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This material was prepared by Karen K.H. Bell, LPIC's Risk Management Counsel, in consultation with lawyers experienced with the practice of investing in clients and the many related issues this practice raises.

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About this booklet

LPIC prepared this booklet to raise awareness among lawyers of the practical realities of investing in clients, and to outline considerations that would assist lawyers/law firms in managing the risks associated with this practice.

LPIC neither encourages nor endorses the practice of investing in clients. The material presented in this booklet does not establish, report or create the standard of care for lawyers; it is also not a complete analysis of any of the topics covered. LPIC encourages all lawyers/law firms engaged in the practice of investing in clients to develop appropriate tools and policies that reflect the unique nature of their relationship with each of their clients, and to further conduct their own appropriate legal research.

Electronic version of this booklet

The complete text of this booklet is also available on the practicePRO section of the LPIC website at practicepro.lpic.ca. Click on Practice Aids to access the entire series of booklets on managing law practice.

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investing in clients: a risky proposition

The practice of lawyers investing in clients' businesses is current and growing. Historically, this type of business transaction found some application in the real estate and mining industries. Inevitably, that practice resulted from time to time in claims against lawyers.

Today, we see the practice being undertaken in the high tech sector whose fast pace and meteoric growth are its trademarks. The high tech industry figures prominently in California, Texas, North Carolina, and northern Virginia, and in Ontario. So that is where we find lawyers taking equity positions in their clients' businesses. And from here come stories about the astounding success of some of the high tech players and those who have invested in them.

Past experience with this type of activity has taught us that this practice raises significant issues which need to be managed. LPIC believes it is vital that all lawyers understand when and why the practice is being undertaken in our jurisdiction, and how to approach it if the opportunity arises in one of your client relationships.

This booklet provides an overview of the key issues to consider before engaging in the practice of investing in clients. On the following pages you will find:

- a clarification separating fact from fiction;
- an overview of typical situations in which an equity position is taken;
- the arguments "for" and "against" taking an equity position;
- a discussion of the risks involved;
- a review of why the activity is defined by the Rules of Professional Conduct as a conflict of interest;
- a framework for a policy on how to manage the practice effectively in the event that you or your law firm have deemed it appropriate to invest in one of your clients.

What are we talking about when we refer to investing in a client or taking equity or stock in a client? What exactly is involved in the practice? To answer these questions, we have to first separate our perceptions of what is happening from the realities of how the practice is being undertaken, at least here in Ontario.

the perceptions

The lawyer calls the shots

We have read about or seen on television the reports – often chilling accounts – of aggressive Silicon Valley law firms hunting down small entrepreneurs, demanding a large percentage of the client's equity before committing to a retainer for a start-up. But is this reality?

A windfall with no downside

Equally prevalent is the myth that IPOs (initial public offerings) make lawyers into millionaires – every time. The story goes like this: A law firm takes a company public, the company's value grows exponentially, and the increase in the value of the shares taken by the lawyers just before the IPO makes them multi-millionaires. Some have compared this picture of greedy success to our own legal community that serves our high tech industry in Ontario.

the realities

Reality is quite different from perception.

The practice is client driven

We know from speaking to Ontario lawyers and law firms who do engage in the practice that it is client-driven rather than dictated by lawyers. Equally important is the reality that the investment represents payment of a portion of the legal fees.

Limited for the most part to the high tech industry where new ventures are hatching daily, a cash-strapped client in a start-up situation needs legal advice but has more equity than cash to offer. Or, clients look to their legal advisors to show confidence in their pursuits or loyalty to them over other potential clients who want the same legal talent to represent them. By taking payment of some of the legal fees in equity, the lawyers align their interests with those of the client, and demonstrate loyalty and confidence in the client.

Lawyers take a cautious approach

Lawyers engaged in this practice limit their interest to a level that overcomes concerns about any type of controlling interest. Alternatively, they move control of the investment to lawyers in the law firm who do not act for the client. And, clients do, in fact, either get independent legal advice about the investment or at least guidance from other advisors involved in financing the transaction.

As many winners as losers

More often than not, the investment made is a wash or represents a loss. In fact, in the United States, the success of client companies at the IPO stage in 1999 was such that losers outnumbered winners as much as 20 to 1, not counting companies that made it to the public market but failed a few months down the road.[1] Clearly, there is some risk to the practice that has been ignored or underplayed by the media.

A shared risk

Yet another aspect of the practice often overlooked is how lawyers within a law firm share the opportunities, winnings and losses among themselves without seriously disrupting the stability of the law firm. The reality is that everyone wants some of the good fortune, but no one wants the risks.

[1] Debra Baker, "Who Wants to Be a Millionaire", ABA Journal, February 2000

the two most frequent occasions for investing

When is the right time to consider taking shares in a client's business? Two different sets of circumstances tend to persuade lawyers/law firms to consider investing in their clients' businesses:

- either as part of an **alternative billing strategy** to fund part of the fair and reasonable legal fee (see Rule 2.08) being charged for work being done by the lawyer in a start-up situation;

OR

- in response to **a client's invitation** to invest from a President's List as a reward for good work or as an expression of client loyalty. This is an exclusive listing of people (usually advisors and management) selected by the client who are given the opportunity to invest in the client's company on the eve of going public. It is generally assumed that the share price after the IPO will exceed the price at which the shares were purchased.

the arguments for and against

FOR	AGAINST
✓ To respond to market demands from specific client sectors, e.g. high tech. ✓ To act as a strategic partner with the client. ✓ To demonstrate confidence in the client. ✓ To allow access to legal services on an alternative billing format where the client is cash poor. ✓ To allow the lawyer to charge the client for value-added service, i.e. to recognize the lawyer's contribution to the client's success. ✓ To align the lawyer's interests with the client's interests. ✓ To share the economic risks of the client's pursuits. ✓ To share economic opportunity and thereby create wealth.	✗ The lawyer's/law firm's personal stake in the client's affairs presents a conflict of interest – the lawyer's independence/objectivity/judgment come into question. ✗ The lawyer/law firm is exposed to corporate responsibilities as a part owner of the company. ✗ The lawyer/law firm is exposed to complaints, losses or claims. ✗ The client may not have adequate disclosure or may be releasing equity under duress. ✗ There may be inadequate accounting/record keeping of the interest in the client. ✗ The intra-firm issues of sharing the gains/costs of opportunities to invest as well as resulting jealousies within the law firm put stress on law firm culture or firm stability.

a balancing act

What's the big deal? Why all the fuss? If clients want lawyers to invest, why not?

After all, the reasons to invest in your client are valid and many: You want to demonstrate loyalty to and confidence in the client and align your interests with those of the client.

But the practice also comes with significant risks – to the lawyer, the law firm and the client. Identifying these risks and opportunities – and balancing them in your specific situation – is a critical first step. At issue are the independence, objectivity and judgment of the lawyer, and whether the client's interests are first and foremost in the minds and actions of the lawyer. Listed on the left are arguments "For" and "Against" the practice for your consideration.

a matter of conflict

The risks that we refer to devolve from your ability or inability to balance your fiduciary duties to your client of loyalty, independence and objectivity with the self-interest involved in taking a "piece of the action."

Rule 2.04 of the Rules of Professional Conduct defines the transaction as a "conflict of interest" or a "conflicting interest." However, subject to certain requirements being met, the practice is not prohibited under the Rule or elsewhere. Instead, like other conflict of interest situations, it calls for vigilant management of some specific criteria.

Defining the conflict of interest

The definition of a conflict of interest or a conflicting interest under Rule 2.04 is a broad one that details the conditions for undertaking the activity. The Commentary to the Rule specifically includes in the definition of a conflict the taking of an interest in a client's business, regardless of the amount of the interest.

Rule 2.04 (1) A "conflict of interest" means an interest

a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

The Commentary to Rule 2.04 (1) provides:

> "conflicting interests include but are not limited to the financial interest of a lawyer or an associate of a lawyer…"

Understanding how the conflict of interest arises

Yet if you are taking equity in a client to align your interests, where is the conflict you might ask? By taking and holding shares in the business of a client, you are no longer disinterested or independent from the client. You have a piece of the action. The essence of the conflict is that self-interest.

Depending on the nature and extent of that self-interest, it has the potential to impair your independence, objectivity and judgment – thereby potentially compromising your ethical and fiduciary obligations. Of course, the smaller your interest or the more removed it is from your control, the less likely your interest will have any impact on your objectivity and judgment.

So, it is probably not surprising that the Rules of Professional Conduct do not prohibit the activity. Rather, they call for scrutiny and management through disclosure to and consent of the client involved. The key is for counsel to remain independent and for the investment to be fair and reasonable to the client. When the necessary rigour on these two fronts is brought to the activity, both the client and the lawyer can realize the benefits and avoid the risks.

These points are addressed in Rule 2.04 (3) where it stipulates that adequate disclosure and informed consent are prerequisites to acting in such a situation. The rationale for these prerequisites is offered in the Commentary to that Rule.

Rule 2.04 (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

The Commentary to Rule 2.04 (3) provides:

> "A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest."
>
> . . .
>
> "As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule..."

the risk of claims

As we mentioned earlier, with more media coverage, more lawyers will hear about and likely become interested in the practice. At first blush, it sounds like an easy way to generate some big bucks. However, nothing could be further from the truth. It is, in most cases, an alternative billing practice based on the delivery of legal services for a fair and reasonable fee.

As the activity increases, LPIC expects to see an increase in the number of related claims. We also anticipate that they will come principally from lawyers who are unaware of the risks and who fail to take a disciplined approach to the practice.

Typically, claims will arise from relationships in which conflict of interest situations were not properly managed – claims founded on preferred interests, non-disclosure, duress and lack of judgment.

Common types of claims

"Aiding & abetting" claims

In these cases, having made the investment, the lawyer/law firm either knowingly or inadvertently is blinded by what turns out to be the client's wrongful actions and accordingly, fails to perform the necessary due diligence in the matter.

Future conflict claims

These typically arise after the investment has been made. The lawyer/law firm may be asked to act on a matter by a new client against an old client in whom the investment was made. The earlier investment by the lawyer/law firm is raised by the old client as a conflict and a barrier to the lawyer/law firm accepting the new retainer with the new client.

While the only guarantee against such claims is to refrain from the activity altogether (and that cautious approach has been taken by many), it may not serve the best interests of your client.

The following section offers some guidelines on how to engage in the practice for lawyers who find complete abstinence impractical.

the need for a law firm policy

Practitioners who engage in this activity in their practices emphasize that lawyers who do the advising need to remain independent, and that the practice of investing in clients' businesses involves a great deal of process and complexity.

That being the case, they suggest that a law firm have a policy in place that sets out a system for all lawyers in the law firm to follow – one that lawyers are made aware of, accept and, in fact, adhere to – so that the reasons for investing in clients are achieved, and the hazards are avoided.

On the following pages we offer a framework for a law firm policy, based on consultations with lawyers/law firms engaged in the practice.

types of issues that a policy should address

To be able to respond to a variety of client investment opportunities, the law firm policy should address WHEN it is appropriate to take an equity interest as part payment of fees for services and HOW it should be done.

In essence, a law firm policy should guide all lawyers in the law firm on the following key issues:

I. the rationale for the policy – noting that the practice is a conflict of interest;

II. the nature of the investment that the lawyer/law firm is prepared to make;

III. the types of legal services to be exchanged for an equity interest;

IV. the nature and extent of the risks that the lawyer/law firm is prepared to assume;

V. the nature and extent of disclosure to and consent from the client; and

VI. the legislative prohibitions/restrictions relevant to taking equity in a private or public entity.

framework for a policy

I. Rationale for a law firm policy

State the rationale for the policy clearly at the beginning of the policy so that all lawyers in the law firm immediately understand why they are or are not engaging in the practice. To ensure lawyers are aware of the seriousness of the practice and the value of adhering to the law firm policy, this rationale should mention that the taking of interest in a client is defined by the Rules of Professional Conduct as a conflict of interest that needs to be managed. Including reference to the penalties that will be applied if the policy is not followed will also serve as a helpful reminder of the need for their adherence to it.

The rationale should include the following:

- An opening statement that explains:
  - reasons for allowing the practice;
  - the practice of taking an equity position with a client is a conflict of interest;
  - the need for vigilant and continuous scrutiny.

- Consequences of not adhering to the policy such as:
  - the impact on the stability of the law firm and firm reputation;
  - individual penalties.

II. Nature of investment

The larger or more material the investment made, the greater the risk of breaching both ethical and fiduciary obligations. Understanding who is responsible for deciding on pursuing the investment, how gains or losses will be shared within the law firm, and precisely what is being taken as an equity interest is essential. To not know these answers means that the lawyer will not be able to disclose and explain them to the client. And adequate and timely disclosure are the prerequisites to this activity being undertaken successfully.

Issues to address in this section include the following:

Who decides whether to invest:

- pre-approval must come from the law firm management committee or a designated group of lawyers and not by the lawyer/s providing the legal services;
- key is to reduce the likelihood that the advising lawyer's judgment and ability to meet fiduciary obligations will be affected;
- the burden rests with lawyer/s proposing the transaction to establish that it is appropriate for the lawyer/law firm to do business with the client.

Who is entitled to the opportunity:

- stipulate to whom opportunity belongs – individuals, group of lawyers or the law firm;
- investment by individuals rather than by the law firm tends to be more claims prone, and as a result will require even more vigilant supervision by law firm management;
- set out sharing arrangement among lawyers in the law firm that applies to both gains and losses.

Who is to make the investment:

- ensure those investing have sufficient expertise;
- stipulate the degree of discretion being given to those investing;
- provide for a form of reporting and accounting.

Type of investment:

- common shares;
- a debenture convertible into shares;
- preferred shares carrying rights of retraction.

Timing of investment:

- at startup;
- just prior to the IPO;
- at the IPO – note the potential for a rapid increase in the market price of IPO stock and a windfall profit for lawyers, which can create unwanted issues of control and perceived breach of legislative prohibitions.

Quantum of investment:

- represents only a part of the fee for legal services; the balance is to be paid in cash/credit;
- usually up to 1% of equity; key is to avoid materiality and control;
- note that more than a 10% interest triggers a reduced indemnity under the LPIC professional liability policy.

Length of time held:

- longer rather than shorter to be consistent with the reason for the investment – to show confidence in the client and maintain a long-term relationship with client;
- refer to insider trading rules;
- discourage flipping – prohibit short sales – agree on lockups.

Vehicle to maintain investments:

- holding company – venture fund – discretionary blind trust;
- must support how the investment and resulting gains/losses will be distributed within the law firm.

III. Description of legal/legal-related services

It is essential to stipulate with some detail the legal services that the lawyer/s will be providing to the client in a particular timeframe. Taking the time to consider the specifics and reducing them to writing gives the lawyer the opportunity to map out a plan. It also gives the client the opportunity to raise questions and avoid misunderstandings.

Anticipating twists and turns in the transaction based on a lawyer's previous experience is particularly critical when dealing with high tech clients who are breaking new ground in many of their business ventures. As a client's needs change, so too must the description in the plan of services being rendered.

Description of services provided:

- detail the share/fee exchange agreement in the retainer letter;
- be specific about the types of services to be provided and what portion will be "paid for" by the equity interest;
- ensure fee is fair and reasonable and not a prohibited practice (see Rule 2.08) .

Records/accounting of services provided:

- reduce to writing all elements of the process;
- relate billing of fees to the investment agreement;
- have the client acknowledge agreement to the accounting methodology at the outset of the retainer.

Valuation of services provided:

- value the shares at the time of the issue and agree on a fixed amount of fees to be offered in exchange;
- the valuation is often dictated by negotiations with venture capitalist; if not, ensure a third party valuation is prepared.

IV. Risk analysis

While the overriding reason for investing in a client may be because the client demands it, the lawyer/law firm must make an educated assessment of the risks involved. The Courts will always place a heavy burden on lawyers where client interests are concerned, and will have little sympathy for those lawyers/law firms who took on the investments with blinders.

In the next section on disclosure and consent, we have noted the need to review with the client the risks of harm as one crucial element of adequate disclosure. Here, the focus is on assessing the risks to the lawyer/law firm, including risks to revenue collection, client relationships, and the law firm's cultural stability and reputation.

Assess risks:

Do we want to/should we act for this client?

- engage in a screening process as done for any client;
- is the client honest and trustworthy?

Is this a good investment?

- treat this as if making any other kind of investment;
- understand the client's product or service;
- if available, request audited financial statements;
- analyze the client's business plan and if necessary, work with client to enhance it with the help of other professionals;
- ensure the evaluation is ongoing.

How will it look in hindsight if something goes wrong? Would the law firm care if it became part of a news story?

- consider the impact on the law firm's reputation if the investment sours or the client is allegedly harmed.

Limit financial risks:

- cap the amount of fees to be satisfied by the investment;
- make the investment only a part of the complete fee;
- anticipate a loss as likely as a gain.

Define responsibilities that give rise to risks:

- those controlling the investment should have expertise;
- consider how the matter will be staffed;
- ensure that the lawyers advising the client are not controlling the investment;
- advisors must remain impartial and safeguard their independence.

V. Disclosure to and consent by client

Although the Rules of Professional Conduct permit representation in the face of a conflict as long as there has been adequate disclosure to and informed consent by the client, the conflict still challenges a lawyer's fiduciary obligations where loyalty to and priority of the client's interests are paramount.

To satisfy both the ethical and the fiduciary obligations, the lawyer must be vigilant to ensure that the highest level of disclosure has been made to the client.

Disclosure to the client about the current and anticipated conflicts and their consequences must be detailed and comprehensive:

- it should include an evaluation of how the client could be harmed;
- note that in some cases, the client does not have a financial stake at risk, rather it is the venture capitalist who bears the risk;

- as new developments or conflicts occur, you may need to make additional or fresh disclosure;
- schedule a review with the client from time to time to ascertain whether additional or fresh disclosure is necessary.

Insist on ILA to avoid future allegations of non-disclosure or inadequate disclosure:

- document the recommendation for ILA and obtain a copy of the certificate of ILA;
- if no formal ILA is provided, at a minimum ensure that the client has at least reviewed the situation with other available mentors or advisors, such as a formal or de facto board of directors, or financier;
- develop a standard language for lawyers to give to their clients about their need to get business advice.

Share/fee arrangement must be fair and reasonable:

- it may be in the client's interest to sign a shareholders agreement.

Written consent by the client to waive the conflicts should include or have annexed a written form of disclosure:

- a blanket form of consent is insufficient;
- key elements discussed with client should be included in the written form.

VI. Legislative prohibitions and restrictions

Acquiring securities in an entity, be it a corporation, partnership or other business vehicle, could have a variety of securities law implications. Care must be taken to ensure that all of the applicable laws relating to matters such as registration and prospectus exemptions, insider reporting and restrictions on trading are followed. The rules of stock exchanges may also come into play. The usual applicable provisions are addressed below:

- The Securities Act of Ontario requires that all trades of securities in Ontario must be done through a registered securities dealer and must be supported by a prospectus except in circumstances when there are exemptions from these requirements:
  - reliance on a prospectus exemption may result in restrictions on the ability of the recipient of the securities to transfer them;
  - an exemption may apply to a "private company" or "private issuer" (the conditions for this exemption are under review); note also that an issuance of securities to a company's lawyers is not generally regarded as a distribution to the public;
  - other exemptions apply to "consultants" who provide services to the issuer under a written contract and to "seed capital" financing if certain conditions are met;
  - if no prescribed exemption is available, it may be possible to obtain an exemption by applying to the securities commission for a discretionary exemption.

- The Securities Act of Ontario includes strict insider reporting rules:
  - a lawyer who is a director or senior officer of a reporting issuer, or of a subsidiary or large shareholder of a reporting issuer, is generally required to file insider trading reports with the securities commissions of each Canadian province or territory where the issuer is a reporting issuer, if the lawyer acquires or disposes of securities of the issuer;

- an insider trading report must be filed within ten days of the acquisition or disposition of securities giving rise to the report.

The Securities Act of Ontario prohibits trading on undisclosed information:

- a prohibition pertains where the lawyer has knowledge of information about the issuer that has not been generally disclosed and is in a "special relationship" with the issuer;
- a person in a special relationship with an issuer is also prohibited from tipping undisclosed material information regarding the issuer to another person, and if such tipping does take place, the person receiving the information is prohibited from trading or tipping as well;
- a lawyer is ALWAYS in a "special relationship" with a client, regardless of whether or not the lawyer is required to file insider trading reports.

Stock exchange rules may apply:

- an issuance of securities by an issuer listed on a stock exchange in Canada requires the prior consent of that stock exchange;
- the stock exchange may impose conditions to its consent, including shareholder approval; shareholder approval is likely to be required if a lawyer receiving shares is a senior officer or director of the issuer;
- foreign stock exchanges may have similar requirements.

Foreign laws may apply:

- the laws of one or more foreign countries may have application to an issuance of securities in Ontario, or their subsequent sale out of Ontario, especially if there is a public market for the issuer's securities in the particular country.

summary

The practice of investing in clients is a complex issue, one that requires diligent attention to process and detail before, during and after the investment decision is made. Throughout, lawyers/law firms must focus on the possible consequences of this practice. This summary provides an overview of the key considerations that have been discussed earlier in this booklet.

key considerations

- Do not invest in a client's business if you do not know or trust the client. The practice poses various risks. In addition, it can present a conflict to acting for other clients in the future.
- Treat the investment as an alternative form of billing that represents only a portion of the legal fees being charged.
- Discuss and decide with the client at the outset of the retainer the anticipated fees, whether part of the fee will be satisfied by an investment and, if so, the amount of the fee that the investment will represent.
- Develop and adhere to a law firm policy that sets out policies and procedures for the practice of lawyers/the firm investing in clients.
- Develop firm-wide awareness and controls to avoid having lawyers run afoul of insider trading and other legislative prohibitions.
- Treat the decision of investing in a client as a law firm decision. In no case, should it be the decision of the lawyer who is advising the client.

- Ensure through a law firm committee or specifically appointed lawyers that the necessary disclosure has been made to the client, and that after being informed the client has consented to the investment.

- Document all disclosure made to the client, allow time for the client to consider the disclosure with other advisors, and then document the client's consent in a manner specific to the subject transaction. Form consents are insufficient.

- Regularly review matters where investments have been made to ensure they continue to benefit both the client and the law firm. Provide additional disclosure to the client where necessary and obtain new or additional written consent from the client.

- Regularly assess whether the ability to advise the client with independence, loyalty and objectivity will be affected by investing in the client. If there are ethical and fiduciary duties to the client that cannot be fulfilled at all times, do not invest in that client's business.

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Ms. Bell is widely regarded as an expert in the areas of law practice management, dispute resolution and loss prevention. She has chaired the CBAO's Law Practice Management section, has taught practice management and professional responsibility in the Law Society of Upper Canada's Bar Admission program, and, as a commercial litigator and defence counsel for insurers, has developed an appreciation for the application and benefits of risk management to law practice and business. Formerly a litigation partner at a large Toronto law firm, Ms. Bell has established her own specialty practice as Risk Management Counsel.

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