<table>
<thead>
<tr>
<th>Existing Standard</th>
<th>Proposed Standard</th>
<th>Rationale</th>
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<td><strong>Standard 1.4</strong></td>
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<td>This is a substantial revision of the old standard on conflicts of interests which focused mainly on unrepresented parties.</td>
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<td><strong>Conflict of Interest</strong></td>
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<td>The old standard was a based on the old Code and needed revision as a result of the adoption of the Professional Code of Conduct approved by Council on September 23, 2011, effective January 1, 2012 as amended January 20, 2012; July 20, 2012; February 22, 2013; September 19, 2014; January 23, 2015; and May 22, 2015.</td>
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In a transaction where a party is not represented by counsel, a lawyer should:

1. advise an unrepresented party that their interests are not being protected by the lawyer;
2. advise the unrepresented party which party the lawyer is representing in the transaction;
3. recommend independent legal advice to the unrepresented party.

If a lawyer is acting for more than one party in a transaction, the Legal Ethics and Professional Conduct Handbook provisions on conflict of interest apply.

**Footnotes:**

This is a substantial revision of the old standard on conflicts of interests which focused mainly on unrepresented parties.

The new Code is more complete with regard to many types of conflict of interest which lawyers face on a day to day basis. The Committee did not endeavor to repeat the relevant provisions of the Code as it relates to real estate but rather highlight the relevant provisions as they relate to real estate practitioners and provide tools to assist the practitioner in his or her duties.

The main idea is that lawyers must always consider if a conflict exists, may exist or develops in the course of a transaction. It is an ongoing obligation. Once a conflict is identified, the lawyer must deal with the possible conflict according to the Code. Using professional judgment to assess such conflicts is a paramount obligation of the lawyer when advising a client or where there are unrepresented parties in the transaction.

The lawyer’s obligation to advise of possible conflicts in writing relates to Standard 1.5 of the Real Estate Standards, the documentation standard.
1. This applies in particular if the unrepresented party might reasonably feel entitled to look to the lawyer for guidance and advice in respect of a transaction (See Commentary 7.1 Legal Ethics and Professional Conduct Handbook)

Additional Resources:

- Legal Ethics and Professional Conduct Handbook, Chapter 6, Impartiality and Conflict of Interest Between Clients.
- Standard 1.5 - Documentation of Advice and Instruction


2 This applies in particular if the unrepresented party might reasonably feel entitled to look to the lawyer for guidance and advice in respect of a transaction.


### Additional Resources:

- Duty on the lawyer to advise unrepresented party that their interests are not being protected: Hants County Business Development Centre Ltd. v. Poole et al. (1998), 172 N.S.R. (2d) 393 (N.S.C.A.), affirming (1997), 165 N.S.R. (2d) 393 per Kelly J.; Klingspon v. Ramsay, 1985 CanLII 548 (BC SC);
- Strother v. 3464920 Canada Inc., 2007 SCC 24, [2007] 2 SCR 177
- Canadian National Railway Co. v. McKercher LLP., 2013 SCC 3
- Reliance of unrepresented party on the lawyer may result in a duty of care: Tracy v. Atkins (1979), 83 D.L.R. (3rd) 46 (BCSC.), aff’d 105 D.L.R. (3rd) 632 (C.A.); Elliott v. Hossack, 1999 CanLII 6001 (BCSC); Paton v. Shaw, 1995 CanLII 2859 (PEISCTD)
- Rice v. Condran, 2012 NSSC 95 (CanLII)
• Standard 1.5 – Documentation
• Standard 4.5 - Limited Scope Retainers
• Practice Checklist, Law Society of British Columbia
• The Canadian Bar Association Toolkit on Conflicts: http://www.cba.org/cba/groups/conflicts/toolkit.aspx
• Sample Joint Retainer Consent – Real Estate Transaction (for Multiple Buyers)
• Sample Waiver of Conflict of Interest

Practice Notes:

Conflicts in transactions can be difficult to identify in certain transactions. A lawyer should use his or her professional judgment in each case.

In a real estate transaction it is the best practice for each side of the transaction (i.e. seller and buyer) to be represented by a separate law firm and not simply another lawyer in the same firm. Concurrent representation may be permitted in certain circumstances. Review 3-4.4 of the Code of Professional Conduct before acting. If acting for both sides, each side must be advised of the potential conflict and the consequences of a conflict in writing and the lawyer must document as per Standard 1.5 the client’s written waiver.

Where there is more than one client (such as with spouses/partners, parent/child) the matter will usually require a written joint retainer agreement. See sample above and in Practice Tools section of these Standards.

A lawyer should use professional judgment to determine if two parties in a transaction (such as two or more buyers or sellers)
may have a potential conflict issue. If the contributions of the parties or relative power of the parties are unequal, this may be an issue. A lawyer should not assume there is no conflict when representing two or more members of one family in a property transaction.

A lawyer representing a buyer and mortgagee in the same transaction should assess whether a conflict may exist. The lender will often require written waiver of conflict of interest. If not requested, the lawyer should not ignore whether obtaining a written waiver of conflict of interest is the best practice. In large value transactions, often the lender retains their own counsel for this reason.

In the event of a joint retainer, it is recommended that the joint retainer letter be sent to the client early on in the retainer and not wait to bring up the issue on closing. This ensures proper communication with the client. It is also important to ensure that communication with only one of the clients is considered to be communication with all of the clients. This can be accomplished using the sample precedent for joint retainer found above and in the Practice Tools section.

Other samples for conflict precedents may be found with the CBA Conflicts Toolkit noted above.