



## **WEL Partners Conflict Check Information Sheet**

Efforts to avoid conflicts of interest are required by the LAW SOCIETY OF ONTARIO, and constitute an essential aspect of the business of law.

The duty to avoid conflicts extends to past, current, and prospective clients, and is reinforced in the *Model Code of Professional Conduct* (in other words, the Rules of Professional Conduct which lawyers are governed by: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>) as well as, at common law by various Supreme Court of Canada decisions, and specifically, the decision of, *R. v. Neil*,<sup>1</sup> and *Canadian National Railway Co. v. McKercher LLP*.<sup>2</sup>

### **What is a Conflict Check?**

Conflict checks by law firms are conducted in order to determine whether a lawyer has ever represented a party or parties with an interest adverse to that of the potential client who has made the inquiry with the law firm for the purposes and intents of retaining such firm for legal representation.

Conflict checks happen before the law firm receives a detailed summary of the potential client matter.

A robust conflict check helps to protect potential and future clients of the law firm and the law firm itself. In order to prevent legal and financial issues arising out of a conflict of interest, it is important to try to identify and address potential conflicts of interest prior to the creation of the lawyer-client relationship. The potential client therefore **must** inform the law firm of the full names, acronyms and all details of all relevant potential persons/parties with an interest in the matter.

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<sup>1</sup> *R. v. Neil*, [2002] 3 SCR 631, 2002 SCC 70 (CanLII).

<sup>2</sup> *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 SCR 649, 2013 SCC 39 (CanLII).

Conflict checks involve the law firm searching their database of past, present and current clients to identify potential conflicts **based on information given by the potential client.**

The importance of such investigations helps to eliminate consequences that may flow to both the client, and the lawyer, when there is a failure to identify conflicts of interest. Lawyers have a duty of loyalty to their clients and conflicts can impact effective representation of a client.

### **Client & Lawyer Checklist**

The following list outlines **some** information helpful to facilitate the conflict check and inquiry with the law firm being consulted:

#### **Prospective Client:**

- Potential client name(s)
- All other relevant names to the matter whether party, lawyer, mediator, or other
- Any other names relevant to the matter
- Nicknames and acronyms
- Address and jurisdictional information
- Spouse's name
- Spouse's other names
- Spouse's nicknames and acronyms
- Address(es) (if different)
- Opposing party(ies) names
- Associated persons or entities

#### **Probate Matter:**

- Deceased's name (including alternative spelling and other names)
- Spouse/child(ren)/heir(s)/relatives/beneficiaries
- Potential claimants with financial interest, minors, unborn, unascertained, persons under disability
- Estate Representative/estate trustee
- Lawyer for estate representative/estate trustee
- Guardian/Attorney/Substitute Decision Maker – prior to death
- Will Drafting Lawyer(s) if any
- Estate Assets
- Jurisdiction of Residence and Death of Deceased

#### **Corporate and Business Entities:**

- Corporate and Business name(s)
- Any trade or alternative name(s) under which the entity carries on a business
- Name(s) of the parent or controlling shareholder of a corporate client
- Business name(s) of any other relevant affiliated companies

- Names of officers and directors of the corporation, or corporate client, and any subsidiaries and the parent company
- Partners' names of a partnership client

### **What is a Conflict of Interest?**

The *Model Code of Professional Conduct*, explains that a lawyer must not act, or continue to act where a conflict of interest exists, **unless permitted under the code.**<sup>3</sup>

A conflict of interest is a situation that impacts a lawyer's ability to provide a client with undivided loyalty. As a result, a conflict of interest exists when there is a substantial risk that representation of a client would be materially, or adversely effected by the lawyers' duties to another client, a former client, or a third person.<sup>4</sup>

In certain instances, the '**bright line rule**' will apply, which explicitly "**prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent.**"<sup>5</sup>

A client may need Independent Legal Advice ("ILA") in order to provide fully informed consent to a waiver of a conflict.

The *Model Code of Professional Conduct* outlines a lawyer's duty to avoid conflicts of interests and includes the following:

#### **Duty to Avoid Conflicts of Interest:**

A lawyer must not act or continue to act for a client where there is a conflict of interest, **except** as permitted under this Code.<sup>6</sup>

#### **Consent:**

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<sup>3</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (2014), online: <<http://flsc.ca/wp-content/uploads/2014/12/conduct1.pdf>>.

<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Supra* note 3 at rules 3.4-1, 3.4-2. See also *R. v. Neil*, [2002] 3 SCR 631, 2002 SCC 70 (CanLII), *Canadian National Railway Co. v. McKercher LLP*, [2013] 2 SCR 649, 2013 SCC 39 (CanLII).

<sup>6</sup> *Ibid* at rule 3.4-1.

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

- a) **Express Consent:** must be fully informed and voluntary after disclosure.
- b) **Consent:** may be inferred and need not be in writing where all of the following apply:
  - i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
  - ii. the matters are unrelated;
  - iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
  - iv. the client commonly consented to lawyers acting for and against it in unrelated matters.<sup>7</sup>

A lawyer may represent a client where there is a conflict of interest if believing that there will not be a material or adverse effect upon the duty of loyalty to another client, if there is implied, or express consent from all affected clients.<sup>8</sup>

**Conflicts of interest situations may arise or come to light later in a retainer:**

- o Simultaneous representation of clients with opposing interests including joint retainers;
- o Representation of a current client with opposing interests to a former client;
- o A lawyer's self-interest conflicts with the current client's retainer;
- o Confidential information received outside the attorney-client relationship about a party with opposing interests to the attorney's client; and
- o Where a lawyer owes a duty of fidelity to a non-client which is adverse to a client's interest
- o Where information unknown to the retained law firm is not provided

*This information sheet has been prepared by Whaley Estate Litigation Partners and is intended for the purposes of providing guidance only. This information is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*

<sup>7</sup> *Ibid* at rule 3.4-2.

<sup>8</sup> *Ibid*.