting the former client **except as permitted by rule 3.3-7**.

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.2-20 **except as permitted by rule 3.3-7**.

Lawyer Due-diligence for non-lawyer staff

3.4-23 A lawyer **or a law firm** must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer **or the law firm** has retained:

- (a) complies with rules 3.4-17 to **3.4-23**; and
- (b) does not disclose confidential information:
 - i. of clients of the firm; **or**
 - ii. any other law firm in which the person has worked.

Commentary

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

[2] Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer/law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.

The content of Rules 3.4-24, 3.4-25 and 3.4-26 has either been included within the above rules or deleted.