



## **Conflicts update: FLSC's Model Code, United States, England and Wales**

This is a brief update on developments with respect to the conflict of interest file nationally and in the United States and England, where amendments to their rules of conduct are also being considered. Both the American Bar Association and the Solicitors Regulation Authority have recently undertaken consultations to find out what the legal profession, clients, and other stakeholders think about proposed amendments to professional conduct rules.

### **Federation of Law Societies of Canada**

On January 19, 2010, the Federation of Law Societies of Canada released its Model Code of Professional Conduct, as approved by the Federation's Council.

[www.flsc.ca/en/pdf/ModelCode.pdf](http://www.flsc.ca/en/pdf/ModelCode.pdf)

The Model Code, which is now being considered by its member law societies across Canada, does not include new rules on conflict of interest or a future harm exception to the rules on confidentiality. These are to come at a later date. The Federation's working group has examined closely the CBA Task Force on Conflicts of Interest's Report.

[www.flsc.ca/en/whatsnew/whatsnew.asp#Model](http://www.flsc.ca/en/whatsnew/whatsnew.asp#Model)

### **The United States**

The American Bar Association Commission on Ethics 20/20 is examining a broad range of regulatory and ethical issues with a view to proposing amendments to the ABA's Model Code. In November, 2009, the Commission published a Preliminary Issues Outline which set out its thinking on its initial agenda of issues. [www.abanet.org/ethics2020/outline.pdf](http://www.abanet.org/ethics2020/outline.pdf)

The nine-page document covers many practice matters, including complex multijurisdictional issues and conflicts rules. The following excerpts concern conflict of interest issues:

#### **"C. Conflicts of Interest**

##### **1. The Current Model Rules**

In view of the trends of substantial growth in law firm size, mergers and consolidations of such firms, and the emergence of many "global" law firms, Model Rule 1.7 (Conflict of Interest—Current Clients) should be re-examined. In many instances, this Rule is more stringent than other countries' conflicts rules. While some caselaw and secondary authority may recognize that it is appropriate to have different standards for sophisticated clients than for clients who rarely use lawyers, the Commission will examine whether and how this can and should be translated into ABA policy.

In the same context of growth and globalization of law firms, the Commission will study the utility and ongoing feasibility of imputed disqualification rules such as Model Rule 1.10.

## **2. Best Practices**

How have multinational firms coped with the issues presented by the current Model Rules and the regulatory disparities among nations in which they practice? For example, what contractual, choice of law, and choice of forum approaches are they using?

## **D. Confidentiality**

### **1. Model Rule 1.6**

U.S. confidentiality rules, based on Model Rule 1.6, generally allow lawyers to disclose confidential information in certain circumstances, both with and without their clients' permission. Model Rule 1.6 differs from rules in other countries where, in some instances, lawyers are forbidden to make disclosures even with client consent. Other countries' rules may require disclosure in circumstances when Model Rule 1.6 requires confidentiality. Other laws, such as European Union privacy and data protection regimes, also have an impact on lawyer confidentiality. How can these differences be addressed for those lawyers or firms that practice across international borders?

Similar variations have from time to time bedeviled wholly U.S. practice where lawyers are admitted, or law firms practice, in multiple states in which the applicable versions of Rule 1.6 impose differing, and sometimes irreconcilable, obligations.

### **Inadvertent Disclosure and Waiver**

In the United States, there are unresolved issues regarding inadvertent disclosure and waiver of privilege.

Given varying rules in other countries, the problems of inadvertent disclosure and waiver of privilege may be exacerbated."

As the ABA's Commission on Ethics 20/20 progresses, we will be monitoring its work to assess whether any useful policy changes might be incorporated into the CBA's work.

## **England and Wales**

The Solicitors Regulation Authority is the independent regulatory body in England and Wales, regulating over 100,000 solicitors. Noting that changes in the law, developments in other jurisdictions, and arguments for change put forward by the City of London Law Society led to a decision to review the conflicts rules, to permit broader conflicts waivers by sophisticated clients. The Authority prepared a consultation paper in 2008 and consulted for a second time to encourage a broader response at the beginning of 2010. Its second paper noted developments in Canadian law. The Authority was looking for comments on changes to two rules in the Solicitors' Code of Conduct 2007:

- relaxing the rule regarding conflicting interests when representing sophisticated clients (Rule 3), and
- relaxing the rule regarding confidential information by recognizing limited circumstances in which representation may occur even though it is not possible to get client consent so long as appropriate “information barriers” (confidentiality screens) are in place (Rule 4). [www.sra.org.uk/sra/consultations/conflict-confidentiality-december-2009.page](http://www.sra.org.uk/sra/consultations/conflict-confidentiality-december-2009.page)

The report on the relatively limited responses to the second consultation shows divided views on the proposed Rule 3 changes; at this time the Authority has decided not to proceed with the amendments. It is moving ahead with amendments to Rule 4.

[www.sra.org.uk/documents/SRA/consultations/conflict\\_and\\_confidentiality\\_second\\_consultation.pdf](http://www.sra.org.uk/documents/SRA/consultations/conflict_and_confidentiality_second_consultation.pdf)

The CBA Task Force on Conflicts of Interest is following the work of the ABA's Ethics Commission 20/20 and the Solicitors Regulation Authority closely, along with developments in other jurisdictions around the world.