EDUCATIONAL NOTE

This Educational Note does not constitute a Rule of Professional Conduct. It is intended to assist actuaries in applying Rules of Professional Conduct in respect of specific matters. Responsibility for the manner of application of Rules of Professional Conduct in specific circumstances remains that of the practitioner.

MEMBER OBLIGATIONS UNDER RULES OF PROFESSIONAL CONDUCT PERTAINING TO CONFIDENTIALITY

ELIGIBILITY AND EDUCATION COUNCIL

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Canadian Institute of Actuaries • Institut Canadien des Actuaires

MEMORANDUM

TO: All Fellows, Associates and Correspondents of the CIA

FROM: Michael Smith, Chairperson of the Eligibility and Education Council

DATE: June 9, 2004

SUBJECT: **Educational Note: Member Obligations under Rules of Professional Conduct Pertaining to Confidentiality**

At its June 2003 meeting, the CIA Board requested that the Eligibility and Education Council undertake a plan to educate the membership on Confidentiality issues arising under the Rules of Professional Conduct. The first step of that plan was an excellent article in the November 2003 issue of the *Bulletin*, authored by Peter Morse. The final step of that plan is this educational note, which reiterates and expands on many points in the Morse article.

Until now, educational notes have been produced to assist actuaries in applying standards of practice in specific matters. This educational note is intended to assist actuaries in applying the Rules of Professional Conduct in respect of Confidentiality. It does not purport to offer legal advice, and any member should seek his or her own legal counsel for any particular concerns or issues as regards confidentiality agreements.

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INTRODUCTION

The purpose of this educational note is to provide additional insight regarding the responsibilities of the member arising from the Rules of Professional Conduct as they pertain to confidentiality. In particular, Rule 7 specifies:

> A member shall not disclose to another party any *confidential information* obtained through a professional assignment performed for a client or employer unless expressly or implicitly authorized to do so by the client or employer, or required to do so under Rule 13, or required to do so by the Committee on Professional Conduct, an Investigation Team, a Disciplinary Tribunal or an Appeal Tribunal regarding any disciplinary matter arising under Section 20 of the Bylaws, or required to do so by law.

Section 20 of the Bylaws addresses Discipline of Members, Associates and Affiliates.

The Rules of Professional Conduct define *confidential information* as:

> Information not in the public domain of which the member becomes aware in conjunction with the rendering of *professional services* to a client or employer. It may include information of a proprietary nature, information which is legally restricted from circulation, or information which the member has reason to believe that the client or employer would wish not to be divulged.

The member's obligations with respect to the Committee on Professional Conduct, and Investigation Team, etc. are identified in Rule 12, which requires that:

> A member shall respond promptly, truthfully and fully to any request for information by, and shall cooperate fully with, the Committee on Professional Conduct, an Investigation Team, a Disciplinary Tribunal, an Appeal Tribunal, or any member of such bodies regarding any disciplinary matter arising under Section 20 of the Bylaws.

Rule 13 states that:

> A member shall comply with the procedures set out in Annotation 13-1 if the member becomes aware of any apparent material noncompliance by another member with the Rules or with the standards of practice.

Note, however, that some provisions of Annotation 13-1 exempt the member from complying with the provisions of Rule 13 when acting in an adversarial environment. Nevertheless, the member should be aware that the exemptions associated with adversarial environments, such as labour negotiations, merger and acquisition activities, or actuarial evidence, last only as long as the adversarial environment exists and the member is subsequently required to comply with the provisions of Rule 13 concerning rectification (if applicable) and reporting.

PURPOSE

This note is intended to assist members in balancing the apparently conflicting obligations to an employer or client concerning confidentiality with the obligations to the actuarial profession, as found within our Bylaws and Rules of Professional Conduct, to cooperate with the profession's

disciplinary process. The note also provides suggested wording for agreements which the actuary may be requested or required to sign by either an employer or a client. It should be noted, however, that this note is intended for general information and does not purport to offer legal advice. Any Institute member with particular concerns or issues concerning confidentiality agreements or employment contracts should seek his or her own legal counsel.

CAVEATS

The sample wordings provided in this note must be viewed as generalized examples. They may not be appropriate in specific situations, so the member should be careful to ensure that the wordings are adapted to the particular case. If there is doubt about the applicability of wording, legal counsel should be consulted.

PRIMACY OF OBLIGATION TO THE PROFESSION

Rule 13 and Annotation 13-1 assert that the member's obligation to the profession to supply requested information to a disciplinary investigation process must be met, whether or not that information is covered by a confidentiality agreement.

It should be noted that any confidentiality agreement can be overridden by a subpoena or other court order, even if that exclusion is not specifically identified in the wording of the confidentiality agreement. This is a matter of public policy; otherwise, the judicial process simply could not operate. Similarly, the professions in Canada have asserted the primacy of the member's obligations to the professions' discipline processes over commercial confidentiality agreements.

The Institute of Chartered Accountants of Ontario (ICAO) Rules of Professional Conduct require all of its members to cooperate with its disciplinary process, even if in doing so, they disclose confidential information. Similar requirements are imposed on accountants in other provinces. The legal profession in Canada, in respect of its disciplinary process, can require lawyers to reveal matters that are subject to attorney/client privilege. This is an even more stringent requirement than that imposed by the CIA Rules.

In fact, this practice is not exclusively Canadian. The Association for Investment Management and Research (AIMR), the international organization that confers the CFA designation, asserts that their standard which requires preservation of confidentiality is not intended to prevent members from cooperating with an investigation by the AIMR's discipline process and failure, on the basis of confidentiality clauses, to provide such requested information can lead to suspension of membership.

WRITTEN AGREEMENTS PREFERABLE

While various legal arguments can be developed to show that there is no conflict between Rule 7 and Rule 12 and that the obligations to the Institute must be complied with regardless of any confidentiality agreement, it is always preferable to have such matters clearly stipulated in written agreements. Actuaries who do not currently sign engagement agreements with their clients may wish to consider doing so. At a minimum, they should consider whether to discuss the matter with the client to ensure that the client is aware of the professional requirements with

which they are required to comply. Clients generally react well to this issue, perhaps because the clients realize that they benefit from the existence of the Institute's rigorous disciplinary process.

Certainly, the Institute member should not enter into an agreement of confidentiality which explicitly requires that the member not provide information to the Institute's disciplinary process, because the member is unable to comply with the requirement.

AGREEMENTS FOR CONSULTING ASSIGNMENTS

In seeking written agreements for a consulting assignment, the member or the member's firm can seek to have suitable wording inserted therein. An example for the member's consideration is the following.

> We (the firm)/[I (the actuary)] agree to take reasonable precautions[1] not to disclose to any third party any confidential information[2] obtained from you (the client) in the course of this engagement, except as required by law[3], or as required by the Canadian Institute of Actuaries[4] in the context of a disciplinary matter[5], or if authorized by you (the client) in writing[6]. If any court of competent jurisdiction, or any disciplinary body of the Canadian Insitute of Actuaries[7] in the context of a disciplinary matter, requires us (the firm)/[me (the actuary)] to disclose such confidential information, we/[I] will do so and advise you (the client) prior to doing so."
>
> [1] 'to take reasonable precautions' is optional wording which decreases the firm's/actuary's obligation.
> [2] 'confidential information' may be defined to limit the scope. Otherwise it would usually exclude information in the public domain, or information which the firm/actuary could obtain from other sources.
> [3] this includes information being provided to regulators and information provided in accordance with an order of a court.
> [4] to broaden the application, 'the Canadian Institute of Actuaries' could be replaced with 'a professional body or association'.
> [5] reference to 'disciplinary matter' limits the context within which information may be disclosed, but may not be adequate if the agreement covers other professions, who may have practice review, etc.
> [6] having the authorization in writing (vs. oral) is not essential, but would limit exposure for the firm.
> [7] see notes 4 and 5.

In some instances, members do not have written agreements with their clients, but the client may have orally identified the confidentiality of certain information or documents. In this case, the member may not have had the opportunity either to advise the client of his/her obligations as a member of the Institute, or to include these obligations as an exception in contract wording. Consequently, the client may not be aware of these obligations. Often clients are not aware of the issue simply because they have not considered it.

In other cases, members may have already signed an agreement which requires confidentiality, but which does not specifically identify the need to comply with requirements in our Rules to cooperate with the disciplinary process, and that this requirement overrides the commitment to confidentiality. In still other situations, there may no longer be a continuing client relationship

and no suitably worded agreement was in place while the assignment or consulting relationship was ongoing.

In each of these situations, the member may be concerned that he or she is exposed from two sides, the client or employer for disclosing certain information and the profession for failing to do so. Where the client or employment situation is ongoing, the member may wish to manage this presumed exposure by seeking the explicit agreement of the client and/or employer to exclude from the confidentiality requirements situations where such information is required to be disclosed to the Institute, or, more broadly, to any professional body.

In most other situations, it probably would not be necessary for the member to take any specific action. In the rare case that the Institute does make a request for confidential information, the prudent member, in consultation with an independent legal advisor, should pursue a resolution of the issue by cooperating actively with both the Institute and the client until either:

(a) the client has waived any objection to the disclosure of the information, or

(b) the conflict is referred for resolution to a court of law.

In some cases, the member may wish to involve the Chair of the Committee on Professional Conduct to assist in explaining to the client the importance of the confidential information to the Institute's disciplinary process.

It should be noted that some contracts contain clauses which, though not explicitly identifying the member's responsibility to the discipline process, may in fact incorporate implicit reference thereto. For instance, there are often clauses, dealing with the scope of the services to be rendered (especially if the work may only be performed by an FCIA) or specifying that the actuaries performing the work will be in good standing with the CIA or stipulating that the work will be done in compliance with professional standards, that can be cited to assert that the client recognizes that an actuary performing the services is bound by obligations to his/her profession.

Very often information which was confidential when an assignment was ongoing, subsequently becomes public, in which case disclosure of it in the course of a disciplinary investigation should be of no concern to the client or former client. As well, the examination of actuarial work within the disciplinary process often occurs a substantial period of time after the work was performed, and this will frequently obviate the need for continued confidentiality. In other cases the need for continuing confidentiality may be for a very limited future period, in which instance the disciplinary process might be able to be postponed for a short period of time, as long as the actuary's right to fair treatment in a discipline investigation is not jeopardized. Also, where the discipline case does advance to a hearing by a Disciplinary Tribunal, it may be possible, in extreme circumstances, for a portion (or even all) of the Disciplinary Tribunal to be held 'in camera'.

AGREEMENTS FOR EMPLOYEES

Many of these same issues arise for an employee whose terms of employment require that a confidentiality agreement be signed, often at the time of hire. Some employers of actuaries, aware of this issue vis-à-vis their relationships with their clients, will have built appropriate exceptions into their employees' employment agreements and internal codes of conduct. In

addition, following the financial fiascos of Enron, Worldcom and the like, many organizations have instituted 'whistle blower' procedures and safeguards, and the awareness of a professional's responsibilities to follow professional standards and rules of conduct is now much greater in the corporate world. A reasonable expectation on behalf of the employer might be that an employee would follow all available internal procedures (consistent with the Insitute's expectations regarding rectification), before taking a confidential matter 'outside the organization' to comply with the requirements of his/her rules of professional conduct.

A sample of wording dealing with professional obligations for inclusion in an individual employment agreement follows.

> I (the actuary), Fellow/Associate of the Canadian Institute of Actuaries, recognize that I may have access to confidential information and documentation in the course of my employment. I expressly agree not to disclose such confidential information or documentation unless permitted by law, or unless the purpose for doing so is to comply with the Rules of Professional Conduct and the Bylaws of the Canadian Institute of Actuaries in connection with a disciplinary matter.

Many actuaries are hired by their employers prior to qualifying as an Associate or Fellow of the Institute. They may therefore need to arrange for an appropriate revision to their employment agreements after qualifying.

Where employees are subject to a corporate code of conduct, that code may also need to be enhanced with the inclusion of wording which recognizes the obligations of employees to their various professions. Such a revision may not be easy to accomplish without the involvement of professionals in senior management positions with the employer. A sample addition (written in general terms to recognize that most employers of actuaries employ professionals from several disciplines) is:

> The company recognizes that certain employees must adhere to professional codes of conduct and other requirements by virtue of their membership in a professional body or association. If there is a conflict between this Code and any professional requirements, this Code is superseded by those professional requirements. Any employee in doubt about the application of the Code to a specific situation should consult his or her immediate supervisor and with an appropriate representative of the professional body or association.