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DISCIPLINE COMMITTEE OF THE COLLEGE OF CHIROPODISTS OF ONTARIO

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF CHIROPODISTS OF ONTARIO**

IN THE MATTER OF a Hearing directed
by the Inquiries, Complaints and Reports Committee of
the College of Chiropodists of Ontario
pursuant to Section 26(1) of the ***Health Professions Procedural Code***
being Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.

BETWEEN:

COLLEGE OF CHIROPODISTS ONTARIO

- and -

CLARISSA DE LEON

PANEL MEMBERS:

Jim Daley	Chair, Public Member
Stephen Haber	Professional Member
Deborah Loundes	Professional Member
Cesar Mendez	Professional Member

COUNSEL FOR THE COLLEGE: Debra McKenna

COUNSEL FOR THE RESPONDING PARTY: Elyse Sunshine

INDEPENDENT LEGAL COUNSEL: Luisa Ritacca

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Hearing Date: September 23, 2024
Decision Date: November 12, 2024
Release of Written Reasons: November 12, 2024

DECISION AND REASONS FOR COLLEGE'S MOTION
(Motion to Remove Registrant's Lawyers of Record)

DECISION OF THE MAJORITY

[1] This matter came for a preliminary motion hearing before a panel of the Discipline Committee of the College of Chiropodists of Ontario (the "**College**") on September 23, 2024. The hearing was conducted by way of video conference. Ms. Clarissa De Leon (the "**Registrant**") was not present.

BACKGROUND AND NATURE OF THE MOTION

[2] The College has brought this motion for an order for the following relief:

(a) An order removing GlickLaw (the "**Responding Party**") as the lawyers for the Registrant for these discipline proceedings due to a disqualifying conflict of interest; and

(b) Such further and other orders as the Panel deems just in the circumstances.

EVIDENCE AND SUBMISSIONS OF THE PARTIES

Background

[3] The allegations against Ms. Clarissa De Leon are set out in the Notice of Hearing, dated December 20, 2023. The allegations relate to alleged overprescribing, incentive, and false or misleading advertising. The alleged misconduct falls within the scope of practices that the College seeks to eliminate per their Zero Tolerance Policy, passed in February 2019.

[4] Ms. De Leon has been registered with the College in the chiropodist class since May 27, 2010.

[5] On May 26, 2023, the College received a complaint (the "**Complaint**") against the Registrant, which was forwarded to the Inquiries, Complaints, and Reports Committee for investigation (the "**ICRC**").

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[6] Following an investigation, the ICRC made a decision regarding the Complaint and referred allegations of professional misconduct to this Committee for a hearing.

[7] On February 16, 2024, the College was advised that the Registrant had retained Jordan Stone, a lawyer and partner at GlickLaw, to represent her in these proceedings.

[8] On April 30, 2024, the College objected to GlickLaw representing Ms. De Leon and sought to have GlickLaw removed as counsel due to a conflict of interest.

[9] WeirFoulds LLP has provided legal services to the College since approximately 2014. These services include providing advice and assistance to the College administration and the various committees of the College, including the ICRC.

[10] Mr. Glick started working in the regulatory practice at WeirFoulds in 2010. Between 2014 and 2018, Mr. Glick was one of four lawyers at WeirFoulds who provided legal services to the College.

[11] During this time, Mr. Glick was counsel to the ICRC on specific investigations and complaint files. Mr. Glick did not receive confidential information other than the case-specific information related to each complaint or investigation. Further, Mr. Glick was also retained to prosecute matters that were referred to discipline by the ICRC. He took instructions from Felecia Smith, the Registrar of the College at the time and Meghan Hoult, neither of whom currently work at the College. Similar to his role as counsel for the ICRC, Mr. Glick received case-specific instructions and provided case-specific advice about these prosecutions.

[12] The College does not dispute that Mr. Glick did not act as general counsel to the College, nor did he conduct any general advisory work, and he was not involved in the strategic initiatives of the College. The information he received in both prosecutorial and counsel roles were limited to specific cases.

Mr. Glick Leaves WeirFoulds

[13] In August 2018, Mr. Glick left WeirFoulds. At this time, he stopped providing any services to the ICRC; however, as directed by the College, Mr. Glick brought ongoing disciplinary prosecutions to GlickLaw. He continued to act for the College in this capacity until mid-2019.

[14] On March 13, 2019, WeirFoulds sent a letter to Mr. Glick containing a direction from the College to transfer the remaining ongoing prosecutions back to WeirFoulds. After the transfer of these files, Mr. Glick ceased all work for the College.

[15] After he ceased working for the College in a prosecutorial capacity, Mr. Glick, and other lawyers at GlickLaw, began representing Chiropodists in matters before the College. In his affidavit, Mr. Glick testified that it is always made clear to the College when GlickLaw is acting for a member.

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[16] Over the past five years, the College has never previously asserted that it was a conflict of interest for GlickLaw to represent members of the College where Mr. Glick had no prior involvement with the members, during his time as counsel to the College. The College has only ever raised concerns where Mr. Glick had provided advice to the ICRC in a prior matter involving the specific member by whom GlickLaw was retained. Further, the College has never taken issue with GlickLaw not writing to the College to seek consent to represent a member before advising the College they had been retained.

The Current Matter

[17] No lawyer at GlickLaw has acted for the College or provided advice to the College regarding Ms. De Leon. It appears, from the information provided, that the Registrant's matter is unrelated to any prior matter where Mr. Glick would have received confidential information. Ms. De Leon does not have any prior discipline history with the College.

[18] Prior to this motion, GlickLaw made an offer on a with prejudice basis to continue the approach of the College over the past five years, which was that GlickLaw would not represent members that Mr. Glick had advised the ICRC on but could represent members on matters where he had never provided any advice or received any information. This offer was not accepted by the College.

POSITION OF THE PARTIES

The College

[19] The College takes the view that Mr. Glick failed to get consent of the College, or WeirFoulds, to act for the Registrant before accepting a retainer. The College's position is that Mr. Glick cannot act for Ms. De Leon as it would be a conflict of interest. GlickLaw has continued to act for the Registrant over the College's objections.

[20] The College states that it constitutes an abuse of process for a lawyer to act in a conflict of interest.

[21] The College's position is that the Panel has the authority to grant an order removing Mr. Glick as counsel of record for Ms. De Leon per section 23(1) of the *Statutory Powers Procedure Act*,[1] and the Panel must do so in order to prevent an abuse of process. The Panel notes that Mr. Glick did not oppose this position.

[22] The College states there are two questions to be answered in determining if there is a conflict of interest:

1. Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand?
2. Is there a risk that it will be used to the prejudice of the former client?

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[1] RSO 1990, c S.22

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[23] The College argues that in answering the first question, the onus is on the College to demonstrate a previous relationship with Mr. Glick that is a sufficiently related matter. However, the College submits that the law does not require it to disclose the precise nature of the confidential information to prove this. If it is proven that the matter is sufficiently related, there is an inference that confidential information was imparted unless Mr. Glick satisfies the panel that no information that could be relevant was imparted.

[24] The College states that a matter is considered a related matter when it is reasonably possible that a lawyer acquired confidential information on the first retainer that could be relevant to the current matter.

[25] The College submits that Mr. Glick is privy to confidential information about the College as a result of his role as counsel to the ICRC and as a prosecutor for the College. Specifically, the College refers to Mr. Glick being privy to matters falling within the College's jurisdiction to regulate the practice of chiropody in Ontario, as well as privileged communications he had with College staff, which Mr. Glick acknowledged in his cross-examination.

[26] In its factum, the College includes a list of the matters WeirFoulds handled as ICRC counsel and as prosecutor for the College during the years Mr. Glick worked at WeirFoulds.

[27] In support of its position, the College relies on the evidence of Peter Stavropoulos, the President of College Council, who stated in his affidavit that Mr. Glick, in his role as ICRC counsel, was involved in providing advice to the College relating to concerns and cases involving inappropriate business practices and, as a result, obtained information that is confidential to the College. Mr. Stavropoulos does not describe the nature of the confidential information at issue.

[28] Regardless, the College states that, for matters involving the ICRC, deliberate secrecy is integral to the decision-making process and the purpose of the privileged relationship between the ICRC and its counsel is to prevent the decision-making process from being penetrated.

[29] The College states that the Law Society of Ontario Rules require lawyers to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship.[2] These obligations preserve confidentiality and privilege and are not time limited.

[30] The College further argues that if another lawyer from GlickLaw were allowed to represent Ms. De Leon, clear and convincing evidence would be required to show reasonable measures have been taken to ensure no disclosure of confidential information by the tainted lawyer because of the inference that lawyers share confidences. They state no evidence has been provided by GlickLaw to prove any steps were taken, in advance of the Registrant's retainer, to protect the confidentiality and solicitor-client privilege that attaches to the College's information. The College states that any steps taken need to be meaningful and timely in order to be effective.

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[2] Law Society of Ontario *Rules of Professional Conduct*, Rule 3.3-1: Confidential Information

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[31] The College also submits that Mr. Glick's cross-examination demonstrates that he is unaware, or unprepared to acknowledge, the broad scope of information protected by confidentiality. Specifically, they note Mr. Glick being unaware of the number of files in which he worked as a prosecutor for the college that he had carriage of after leaving WeirFoulds and starting to practice at GlickLaw.

[32] As the Panel understands it, the College's argument is that Mr. Glick's knowledge from his time at WeirFoulds, when he worked in both a prosecutorial role for the College and provided advice to the ICRC, imbued him with confidential information that is sufficiently related to the matter involving Ms. De Leon. This is in spite of the fact that Ms. De Leon was never the subject of or connected to any of the matters for which the College received legal services from Mr. Glick or WeirFoulds. The College submits the acknowledgement of privileged communications, in the form of emails between Mr. Glick and College employees, as well as the numerous cases handled by WeirFoulds during the time period in question, amounts to sufficient evidence of Mr. Glick possessing confidential information; however, no actual evidence as to the nature of the confidential information, nor why it would be relevant to the current matter, has been submitted by the College. Further, in relation to Mr. Glick's work as counsel to the ICRC, the College relies on the notion that his work on certain cases gives Mr. Glick knowledge and insight into the decision-making process of the ICRC, that proves the previous retainer is sufficiently related to the matter involving Ms. De Leon.

The Responding Party

[33] GlickLaw largely agrees with the test for a conflict of interest, as set out by the College. GlickLaw notes, however, that whether the new retainer (Ms. De Leon's case) is "sufficiently related"[3] to the prior retainer (Mr. Glick's work for the College) is a fact specific inquiry and the College must prove the possibility of confidential information relevant to the current matter being obtained by Mr. Glick from his prior solicitor-client relationship with the College is realistic, not theoretical, using clear and cogent evidence.

[34] GlickLaw submits that the College must provide particulars about the nature of the information received in the past retainer that can demonstrate why the retainers are sufficiently related, why the information is relevant to the current matter, and how any information could be used to prejudice the College.

[35] The Responding Party agrees with the College that the exact confidential information need not be revealed. However, GlickLaw submits that the College is obligated to provide an "outline of the nature of the confidential information"[4] so the Panel can determine if that information is confidential and whether it is sufficiently related to the new matter. Further, if the Panel were to be left to guess as to the type of information that counsel might be privy to, the College will have failed to meet its evidentiary burden. GlickLaw notes that courts have cautioned against an overbroad application of the test for a conflict of interest, as disqualifying

[3] *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39, para 24.
[4] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30.

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counsel removes a party's counsel of choice, which has been recognized as a fundamental value of our legal system.[5]

The Evidence

[36] The Responding Party urges this Panel to only consider the affidavits of Peter Stavropoulos and Mr. Glick, the transcript of the cross-examination of Mr. Glick, and the numbered exhibits to the cross-examination of Mr. Glick.

[37] GlickLaw states that the document marked as Exhibit "A" to the cross-examination of Mr. Glick – which is a document put to Mr. Glick during cross-examination that he had never seen before and could not identify – is not evidence and should not be considered as the College failed to identify or authenticate the document through an affiant or witness. As such, the Responding Party submits there is no evidence before the Panel to satisfy the requirements of identification and authentication, which are pre-conditions to admissibility.

[38] The Responding Party emphasizes that the College should have included the document marked as Exhibit "A" as part of an affidavit in its motion record if they wanted to rely on it, as this would have allowed GlickLaw to file responding evidence, if necessary. Further, the Responding Party argues that the decision by the College to show this document to Mr. Glick for the first time during the cross-examination was an unfair attempt to attack his integrity.

[39] The Responding Party further submits that the Panel should not admit the affidavit of Ken Ko, served on September 6, 2024, because it was served outside the agreed scheduled and after cross-examinations, could have been included in the College's original motion record, and is unclear and unable to assist the Panel.

[40] The College encourages this Panel to admit both documents. Regarding Mr. Ko's affidavit, the College stated during oral arguments that this issue is one of fairness and this affidavit is available evidence to assist the panel in that regard.

The College as a Public Body

[41] The Responding Party submits that the College's role as a public regulator, and not a private litigant, influences the nature of information that can be considered confidential. By way of an example, the Responding Party contrasts the College, as a public body with powers granted by statute and which has an obligation to the public and its registrants to operate transparently, with that of a privately held corporation, which holds trade secrets. GlickLaw concedes that the College is still capable of possessing confidential information, however, the scope of the information that could be considered confidential is significantly lessened compared to a private litigant.

[42] The Responding Party emphasizes that the College has not provided any case with factual similarities to the Panel. Instead, the cases provided deal with private litigants and do not address the scope of confidentiality for a public body. The Responding Party notes only two cases that

[5] *Skii km Lax Ha v. Malii*, 2021 BCCA 140, at para. 37; *Mann v. Mann*, 2023 SKCA 104, at para. 44.

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exist where a regulator sought to have its former counsel disqualified and both were dismissed.[6] GlickLaw notes that it is common practice in this province for lawyers who have worked for a regulator or the Crown to subsequently act on unrelated matters for registrants or defendants later in their career.

[43] The Responding Party emphasizes the College's requirements to make information public; this includes disciplinary cases, which are matters of public record. Both in cases where a matter settles and where matters are contested, information is public by default. The Responding Party contrasts this with civil litigation between private parties where settlements occur out of court with confidentiality clauses to ensure no information is made public.

[44] Finally, the Responding Party notes the significant disclosure obligations on the College, noting that any documents or information disclosed to any registrant in an investigation before the ICRC or prosecution before the Discipline Committee could not be covered by solicitor-client privilege. As such, none of it could be considered confidential information supporting disqualification.

The College Failed to Meet the Test for Disqualifying Counsel

[45] The Responding Party submits the College failed to meet the test for disqualifying Mr. Glick, or GlickLaw, from acting as Ms. De Leon's counsel. The test is not met because the College failed to (i) present the "clear and cogent"[7] evidence necessary as the evidence submitted is largely unspecific; and (ii) prove that the matter involving Ms. De Leon is sufficiently related to Mr. Glick's prior work for the college or that Mr. Glick is in possession of any confidential information from the past retainer that is relevant to the current matter and capable of being used against the College.

i. <u>The Insufficiency of the College's Evidence</u>

[46] The Responding Party characterizes the College's affidavit evidence (from Mr. Stavropoulos) as lacking in any specificity and relying on hearsay and speculation; further, it is from an affiant that could not have knowledge of what information Mr. Glick was in possession of.

[47] The Responding Party argues that the party seeking to disqualify opposing counsel must provide an outline of the nature of the confidential information provided in the first retainer so a determination can be made if the test for disqualification is met. As an example, the Responding Party cites the decision of the Cout of Appeal in *Chapters Inc. v. Davies, Ward & Beck LLP*, in which the court held that a simple description of the retainers would not suffice to establish a conflict.[8] Instead, as was the case in *Chapters*, detailed evidence regarding the nature of information in the possession of former lawyers – such as confidential financial statements,

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[6] *Ontario New Home Warranty Program v. Campbell*, [1999] O.J. No. 366; *Barry v. Law Society of New Brunswick* (No. 1), 1989 CanLII 7866 (NB KB).
[7] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 29.
[8] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 29.

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analyses, projections, expert reports regarding market share – is the level of evidence required to establish a sufficient relationship.[9]

[48] The Responding Party states that the only evidence the College led regarding any confidential information Mr. Glick possessed was in paragraph 15 of Mr. Stavropoulos's affidavit. However, this evidence fails to offer an explanation as to the nature of the information Mr. Glick received in his past retainer, how it would be relevant to the matter involving Ms. De Leon, or how those matters would be sufficiently related to the matter involving Ms. De Leon.

[49] The Responding Party also takes issue with the lack of evidence elicited during Mr. Glick's cross-examination. They state the College only asked Mr. Glick to confirm that he had confidential discussions with former staff of the College and panels of the ICRC, but that no questions were asked regarding the nature or categories of the confidential information Mr. Glick received prior to his being retained by the Registrant.

[50] The Responding Party states the various discipline decisions cited in the College's factum, in which Mr. Glick acted in a prosecutorial role, only relate to information that is public in nature and do not provide evidence of confidential information. Further, the Responding Party states that there has been no evidence presented as to what information Mr. Glick received in his time advising the ICRC.

[51] The Responding Party characterizes Mr. Stavropoulos's affidavit as being based on hearsay. They state that Mr. Stavropoulos could have no firsthand knowledge of the information Mr. Glick received in relation to discipline prosecutions from the College as it would have been inappropriate for Mr. Stavropoulos, as a member of the Discipline Committee, to discuss ongoing prosecutions with Ms. Smith or Ms. Hoult, from whom Mr. Glick took instructions. Similarly, the Responding Party states Mr. Stavropoulos could have no direct knowledge of ICRC matters he was not involved in personally.

[52] The Responding Party concedes that hearsay can be included in affidavits, however, the source of the information must be stated for such evidence to be admissible. GlickLaw notes that Mr. Stavropoulos does not do this and as such the hearsay contained in the affidavit should be given no weight or consideration. The Responding Party also characterizes Mr. Stavropoulos' affidavit as troubling for containing speculation and inference on the part of the affiant, noting that Mr. Stavropoulos infers that Mr. Glick obtained confidential information because of his role as counsel to the ICRC and prosecutor for the College. As a result of Mr. Stavropoulos drawing an inference, his evidence should be disregarded.

[53] The Responding Party asks this Panel to draw an adverse inference against the College for relying on hearsay evidence and failing to provide an affidavit from anyone who would have knowledge of the issues, such as Ms. Smith or Ms. Hoult or the current staff. Further, they characterize the College asking Mr. Stavropoulos to swear the affidavit as troubling since it forces this Panel into the uncomfortable position of being asked to consider the reliability and credibility of one of our fellow Discipline Committee members, which could lead to concerns of

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[9] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30.

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a reasonable apprehension of bias. For these reasons, the Responding Party further cautions this Panel against accepting the evidence from Mr. Stavropoulos.

ii. The Retainers are not Sufficiently Related and GlickLaw does not Possess Relevant Confidential Information

[54] The Responding Party submits that the College has failed to establish that Mr. Glick's past retainers with the College are sufficiently related to the current matter or that Mr. Glick possesses relevant confidential information. The Responding Party states there is no information on which the Panel could conclude there is a sufficient connection between the matters, nor is there a realistic possibility of confidential information from prior matters being used in a tangible way.

[55] On the issue of Mr. Glick having worked for the College, the Responding Party contrasts the lack of evidence presented by the College with Mr. Glick's own evidence, which GlickLaw characterizes as detailed, noting the uncontradicted evidence is that Mr. Glick only ever received confidential information on a case-specific basis on matters involving members of the profession unrelated to Ms. De Leon. Moreover, Mr. Glick did not take instruction or direction directly from the College, nor was he made aware of any secret litigation strategies of the College.

[56] The Responding Party similarly states that there is no evidence that Mr. Glick has any knowledge of the College's current approach to business practice cases as he last worked for the College over five years ago and a new leadership team has come in since that time. To this end, they point out that none of the current staff of the College were employed there when Mr. Glick was providing legal services to the College.

[57] On the issue of Mr. Glick's role in advising the ICRC, the Responding Party once again emphasizes the case-specific nature of Mr. Glick's role. GlickLaw submits that this role could not create a sufficient relationship to the matter involving Ms. De Leon as decisions of the ICRC are made on their own unique facts. The ICRC believing that there is sufficient evidence to warrant referral to the Discipline Committee in one case has no bearing on other cases.

[58] The Responding Party submits that Mr. Glick having previously dealt with cases that related to inappropriate business practices in the same vein as the current matter does not create a sufficient relationship that requires disqualifying him or his firm as counsel. GlickLaw provided the Panel with cases in which courts have found that two legal issues intersecting or overlapping does not make retainers sufficiently related.[10] The Responding Party also cites caselaw in which courts have dismissed applications by organizations seeking to disqualify former counsel from acting against them as a result of insufficient evidence that retainers are related.[11]

[59] On the College's argument of Mr. Glick being privy to the ICRC decision-making process and this being grounds to remove him as counsel because of deliberative privilege/secrecy, the Responding Party states that no caselaw supports this position.

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[10] *Greater Vancouver Regional District v. Melville*, 2007 BCCA 410, at para. 26-27; *Skii km Lax Ha v. Malii*, 2021 BCCA 140, at para. 39; *The City of Winnipeg v 3177751 Manitoba Ltd*, 2023 MBCA 100, at para. 28.

[11] *Ontario New Home Warranty Program v. Campbell*, [1999] O.J. No. 366, at paras. 41, 48, 50-52.

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[60] The Responding Party contends deliberative secrecy applies to the protection of the decision-making process for a specific case, primarily to protect from attempts to summon documents from and compel examinations of the decision-makers. The Responding Party submits these protections are not so broad as to exclude someone who advised a statutory decision-maker from all future cases. In support of this, GlickLaw cite a case in which the Canadian International Trade Tribunal rejected a motion to remove counsel – for a reasonable apprehension of bias – on the basis that counsel's general knowledge of the tribunal's decision-making process, its methods of analysis, and other institutional aspects of its decision-making were not confidential.[12] The Responding Party also, once again, highlights the case-specific nature of Mr. Glick's work, noting that any information he received could not have relevance to the future cases or to be used to the prejudice of the college.

[61] The Responding Party submits that the College conflates itself with the ICRC in a way that is contrary to the proper separation of functions of the College. GlickLaw notes that the College staff members are separate from and should not be involved in the ICRC's statutory decision-making. It is wrong to suggest that Mr. Glick providing case-specific information to the ICRC panels is the same as providing advice to the College staff.

ANALYSIS

The Evidence the Panel will Consider

[62] Before addressing the legal test and if the College has met its burden, it is important for the Panel to clarify what evidence we will be relying on in coming to this decision.

[63] The Panel has chosen to allow Exhibit "A" and the subsequent affidavit from Mr. Ko, served on September 6, 2024, into evidence that we will consider. But, as set out below, neither factor significantly into the Panel's ultimate decision, as they could not assist the Panel in considering the legal test. The Ko affidavit is very brief and only sets out the exact number of files exported from WeirFoulds to Mr. Glick in 2019. As such, it does not impact the evidence considered for the legal analysis on this decision. Neither does the document marked as Exhibit "A" to the cross-examination of Mr. Glick, as it appears to have been written by someone outside of GlickLaw and is not related to Ms. De Leon's case.

[64] Additionally, contrary to the Responding Party's request, we will not draw an adverse inference against the College for their failure to provide an affidavit from any former or current College staff.

The Legal Test

[65] In matters where a party seeks to disqualify counsel for a conflict of interest arising out of a previous relationship, a two-part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: (1) Did the lawyer receive confidential information

[12] *Certain Container Chassis, 2021 CanLII 84563* (CA CITT), at paras. 2, 27-31, 56, 63-64.

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attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of that client?[13]

[66] To meet this test, the College must prove either: (a) that confidential information relevant to the current matter was shared with the lawyer in the prior solicitor-client relationship; or (b) that the new retainer is "sufficiently related" to the prior retainer.[14] If it is established that a prior solicitor and client relationship existed and that the retainers are sufficiently related, a court will presume that confidential information was passed between the client and lawyer unless the lawyer establishes that no confidential information relevant to the present matter was received.[15]

[67] It is clear from *MacDonald Estate* that the onus of showing the two retainers to be sufficiently related rests with the client asserting the conflict of interest.[16] It is also clear that it is not enough for that client to rest on a bald assertion that the retainers are sufficiently related. There must be clear and cogent evidence from which the court can reach that conclusion.[17]

[68] Determining whether there is a sufficient relationship between two retainers is a fact-specific inquiry. Matters may be found to be sufficiently related where there are "[s]pecific 'points of connection' or insight acquired into the former client's strengths and weaknesses, character and personality traits, or litigation strategy in the present matter".[18] As Cromwell JA (as he was then) stated it in *Brookville*, "[t]he issue is not so much whether the subject matter of the two retainers is the same, but whether confidential information learned in one would be relevant to the other".[19] For a court to find that the retainers are sufficiently related, it must conclude that in all the circumstances it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter.[20]

[69] To this end, an outline of the nature of the confidential information passed to the lawyer pursuant to the first retainer will likely be needed.[21] This does not mean revealing the confidential information in question, as that would defeat the purpose of these motions, but sufficient information is needed for a client to demonstrate that the possibility of relevant confidential information having been acquired is realistic, not just theoretical.[22] In rarer cases, it may be that a simple description of the two retainers shows them to be so closely connected that a court will infer the possible misuse of confidential information and hence find the retainers to be sufficiently related.[23]

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[13] *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, at p. 1260; *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39, para 24.
[14] *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39, para 24.
[15] *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, at p. 1260; *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39, para 24, 54.
[16] *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, at p. 1260.
[17] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 29.
[18] *Skii km Lax Ha v. Malii*, 2021 BCCA 140, at para. 39.
[19] *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.*, 2008 NSCA 22, at para. 50.
[20] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 29.
[21] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30.
[22] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30.
[23] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30.

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[70] In the Panel's view, this matter does not fall into the latter category. As such, some outline of the confidential information possibly acquired by Mr. Glick during his retainer with the College or the ICRC is needed, and the College must show Mr. Glick having acquired this information rises above being purely theoretical.

[71] With this being the case, it is important to emphasize that it is incumbent on the College, as the party seeking to disqualify Mr. Glick, to specify why the documents and information supplied previously to counsel are connected or related to the new matter rather than leave this Panel to have to speculate at the degree of connection.

Has the College Met the Test for Disqualification?

[72] In the Panel's view, the College has failed to meet the test for disqualifying Mr. Glick as counsel for Ms. De Leon. Even when the contested evidence is considered, the Panel has concluded that the College has failed to meet the test for disqualification for two main reasons. First, the College has failed to sufficiently describe or provide an outline of the nature of the confidential information it says Mr. Glick has. Second, the College's evidence has fallen short of proving that Mr. Glick's current retainer for the Registrant is sufficiently related to his previous retainer with the College. We will address both in turn.

i. <u>The Lack of Clear and Cogent Evidence</u>

[73] The evidence presented by the College on this motion was contained in the affidavit from Mr. Stavropoulos and the concessions made by Mr. Glick during the cross-examination on his own affidavit.

[74] In its factum, the College lists numerous matters that WeirFoulds handled during Mr. Glick's time working there. However, they did not specify which of these matters Mr. Glick actually worked on. Similarly, the College points out that on cross-examination, Mr. Glick conceded that he had privileged communications with College staff that occurred via email.

[75] The College failed to specify why any documents and information supplied previously to Mr. Glick, as related to the numerous cases or in those privileged communications, are connected or related – in other words, relevant – to the current matter involving Ms. De Leon.

[76] To establish that the previous retainer with the College is 'sufficiently related' to the present retainer for Ms. De Leon such as to imply a concern that confidential information may be, or may be perceived to be, imparted requires clear and cogent evidence as to the nature of that previous relationship.[24] It requires evidence as to the confidential information obtained through the work done previously and how such information might relate to the present retainer.[25]

[77] Instead, the evidence of the College as to the relationship is in the nature of broad generalities and this Panel has been left to guess at the degree of connection that might exist because of Mr. Glick's previous work and communications. This is insufficient to warrant

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[24] *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566, at para. 30.
[25] *Ontario New Home Warranty Program v. Campbell*, [1999] O.J. No. 366, at para. 52.

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GlickLaw's removal as the mere assertion that there is an appearance of impropriety or that the former lawyer has some general form of confidential information, has been held by various courts to be insufficient to remove the solicitor.[26]

ii. Insufficient Connection Between the Retainers

[78] The Panel is not satisfied that the confidential information, as described by the College, makes the two retainers sufficiently related.

[79] The Panel accepts the evidence of Mr. Stavropoulos, as set out at paras. 13-15 of his affidavit, that Mr. Glick routinely investigated matters related to inappropriate business practices. As the Panel understands the College's argument, they submit that Mr. Glick's knowledge from his role as a prosecutor for the College is a form of confidential information by way of him having insight into the College's litigation strategy for cases referred to the Disciple Committee. The Panel concludes that this argument must fail. Mr. Glick's personal experience in practicing in this area of the law and gaining an understanding of the College's approach to complaints from his time as a prosecutor for the College does not prove he received any confidential information that is relevant to the current matter.

[80] The Panel accepts Mr. Glick's current retainer is in the same area of law and dealing with the same legal issues as his previous retainers. Although these previous matters may have involved the same or similar legal issues that arise in Ms. De Leon's matter, this does not create a sufficient relationship that requires disqualifying him or his firm as counsel. GlickLaw provided the Panel with cases in which courts have found that two legal issues intersecting or overlapping does not make retainers sufficiently related.[27] To use a comparable example, there is nothing improper if a former Crown prosecutor were to start acting as defence counsel.

[81] No evidence was presented by the College to suggest that Mr. Glick's experience amounted to knowledge over a secret litigation strategy to be used by the College in the present matter. The uncontradicted evidence on this motion is that Mr. Glick only ever received confidential information on a case-specific basis.

[82] Moreover, the College seemed to tacitly accept Mr. Glick acting for registrants for five years after his retainer ended, in matters that were unrelated to those Mr. Glick was involved in previously. Further, the College has been unable to explain why they changed their position in this matter; this is strange considering the uncontested evidence is that Ms. De Leon was not involved in any matter that Mr. Glick previously handled while working at WeirFoulds.

[83] Finally, the College submits that Mr. Glick's knowledge about the ICRC's decision-making process from his time working for them amounts to confidential information because of the deliberative privilege that attaches. However, no law has been provided to support the idea that deliberative privilege is so broad as to exclude counsel who previously advised a statutory decision-maker from all future cases five years in the future, especially when that case is not

[26] *Remus v. Remus* (2002), 61 O.R. (3d) 680, at para. 13 (S.C.).
Greater Vancouver Regional District v. Melville, 2007 BCCA 410, at para. 26-27; *Skii km Lax Ha v. Malii*, 2021 BCCA 140, at para. 39; *The City of Winnipeg v 3177751 Manitoba Ltd*, 2023 MBCA 100, at para. 28.

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related to any case on which counsel advised the statutory decision-maker. In fact, the law presented, although not a completely comparable situation to the one before this Panel, seems to indicate the opposite.[28]

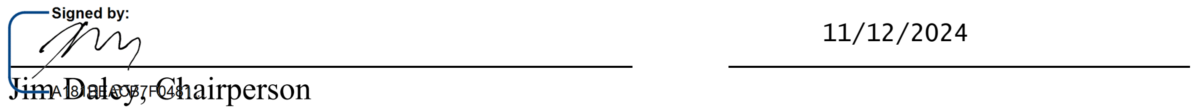
[84] The Panel does not need to address the College's submission on GlickLaw not being able to act for the Registrant because of the lack of any ethical walls on Mr. Glick's behalf as the College has failed on the first part of the legal test. As such, the onus does not shift to Mr. Glick to disprove that he shared any confidences with any other members of GlickLaw.

CONCLUSION

[85] The College's motion to remove GlickLaw as counsel for Ms. De Leon is dismissed.

[86] As was confirmed at the hearing of this matter, the Panel is not seized of Ms. De Leon's matter, but nothing prohibits one or more panel members from acting on the merits hearing panel.

I, Jim Daley, sign this decision and reasons for the decision as Chairperson of this panel and on behalf of the majority of the members of the panel as listed below:



Jim Daley, Chairperson

Concurring Members of the Discipline panel:

Stephen Haber	Professional Member
Deborah Loundes	Professional Member

DISSENTING REASONS

[87] I have had the opportunity to review my colleague's reasons, however, I disagree with the result at which they have arrived.

[88] Accordingly, I would grant the motion.

FACTS

[89] My colleagues have carefully reviewed the facts of this case. I accept and adopt their description.

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[28] *Certain Container Chassis, 2021 CanLII 84563* (CA CITT), at paras. 2, 27-31, 56, 63-64.

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ANALYSIS

The Legal Test

[90] The test for a 'disqualifying conflict of interest' has been alternatively stated as requiring:

1. Did the lawyer receive information attributable to a solicitor and client relationship, relevant to the matter at hand; and
2. Is there a risk that it could be used to prejudice the client?[29]

Has the College Met the Test for Disqualification?

[91] In considering the submissions of both parties, I recognize two pathways in which confidential information from the Responding Party's previous retainer relevant and related to this matter could reasonably have been received by the Responding Party.

i. <u>The First Pathway</u>

[92] Since 2014, WeirFoulds has been retained by the College to provide general legal counsel and advisory work. As Jordan Glick (a partner at GlickLaw) was previously a partner at WeirFoulds practicing in the regulatory group between 2010 to 2018, he provided legal services and advice to the committees of the College. This included the ICRC where Mr. Glick routinely attended ICRC meetings and provided legal advice to the ICRC relating to matters falling within the ICRC's investigatory and decision-making mandate.

[93] Mr. Glick submits, at paragraph 15 of his affidavit, that he does not recall "being involved in the formation of the Zero Tolerance Policy referred to at paragraph 16 of the affidavit of Mr. Stavropoulos which was issued in February 2019" or have "knowledge of receiving information in relation to this policy or being consulted on its development. As indicated in the minutes of Council at Exhibit "J" of Mr. Stavropoulos's affidavit, legal counsel present at the meeting of Council where the policy was adopted was Alan Bromstein.

[94] Policies such as this do not spontaneously materialize. The necessity, intended effects, and other particulars of such a policy would seem to stem from the very work that Mr. Glick has stated he was performing for the College until his departure. It is more likely than not that discussions and communications regarding the development of this policy did occur despite Mr. Glick's inability to recall them.

[95] While Mr. Glick submits that he did not act as general counsel to the College or conduct general advisory work, "[t]here is a 'strong inference' that lawyers working together will share confidential information about clients. That inference is rebutted by 'clear and convincing' evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted lawyer' to the member or members of the firm who are engaged against the former

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[29] *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, at p. 1260; *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39, para 24.

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client."[30] No evidence has been submitted that any processes or firewalls were in place to prevent the disclosure of confidential information between members of WeirFoulds during this period.

ii. The Second Pathway

[96] Due to the unique screening and decision-making role of the ICRC, Mr. Glick was also privy to information that is protected by deliberative secrecy. Both solicitor-client privilege and deliberative secrecy are constitutionally protected legal principles that are fundamental to the proper function of the administration of justice.[31] As a direct consequence of his stated role with the College, Mr. Glick, for years, was able to observe ICRC panels actively and openly discuss and deliberate on all aspects of the matters placed before them on the basis that all information, considerations, and discussions from these deliberative proceedings were privileged and would be held in strict confidence indefinitely.

[97] The requisite necessity of protecting the confidentiality of the deliberations of a decision-making body has long been considered fundamental to their ability to effectively adjudicate.[32] While the subsequent decisions of these panels and the reasons for the decisions may be made available to the public, the details and specifics of the deliberations which led to the panel's decision are not public. The only individuals to have full knowledge and information of what transpired during these deliberative proceedings were the panel members and Mr. Glick himself.

[98] These panel members and Mr. Glick are bound by deliberative secrecy, and it would be inappropriate for a panel or Mr. Glick to comment or provide any details of what transpired during these deliberations.

[99] The Responding Party submits, at para. 39 of their factum, the College's role as a public regulator, and not a private litigant, impacts the nature of information that can be considered confidential. By way of an example, the Responding Party contrasts the College as a public body, with powers granted by statute and which has an obligation to the public and its registrants to operate transparently, with that of a privately held corporation, which holds trade secrets. GlickLaw concedes that the College is still capable of possessing confidential information, however, the scope of the information that could be considered confidential is significantly lessened compared to a private litigant.

[100] I understand the obligations of a public regulator to operate transparently but does not accept that this invalidates or somehow lessens the right of its decision-makers to freely and confidentially deliberate as well as confer with legal counsel. It is this deliberative secrecy which necessitates the College to rely on the hearsay evidence provided by Mr. Stavropoulos and which under these same circumstances makes this hearsay evidence admissible in this matter.

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[30] *HMTQ v. Imperial Tobacco Canada Limited*, 2013 BCSC 1963, at para. 24; *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, at p. 1260.
[31] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, at paras. 20 and 34; *Popsor v. College of Physicians and Surgeons of Ontario*, 2013 CanLII 61807, at para. 26.
[32] *Popsor v. College of Physicians and Surgeons of Ontario*, 2013 CanLII 61807, at para. 26.

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The Confidential Information

[101] Notably, and in contrast, the confidential information that is cited in the cases that have been submitted by the Responding Party in support of their position, do not specifically reference confidential information originating from the deliberations of a decision-making body or jury. As such, there remains the ability to broadly discuss the type and nature of the confidential information.

[102] Accordingly, I accept the College's submission that it is unable to provide any further details regarding the confidential information stemming from the deliberation proceedings of the decision-making investigative panel. I am satisfied that confidential information would have reasonably been disclosed and discussed during these deliberative proceedings that could be misused to prejudice the College and that, as such, the involvement of GlickLaw in this matter represents a conflict of interest.

[103] The College has provided the Panel with information regarding several of the cases on which Mr. Glick previously worked while on retainer with the College (Manhaeve, Tran, Moravac).

[104] In addition to many identical allegations in these previous matters, these cases show significant substantial similarity to the current DeLeon matter. These similarities are including but not limited to: the complaint submission by an insurance provider following an undercover investigation of the member regarding orthotic and shoe benefits abuse; the insurance carrier specifically alleging unusually high percentage of claims from a specific benefit plan; and the insurance carrier alleges that the member provided free shoe incentives.

[105] Mr. Glick's previous retainer with the College allowed him to observe the private and confidential deliberations of the ICRC panels in the cases referenced above that led these ICRC panels to ultimately decide to refer the matters to the Discipline Committee. The panel's decisions to refer the matters to the Discipline Committee and the reasons why these decisions were made are part of the public record. There are no public records of the private and confidential deliberations of the panels which led to these decisions. Mr. Glick subsequently went on to prosecute these matters on behalf of the College. Mr. Glick would like to now defend a client against similar allegations brought on by the College.

[106] Upon reviewing the submissions, this panel member does not accept that this is an unrelated matter nor that Mr. Glick's previous involvement in these related matters, specifically observing the decision-making panel's confidential and privileged deliberations. Nor does this panel member accept this does not represent a conflict of interest that could not be used to prejudice the College's efforts to prosecute the related DeLeon matter.

[107] From the evidence provided, it is more reasonable than not that Mr. Glick would have been privy to privileged and confidential information acquired from his work with his former retainer with the College. Similarly, from the evidence provided, it is more reasonable than not that Mr. Glick would have been privy to privileged and confidential information acquired from

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his attendance during the privileged and confidential deliberations of the decision-making investigative panels.

[108] No assurances have been provided that any lawyer at GlickLaw will not or has not already had access to this confidential information, or that it will not be misused to prejudice the College. It is my opinion that dismissing this motion and allowing GlickLaw to continue as counsel in the DeLeon matter would not only represent an actual conflict of interest but would also likely be perceived as a conflict of interest by the public which would undermine the public's confidence in the administration of justice in these matters.

Mr. Glick's Experience in this Area

[109] The Responding Party submits, at para. 65 of their factum, that

> [T]he fact that Mr. Glick gained an understanding of the chiropody profession, the regulations and standards governing chiropodists, and the law applicable to disciplinary proceedings involving chiropodists also does not create a sufficient relationship between retainers. His legal knowledge, experience and skills gained by advising on and prosecuting cases is not confidential information that can create a sufficient relation between retainers. On this point, the College's assertion that GlickLaw has acted improperly in marketing its services to registrants on the basis of its experience acting on behalf of regulators is irrelevant and misguided. Advertising legal knowledge and experience has nothing to do with confidential information.

[110] The Responding Party has submitted multiple cases as evidence that this is a commonly accepted practice within the legal community. However, none of these cases include an individual who attended the deliberations of a decision-making panel or jury under one retainer and then subsequently proceeded to act against this same entity under a new retainer.

[111] While it is understood that the College is required by statute to function in a transparent manner, both solicitor-client privilege and deliberative secrecy remain constitutionally protected legal principles that are fundamental to the proper function of administration of justice.[33] Any information and insight garnered during these deliberations is not public and is considered privileged and confidential and was only afforded to Mr. Glick by the College in his role as legal counsel to the panels and, as such, this "deliberative secrecy" is protected by solicitor-client duty of confidentiality.

[112] I do not accept that Mr. Glick's previous retainer with the College provided him with only experience and a better understanding of regulatory matters, but instead this previous retainer has provided him access to confidential information which can now be used to the prejudice of the College. The College references *MacDonald Estate* in support of its position that

[33] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, at paras. 20 and 34; *Popsor v. College of Physicians and Surgeons of Ontario*, 2013 CanLII 61807, at para. 26.

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Mr. Glick "cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere".[34]

[113] It is my view that Mr. Glick would be in a conflict of interest prejudicial to the College if he were to defend Ms. DeLeon in this matter.

Balancing Counsel of Choice

[114] Counsel of choice is fundamental but not absolute. The right of a member to choose a lawyer should be balanced with the duties of confidentially afforded to previous clients.[35]

[115] Regarding the credibility of the submissions, this panel member considers the following:

- This is not the first instance that this issue has been raised with GlickLaw. The College has been consistent in its position that GlickLaw is in possession of confidential information that can be used to prejudice the College and that this represents a conflict.
- Neither the College nor Mr. Stavropoulos would materially benefit if this motion were granted. While potentially disadvantaged, the College would continue to work to fulfill its mandate should the motion be dismissed.
- The position of GlickLaw has varied; at times requesting the College waive its conflict-of-interest allegations, at times request requesting the College consent to waive its privilege of confidentiality, and now stating that no confidential information which could prejudice the College exists and therefore no conflict exists.
- GlickLaw would materially benefit should this motion be dismissed.

[116] The Responding Party submits, at para. 41 of their factum, that "[i]f the Panel were to grant this motion it would be making an order that is unprecedented and would have serious repercussions to the legal industry in Ontario"**.** In support of this position, the Responding Party submits multiple cases as evidence that this is a commonly accepted practice within the legal community;[36] however, as previously noted and discussed, not one of these cases includes an individual who attended the confidential and privileged deliberations of a decision-making panel or jury under one retainer and then subsequently proceeded to act against this same entity under a new retainer.

[117] It is this deliberative secrecy element which is important and significant, and which distinguishes this case and this motion. While the referenced cases included in the submissions are relevant in informing the panel on similar matters, the deliberative secrecy element significantly and sufficiently differentiates this specific case and this motion and, while unprecedented, does not compel a similar decision to the previously noted cases. Moreover, it is my view that upon considering the arguments and submissions, granting this motion is not only in the public interest but also protects the public confidence in the administration of justice.

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[34] *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, at p. 1260.
[35] *Skii km Lax Ha v. Malii*, 2021 BCCA 140, at para. 37.
[36] *Ontario New Home Warranty Program v. Campbell*, [1999] O.J. No. 366; *Barry v. Law Society of New Brunswick* (No. 1), 1989 CanLII 7866 (NB KB).

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CONCLUSION

[118] For the above reasons, I would grant the motion.

Cesar Mendez, Professional Member