

# Conflicts of Interest Actuarial and Legal Perspectives

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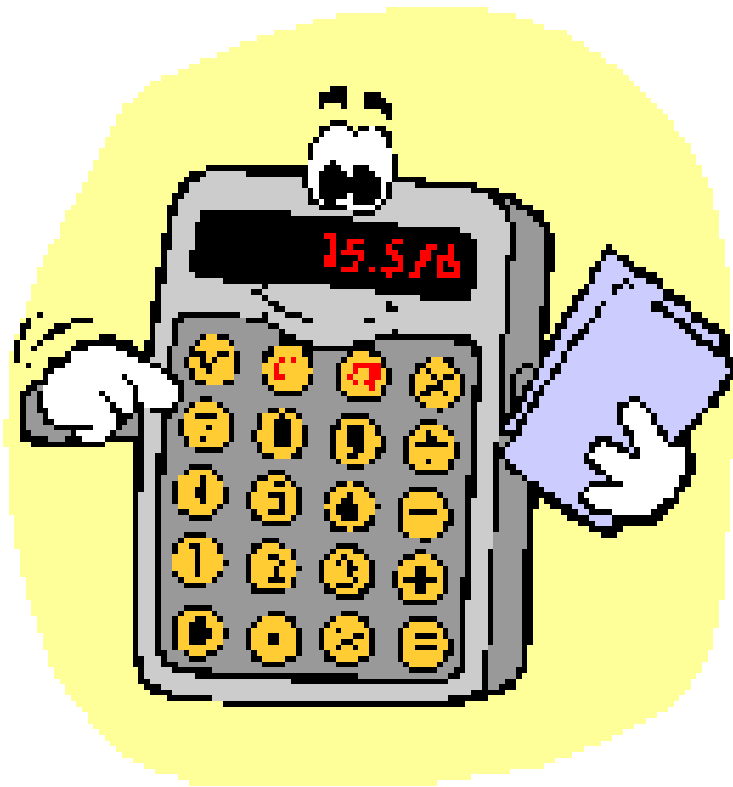


Institut  
canadien  
des actuaires



# Conflicts of Interest

## Actuarial and Legal Perspectives





# Conflicts of Interest Definitions

Merriam-Webster – A conflict between the private interests and the official responsibilities of a person in a position of trust.

Dictionary.law.com – A situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interests of both parties.

Businessdictionary.com – 1. A situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self-interest and professional interest or public policy. 2 – A situation in which a party's responsibility to a second-party limits its ability to discharge its responsibility to a third-party.

# Conflicts of Interest - Actuarial Perspectives

Unified **Code of Professional Conduct** adopted by all five US-based actuarial organizations

- ☐ American Academy of Actuaries
- ☐ American Society of Pension Actuaries
- ☐ Casualty Actuarial Society
- ☐ Conference of Consulting Actuaries
- ☐ Society of Actuaries

# Conflicts of Interest - Actuarial Perspectives

Precept	Code of Professional Conduct
1	Professional Integrity
2	Qualification Standards
3	Standards of Practice
4, 5, 6	Communications and Disclosure
7	<b>Conflict of Interest</b>
8	Control of Work Product
9	Confidentiality
10	Courtesy and Cooperation
11	Advertising
12	Titles and Designations
13 & 14	Violations of the Code of Professional Conduct

# Conflicts of Interest - Actuarial Perspectives

## Precept 7 - Conflict of Interest

An Actuary shall not knowingly perform Actuarial Services involving an actual or potential conflict of interest unless:

- A. The Actuary's ability to act fairly is unimpaired;
- B. There has been disclosure of the conflict to all present and known prospective Principals whose interests would be affected by the conflict; and
- C. All such Principals have expressly agreed to the performance of the Actuarial Services by the Actuary.

# Conflicts of Interest - Actuarial Perspectives

Potential breach of Code of Conduct

Matter is investigated by the Actuarial Board for Counseling & Discipline

If found to have materially violated the Code, either privately disciplined (no public info) or publicly disciplined (Public Notices)

Public Notice will state A) what Precepts were breached and B) describe the level of discipline. Following chart summarizes information

# Conflicts of Interest - Actuarial Perspectives

	2005	2006	2007	2008	2009	2009	2010	2010	2010	2011	2011	2012	2012	2012	2012	2013	2014	2014	2015	2015
<b>Professional Integrity</b>																				
<b>Qualification Standards</b>																				
<b>Standards of Practice</b>																				
<b>Communications</b>																				
<b>Communications</b>																				
<b>Disclosures</b>																				
<b>Conflict of Interest</b>																				
<b>Control of Work Product</b>																				
<b>Confidentiality</b>																				
<b>Courtesy &amp; Cooperation</b>																				
<b>Advertising</b>																				
<b>Titles &amp; Designations</b>																				
<b>Knowledge of Violation</b>																				
<b>Cooperation with ABCD</b>																				
<b>Discipline</b>																				

E = Expelled; S = Suspended; P = Public Discipline; C = Course on Professionalism



# Conflicts of Interest - Actuarial Perspectives

So – good news is that to the best of my knowledge no US-based actuary has violated the Conflict of Interest precept since 2001.

Areas of possible conflicts of interest for actuaries:

- ☐ **Pension actuaries** – advising an employer while also determining the amount to be funded
- ☐ **Health actuaries** – preparing health insurance rates for submission to regulator and same firm reviewing rates for the regulator
- ☐ **Consulting actuaries** – mergers & acquisitions, where same firm advises buyer and seller

# Conflicts of Interest - Legal Perspectives

## Canadian Institute of Actuaries Rules of Professional Conduct

**Rule 5:** A member shall not perform professional services involving an actual or potential conflict of interest unless:

- (a) the member's ability to act fairly is unimpaired,
- (b) there has been full and timely disclosure of the conflict to all known present and prospective direct users, and
- (c) all known present and prospective direct users have expressly agreed to the performance of the services by the member.

# Conflicts of Interest – Pension Plans

## Single-Employer Pension Plans

- Courts have found that the employer wears “two hats”:
  - Acts in its own capacity (not a fiduciary) in adopting, amending and funding the plan
  - Acts in its capacity as “administrator” (fiduciary) in day-to-day administration



# Conflicts and Pension Plans cont'd

## Employer & administrator hats: Actuaries straddle the line?



- Plan design changes (conversions)
  - generally, an employer function, but actuaries communicating design changes can engage the administrator (fiduciary) function—***potential for conflicts!***
- Completing & filing valuation reports
  - generally, an administrator function; however, setting actuarial methods can engage the employer function

# Conflicts and Pension Plans cont'd

## Select case law

- ***Slater Stainless Steel*** (2005-12): Claim against an actuarial firm and criminal claim against a named actuary in connection with use of particular actuarial methods and assumptions
  - criminal charges dismissed
  - remainder of claim settled
- ***McLaughlin v. Falconbridge*** (1999); ***Dawson v. Tolko Industries*** (2010) & ***Weldon v. Teck Metals*** (2011): Claims against actuarial firms in connection with communications accompanying a plan termination/conversion
  - *Dawson* also named an individual actuary
  - all settled



# Conflicts and Pension Plans cont'd

## Select case law

- ***Ault v. Canada*** (2011) and ***Bonisteel v. IPC*** (2016): Claims against actuarial firms relating to portability advice on termination of membership
  - plaintiff plan members succeeded in *Ault*
  - claim ongoing in *Bonisteel*
- ***University of Windsor v. Faculty Association of the University of Windsor*** (2013): Order that employer disclose to union confidential actuarial consulting advice on plan design, because actuary was also the actuary for the plan

# Conflicts and Health & Welfare Plans

- No direct case law
- However, Ontario Court of Appeal recently extended the “two hats” metaphor to trustees of health & welfare trusts (*Garcia v. LIUNA, Local 1059* (2015))
- Future cases possible if actuary retained by the plan sponsor (union or joint labour-employer body) for the benefit of the trustees (or vice versa)



# Potential Conflicts in Other Contexts

## No case law on the following:

- Actuarial advice to a government on a governmental program and separate advice to stakeholders on complying with the program
  - See Adam's comments previously
- Duty to disclose to a client when another client's similar plan design or practice has been challenged by a regulator
- Government actuaries' attendance at events sponsored by firms that may make submissions/arguments to them
  - Recent publicity involving Canadian tax authorities
- Full contours of how Canadian law will accommodate limited service provider availability in a small market

# Conflicts of Interest - Conclusions

## Keys to avoiding Conflict of Interest

- ☐ Consider parties and prospective Principals whose interests could be affected by the conflict – both direct parties and others
- ☐ Disclose the potential conflict
- ☐ Obtain agreement from Principals to proceed
- ☐ Consider merits of proceeding with the assignment vs declining
- ☐ If you decide to proceed
  - Document liberally
  - “Look in the mirror” test