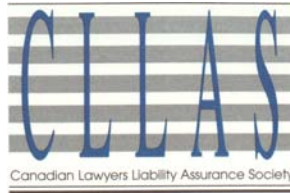


**Risk Management Policy**  
**Respecting Lawyers Acting as Directors and Officers**

The purpose of the following suggested guidelines is to assist member firms to reduce the risks that may arise as a result of their lawyers acting as directors or officers.

The Risk Management Committee recommends that members' policies respecting lawyers acting as directors and officers contain the following elements:

1. Lawyers should obtain the consent of the firm's management before accepting an appointment as a director or officer.
2. Firms should, wherever practicable, require that:
  - a. appropriate indemnification and/or directors' and officers' liability insurance, and/or
  - b. where appropriate, a unanimous shareholder's declaration or agreement that restricts the powers of the directors to manage the business and affairs of the corporation,be in place before a lawyer is allowed to accept a directorship or officer position. The firm's management will need to make a judgement as to whether such arrangements are acceptable in the context.
3. The firm should maintain an up-to-date inventory of the directorships and officer positions held by its lawyers.



## **Risk Management Policy** **Respecting Conflicts of Interest**

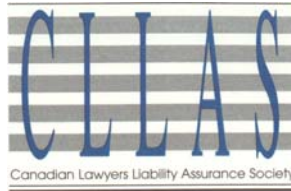
The purpose of the following suggested guidelines is to assist member firms to reduce the risks that may arise as a result of conflicts of interest.

The Risk Management Committee recommends that members' policies respecting conflicts of interest contain the following elements:

1. Each member firm should establish at a management level a committee to assist in the resolution of conflicts issues and to maintain a current perspective on emerging issues in the conflicts area.
2. Lawyers should comply with the conflict of interest rules published by the applicable provincial law society and any commentary thereto. Member firms should be mindful that different law society rules may apply where members of different law societies are working on the same matter or where a lawyer working on a material matter is a member of more than one law society. In addition, ideally, no lawyer should agree to act for more than one party with adverse or potentially adverse interests in respect of a matter without the concurrence of the member firm's management or conflicts committee.
3. Lawyers should comply with CLLAS' conflict of interest policy with respect to claims against another member firm.
4. A conflicts check should be performed on each new client, each new matter for a continuing client and each revived matter using a computerized conflict checking system that searches clients and matters on a firm-wide basis (including all offices), augmented, to the extent practical, by a search of material subsidiaries and affiliates.
5. If the member firm allows confidential files to be opened using code names, a database of such confidential files containing the names of the parties and a description of the matter should be maintained and all new clients and new or revived matters should be checked against this confidential database.
6. Information management restrictions to ensure the confidentiality of all information relating to each client (including Chinese walls, where permitted by the applicable provincial law society) should be put in place in respect of a) any lawyer or law clerk joining the member firm and all persons working on adverse matters; b) persons representing different clients in respect of the same matter <sup>1</sup>; and c) persons representing a client against a former client and the persons who represented the former client.

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<sup>1</sup> The representation of different clients in respect of the same matter must be conducted in compliance with applicable provincial law society rules. For example, in Ontario, Rule 3.4-5 of the Law Society of Upper Canada's *Rules for Professional Conduct* provides, among other things, that where a lawyer accepts such a joint retainer "no information received in connection with the matter from one [client] can be treated as confidential so far as any of the [other clients] are concerned". This rule may prevent the use of a Chinese wall in such circumstances. Each CLLAS member firm will need to consider this issue and form its own conclusions as to whether a Chinese wall is permissible.

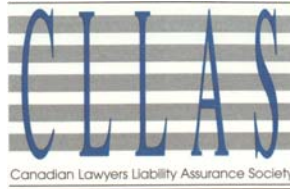


## **Practice Note** **Respecting Tax Opinions**

The purpose of this practice note is to raise awareness about certain risks associated with tax opinions (such as tax shelter opinions or opinions with respect to off-shore trusts) that third parties (such as investors) may have, or may allege they have, relied upon.

These risks have emerged as a result of class action litigation with respect to leveraged, charitable donation programs. However, the lessons learned from this litigation may be applicable to other types of tax opinions that could be relied upon, or alleged to have been relied upon, by third parties.

1. As a result of recent developments with respect to class action litigation, it may be difficult, if not impossible, to restrict reliance by investors or participants in tax shelters or other products that are sold on the basis of a tax opinion. Recent cases indicate that the Courts will certify class actions even where the purchasers never received or read the tax opinion, or the opinion expressly stated that it could not be relied upon by third parties. Once a class action is certified, it is often uneconomic to defend the action, even where the purchasers never received or read the tax opinion. This results in negotiated settlement of the class action, at considerable cost.
2. Care should be taken that assumptions contained in such tax opinions are reasonable and, where possible, supported by due diligence (even if the cost of such due diligence is significant). Assumptions should not be made that the opinion giver knows, or ought to know, are untrue or that are overly broad as the Courts have held that in such case the opinion giver may not be entitled to rely on such assumptions as a defence to the claim.
3. Consideration should be given to the risk that reassessment by Canada Revenue Agency could give rise to litigation and, in particular, class actions, and to including disclosure concerning the risk of reassessment in such tax opinions and/or the offering memorandum provided to investors.
4. Due to contributory negligence laws, consideration should be given as to whether, if a claim is made, there would be any other financially strong defendants besides your firm. If not, your firm could be contributorily liable for most or all of the damages or settlement. This issue should be considered in the file opening process.
5. Consideration should be given as to whether the fee you can charge for such an opinion is commensurate with the heightened risks described above.



**Practice Note**  
**Outside Counsel Guidelines**

Over the past several years, there has been a significant increase in the number of clients that require law firms to adhere to their terms of engagement or “Outside Counsel Guidelines” (“OCGs”). They often contain onerous provisions relating to – among other things - conflicts of interest, matter budgeting, limitations on disbursements, prohibitions on rate increases and restrictions and/or requirements regarding technology and staffing. The purpose of this practice note is to raise awareness about certain risks associated with some of the terms and conditions that can be found in OCGs. Some terms and conditions may create potential liabilities under contract that are not insured by LawPro or CLLAS, while others may increase the cost or complexity of defending an insured claim.

1. CLLAS members should consider having a procedure in place so that OCGs are reviewed not only by the client relationship manager, but also centrally by a person or persons familiar with the terms OCGs frequently contain and the risks they could present. For instance, OCGs could be reviewed by the General Counsel or other risk management personnel (from a risk management perspective), and the Director, Finance or other accounting department personnel (to ensure compliance with the financial provisions), before agreeing to their terms.
2. CLLAS members should consider taking steps to ensure that lawyers and others working on matters for clients who have provided OCGs are aware of the content of the OCGs and are complying with them.
3. CLLAS members should be aware that some of the more onerous OCGs contain provisions that raise serious risk management issues, including:
  - a. demands that the firm indemnify the client or third parties;
  - b. demands that the firm monitor “business” and “issue” conflicts of interest and/or the application of the conflicts provisions to all affiliates of the client anywhere, which may expose the law firm to unknown and undiscoverable conflict of interest claims;
  - c. statements that the client owns all intellectual property in the work product, which fail to recognize the role of precedents in legal practice;
  - d. requests that the firm provide copies of CLLAS policies and procedures or disclosure concerning the operations of CLLAS itself;
  - e. designation of the governing law or forum as a jurisdiction other than the province in which the firm is located, or the retainer being subject to binding (often foreign) arbitration; and
  - f. demands that the firm perform criminal background checks on lawyers, law clerks, legal assistants or other employees, which may raise privacy concerns.

4. Similarly, CLLAS firms should note some of the more onerous technology requirements contained in OCGs, including:
  - a. demands that clients be permitted to conduct invasive technology audits;
  - b. requirements that documents be accessible on a “need to know” only basis (i.e. all of the client’s matters will have to be behind ethical walls with limits on staffing and knowledge sharing);
  - c. prohibitions or restrictions on the use of the cloud, mobile apps, USB keys, other unencrypted portable devices and/or publicly accessible wifi;
  - d. the completion of detailed technology security questionnaires and confirmation that certain security systems are in place (i.e. complex passwords, short timeouts, two factor authentication, remote access protocols, encrypted emails, servers and wifi, etc.);
  - e. disclosure of details of attempted (and successful) electronic security breaches and obligations to notify the client within very short time frames and prior to engaging forensic specialists;
  - f. disclosure of details of vulnerability assessments;
  - g. disclosure of details of business continuity and disaster recovery plans, including security breach (i.e. hacking) response plans; and
  - h. confirmation of sufficient cyber insurance.