LAW SOCIETY OF UPPER CANADA

PROFESSIONAL REGULATION COMMITTEE

CALL FOR INPUT

The Professional Regulation Committee is seeking input from the profession on a number of proposed amendments to the Rules of Professional Conduct, described in this document. The proposed changes relate to the following subjects:

- Conflicts of interest
- Doing business with a client
- Short-term legal services
- Incriminating physical evidence
- Advertising

This document includes an explanation of the proposed amendments and a blackline version of the rules showing the proposed amendments.

Comments should be submitted in writing to the Law Society by October 16, 2015 to the following address:

Call for Input on the Rules of Professional Conduct
Policy Secretariat
Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON M5H 2N6
Or by email to mdrent@lsuc.on.ca

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PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING CONFLICTS OF INTEREST

Introduction

Convocation approved changes to the Rules of Professional Conduct to implement the Model Code of the Federation of Law Societies of Canada in October 2013. These changes came into force on October 1, 2014.

The amendments to the commentary to Rule 3.4-1 approved by Convocation did not take into consideration the Supreme Court of Canada's decision in *Canadian National Railway Co*. v. *McKercher* LLP (*McKercher*).[1] Based on the principles discussed in this case, the Professional Regulation Committee has drafted new commentary to Rule 3.4-1 which the Committee believes provides appropriate guidance to lawyers in this area based on the *McKercher* decision and other developments in the law in this area. A blackline, showing changes that would be made to Rules 3.4-1 and 3.4-2, is attached to this report as Appendix 1. A "clean" version is attached as Appendix 2.

Overview of Proposed Amendments

As a result of the changes approved by Convocation in 2013, the Rules and Commentary on conflicts of interest were substantially revised. Rule 3.4-1 (Duty to Avoid Conflicts of Interest) of the Rules of Professional Conduct currently provides that "a lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section".

The *McKercher* decision, referred to earlier, considered the "bright line" rule, established by the Supreme Court of Canada in 2002 in *R*. v. *Neil*.[2] According to *McKercher* a lawyer, and by extension, a law firm, cannot act for a client whose immediate legal interests are adverse to those of another existing client, unless both clients consent. The "bright line" rule applies regardless of whether the matters are related or unrelated.[3]

The Committee has carefully reviewed *McKercher,* the Model Code changes in this area, and other developments in the law and is proposing various changes to the Commentary to Rule 3.4-1, Rule 3.4-2 (Consent), and the Commentary to 3.4-2 that are discussed in this report.

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[1] *Canadian National Railway Co*. v. *McKercher LLP*, 2013 SCC 39, online at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13154/index.do, 2013 S.C.C. 39.
[2] *R*. v. *Neil* [2002] 3 S.C.R. 631, online at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2012/index.do.
[3] *McKercher*, *supra* note 1 at paragraph 31.

Proposed Amendments

Rule 3.4-1 – Duty to Avoid Conflicts of Interest

The changes proposed to the Commentary to Rule 3.4-1 (Duty to Avoid Conflicts of Interest) are intended to provide guidance to lawyers regarding their ethical obligations in this area.

Paragraph [1] of the Commentary explains that a conflict of interest may arise for a lawyer as a result of the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

These potentially conflicting duties and interests are further explained in paragraphs [4] through [8] of the commentary, as follows:

(a) paragraph [4] describes conflicts of interest resulting from a lawyer's personal interest;
(b) paragraphs [5] and [6] describes conflicts of interest that may arise because of a lawyer's duty to a current client;
(c) paragraph [7] discusses conflicts arising from a lawyer's duty to a former client; and
(d) paragraph [8] conflicts that may arise as a result of a duty to anyone else.

Examples of circumstances that may give rise to a conflict of interest are included in paragraphs [4] to [8]. These examples are not intended to be exhaustive but rather to illustrate how these duties and interests can give rise to a conflict of interest.

Paragraph [2] of the Commentary explains that the duty of confidentiality, the duty of candour, and the duty of commitment to the client's cause are all aspects of the duty of loyalty. This paragraph provides that "this rule protects of all of these duties from impairment by a conflicting duty or interest". The recent decision of the Supreme Court of Canada in *Attorney General of Canada* v. *Federation of Law Societies of Canada*.[4] has underscored that the duty of commitment to the client's cause, as well as the lawyer's duty to protect a client's confidences, are central to the lawyer's role in the administration of justice.[5]

Paragraph [3] provides additional guidance regarding the threshold to be established in order for a conflict of interest to be established, as follows:

> The rule addresses the risk of impairment rather than actual impairment. The risk contemplated by the rule is more than a mere possibility, there must be a genuine, serious risk to the duty of loyalty or to client representation. However, the risk need not be likely or probable. Except as otherwise provided by Rule 3.4-2, it is for the client and not the lawyer to decide whether to accept this risk.

[4] *Attorney General of Canada* v. *Federation of Law Societies of Canada*, 2015 S.C.C.7.
[5] Ibid., paragraph 91.

The Commentary to the definition of "conflict of interest", advises that "in this context, 'substantial risk' means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur".

The "Bright Line" Rule

As noted earlier, the "bright line" rule was first developed by the Supreme Court of Canada in *Neil*.[6] The changes that are now being proposed to the Commentary to reflect *McKercher* are intended to draw lawyers' attention to the application of the bright line rule, which would apply to a circumstance in which a lawyer representing a current client became involved in a matter against that client. In that decision, the Supreme Court of Canada notes that the bright line rule applies regardless of whether the client matters are related or unrelated.[7]

Paragraph [6] of the Commentary explains the scope of application of the bright line rule. The scope of the bright line rule as stated by the Supreme Court of Canada in *McKercher* is reflected in the second sentence of the paragraph: "the main area of application of the bright line rule is in civil and criminal proceedings. However, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters". [8]

Paragraph [6] Commentary also emphasizes that even if the bright line rule does not apply, there may still be a conflict of interest that arises from a lawyer's duties towards a current client. The Commentary notes that "in matters involving another current client, lawyers should take care to consider not only whether the bright line rule applies, but whether there is a substantial risk of impairment. In either case, there is a conflict of interest".

Paragraph [7] indicates that a conflict of interest may arise because of a lawyer's duty to a former client, noting that "as the duty of confidentiality continues after the retainer is completed, the duty of confidentiality owed to a former client may conflict with the duty of candour owed to a current client if information from the former matter would be relevant to the current matter". The law of conflicts is intended to address the prejudice that may arise as a result of a lawyer's misuse of confidential information obtained from current and former clients.[9]

A conflict of interest that may arise as the result of a lawyer's duty to another person is also mentioned in paragraph [8]. The Commentary provides several examples of this, including the situation in which a lawyer acts as a director of a corporation and then acts against the corporation.

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[6] *R*. v. *Neil*, *supra* note 2.
[7] *McKercher*, *supra* note 2 at paragraph 31.
[8] *McKercher*, *supra* note 2, paragraphs 23 and 24.
[9] Ibid., paragraph 23.

The balance of the commentary addresses other issues that must be taken into consideration, including the lawyer's duty of commitment to a client's cause, the duty of candour, the duty of confidentiality, and consent (also addressed in Rule 3.4-2, discussed in greater detail below). Paragraph [14] refers to the relationship between the Law Society and the courts with respect to court proceedings regarding lawyers' relationships with their clients.

Rule 3.4-2 – Consent

The Committee is also proposing amendments to the Rule 3.4-2 and Commentary which are intended to enhance guidance to lawyers in this area. The Rule currently provides that consent may be express or implied. Rule 3.4-2, paragraph (a) provides that express consent must be fully informed and voluntary after disclosure. Currently, Rule 3.4-2, paragraph (b) provides that consent may be implied and need not be in writing in the following circumstances:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
(ii) the matters are unrelated;
(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the representation of the other client, and
(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

The Committee proposes to amend the rule by eliminating the distinction between express and implied consent and has reformulated the rule as follows:

> **3.4-2** A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

The jurisprudence in this area has evolved since the Supreme Court of Canada's decision in *Neil*, in which Justice Binnie referred to the category of "professional litigants" whose consent to concurrent representation of adverse legal interests could be inferred. [10] In *McKercher*, the Court observes that "in some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters." Further, according to the Court, "factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters".[11]

[10] *Neil*, *supra* note 2, paragraph 28.
[11] *McKercher*, *supra* note 1, paragraph 37.

The emergence of a "reasonableness" limitation to the scope of the "bright line" rule, as opposed to the notion of implied consent in certain circumstances, is reflected in the proposed amendment to Rule 3.4-2.

The Committee also proposes to amend paragraphs [1] and [2] of the Commentary to elaborate upon the reference to disclosure in Rule 3.4-2 itself. Paragraph [1] is amended to provide that the duty of a client to disclose a conflict of interest arises from the lawyer's duty of candour to the client. Paragraph [2] is amended to provide that "disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed". Paragraph [2A] provides that a lawyer advise a client to obtain independent legal advice about the conflict of interest and explains that the purpose of this is to ensure that the client's consent is informed, genuine and uncoerced.

Paragraph [3] also provides that a client can decide whether to give consent after the lawyer makes the required full and fair disclosure of all information relevant to the decision. The Commentary acknowledges that the client may take other factors into consideration in deciding whether to give consent. These factors include 'the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs".

Paragraph [3] further provides that a lawyer may request that a client consent in advance to conflicts that might arise in the future. However,

> a general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

Advance consent must be recorded, for example, in a retainer letter (see paragraph [5]).

Paragraph [6] of the Commentary would also amended to reflect developments in the law since *R.* v. *Neil* and *Strother* v. *3464920 Canada Inc*.[12] Consistent with the changes described earlier to Rule 3.4-1, the revised Commentary provides that

> The bright line rule, referred to in the Commentary to Rule 3.4-1, does not apply in circumstances where it is unreasonable for a client to expect that its law firm

[12] *Strother* v. *3464920 Canada Inc*., 2007 SCC 24, online at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2363/index.do.

will not act against it in unrelated matters. No issue of consent arises in such circumstances absent a substantial risk of material and adverse effect on the lawyer's loyalty to, or representation of, a client. Where such a risk exists, consent is required even though the bright line rule does not apply.

Next Steps

The Professional Regulation Committee will carefully consider all responses it receives to the call for input regarding the conflicts rules in formulating amendments for Convocation's consideration in the fall of 2015.

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT ON DOING BUSINESS WITH A CLIENT

Introduction

Convocation approved changes to the Rules of Professional Conduct to implement the Model Code of the Federation of Law Societies of Canada in October 2013. These changes came into force on October 1, 2014.

The provisions regarding Doing Business With a Client were substantially amended as a result of the implementation of the Model Code. The Law Society of Upper Canada has received feedback regarding these changes. In October, 2014, Federation Council approved additional changes to the Model Code Rules in this area. The Professional Regulation Committee has reviewed these developments as well as comments from lawyers regarding the amended rules and is proposing revisions to the Law Society of Upper Canada's Rules of Professional Conduct in this area. These changes are described in greater detail in this report. A blackline is attached to this report as Appendix 3. A "clean" version is attached as Appendix 4.

Overview

The rules in this area govern lawyer's conduct when doing business with their clients. Given the complexity of these issues, the risk of conflict of interest, and the need to protect the public, the Committee considers that guidance in the Rules should be as clear as possible.

The Committee has reviewed the 2014 Model Code amendments and feedback received from lawyers and proposes changes to the Rules of Professional Conduct, described in greater detail in this document. These changes are intended to make the Rules consistent, logical and clearer.

Following an interpretive section, Rule 3.4-28 would provide a general substantive obligation ("a lawyer shall not enter into a transaction with a client unless the transaction is fair and reasonable to the client"). Rule 3.4-29 describes specific requirements that apply if a lawyer enters into a transaction with a client. Rule 3.4-30 describes circumstances in which 3.4-29 does not apply. The Commentary to Rule 3.4-30 provides guidance on conflict of interest issues, among other things.

Borrowing from clients is addressed in Rule 3.4-31 and 3.4-32. Lending to clients is addressed in Rules 3.4-33 to 33.3, including rules regarding syndicated mortgages. Guarantees by a lawyer are addressed in 3.4-34 and 35. Payment for legal services is the subject of 3.4-35. The remaining Rules address testamentary instruments and gifts and judicial interim release.

Proposed Amendments

Definitions and Interpretation

The definitions of "independent legal advice" (ILA) and "independent legal representation" (ILR) are set out in section 1.1 of the Rules.

To provide clarity on the subject of related persons, the Committee is proposing a new interpretive provision which would appear in Rule 3.4-27 and which is reproduced below:

> For the purposes of rules 3.4-29 to 3.4-36, a lawyer is related to a person if the person and the lawyer are related persons as set out in subsections 251(1) to (6) of the Income Tax Act (Canada) and includes
>
> (a) associates and partners of the lawyer; and
> (b) trusts and estates in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.[13]

Rule 3.4-28 and 28.1 – Doing Business with a Client

Rule 3.4-28 currently provides that "a lawyer shall not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction".

The Committee is proposing the amendment of 3.4-28 to provide "a lawyer shall not enter into a transaction with a client unless the transaction is fair and reasonable to the client".

This amendment removes the invariable requirement of independent legal representation (ILR). This change is consistent with amendments proposed by the Standing Committee on the Model Code, and with feedback received by the Law Society of Upper Canada. It has been suggested that the requirement that a lawyer ensure that a client receive ILR in each instance in which a lawyer proposes to do business with a client in Rule 3.4-28 is overly onerous. As set out below, an amendment to Rule 3.4-29 is proposed requiring the lawyer to consider whether independent legal representation is reasonably required.
The current Commentary to Rule 3.4-28 is as follows.

Commentary [1] This provision applies to any transaction with a client, including

[13]The Model Code proposes a definition of the term "lawyer" which would apply to these Rules, and provides that "'lawyer' includes an associate or partner of the lawyer, related persons as defined by the Income Tax Act (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity".

(a) lending or borrowing money;
(b) buying or selling property;
(c) accepting a gift, including a testamentary gift;
(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;
(e) recommending an investment; and
(f) entering into a common business venture.

[2] The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

The proposal is to change paragraph [1] of the Commentary to Rule 3.4-28 into a revised Rule 3.4-29, discussed below. Parts of paragraph [2] of the Commentary would move to Commentary following Rule 3.4-30 and Rule 3.4-36, also discussed below.

To ensure that lawyers are not able to use an associate, related person, or trust/estate to enter into otherwise prohibited transactions with clients, the Committee proposes two new subrules (3.4-28.1(1) and 3.4-28.1(2)), as follows:

> **3.4-28.1(1)** A lawyer shall not, through a person related to the lawyer do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-29 to 3.4-36.
>
> **(2)** If a lawyer is or becomes aware that a client of the lawyer, through a person who is related to the lawyer, proposes to enter a transaction described in Rules 3.4-29 to 3.4-26, the lawyer shall take the same steps as the lawyer is required to take under those rules with respect to conflicts of interest as if the transaction were between the lawyer and the client.

Rules 3.4-29 and 3.4-30 – Transactions with Clients

Rule 3.4-29, set out below, currently provides that a lawyer who intends to enter into a transaction with a client must "recommend and require" that the client receive independent legal advice. This requirement also applies in the event that a lawyer holds an interest in a corporation or other entity whose securities are publicly traded, and intends to enter into a transaction with a client.

> **3.4-29** Subject to rule 3.4-30 [which deals with payment for legal work], if a client intends to enter into a transaction with their lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;
(b) recommend and require that the client receive independent legal advice; and
(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[2] A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

[3] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-31.

The Committee is mindful of the need to protect clients who enter into transactions with their lawyers. However, in the Committee's view, in the case of the transactions that are specifically mentioned in Rule 3.4-29, it is sufficient that a lawyer be required to recommend independent legal advice; further, the lawyer should consider whether the circumstances reasonably require independent legal representation.

The Committee proposes to amend 3.4-29 to read as follows:

3.4-29 Subject to Rule 3.4-30, where a transaction involves lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment or entering into a common business venture, a lawyer shall in sequence,

(a) disclose the nature of any conflicting interest or how and why it might develop later;
(b) recommend that the client receive Independent Legal Advice and consider whether the circumstances reasonably require independent legal representation with respect to the transaction; and

(c) obtain the client's consent to the transaction if the client receives such disclosure and legal advice or legal representation.

The reference to "nominal value" is consistent with amendments proposed by the Standing Committee. This change intended to permit, for example, a lawyer in a small community to enter into a nominal transaction with a client who operates a snow plowing business for a small amount of snow removal (assuming that both the client and the lawyer would consider this contract nominal, depending on their circumstances).

Rule 3.4-30 is new, based on the Model Code rule. It would provide that Rule 3.4-29 does not apply where

(a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest, or

(b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

The Commentary would also be amended as described below.

First, the first part of the current paragraph [1] of commentary appearing after this Rule (currently now following Rule 3.4-29) would be moved to a new paragraph [3], and new language would be added as paragraph [1] to remind lawyers of the fiduciary nature of the lawyer-client relationship, as follows:

> The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

Second, the Committee proposes to amend paragraph [2] of the Rule 3.4-30 Commentary (currently following Rule 3.4-29 as noted) to provide additional guidance. After the sentence "if the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined", the Committee proposes that the following new commentary be added:

> This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or representation.

Third, the Committee is proposing an amendment to require a lawyer retained to give independent legal advice (ILA) with respect to a transaction to document that the ILA was provided, by

a) providing the client with a written certificate that the client has received ILA;
b) obtaining the client's signature on a copy of the certificate of ILA and;
c) sending the signed copy to the client with whom the client proposes to transact business.

Fourth, the Committee proposes to amend the Commentary to require a lawyer to document a client's decision not to accept ILA (see proposed new paragraph [6]). Additional protection is provided to vulnerable clients, as follows:

> If the client is vulnerable and declines independent legal advice, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

Rule 3.4-31 and 3.4-32 – Borrowing from Clients

The changes proposed are intended to make the rule on borrowing from clients easier to understand. If amended as proposed, Rule 3.4-31 would provide that a lawyer shall not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company, or any similar corporation whose business includes lending money to members of the public; or
(b) the client is a person related to the lawyer, and the lawyer complies with certain requirements described in the Rule.

The Committee also proposes to add commentary to Rule 3.4-31 regarding the documentation of a client's decision to decline independent legal advice, as well as protections for the vulnerable client, as described earlier in this document. The proposed new commentary paragraph [2] is consistent with the Model Code.

Amendments are proposed to Rule 3.4-32, which would provide as follows:

> Subject to Rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer shall
>
> (a) disclose to the client the nature of the conflicting interest; and
> (b) require that the client receive independent legal representation.

The Committee is also proposing substantial revision of the Commentary to provide additional guidance. The first paragraph would provide

> Whether a person is considered a client within rule 3.4-32 and 3.4-33 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

The Committee proposes the addition of two paragraphs of Commentary regarding the documentation of a client's decision to decline independent legal representation.

Rule 3.4-33 – Lending to Clients

The Committee is proposing substantial revision of this Rule, consistent with the Model Code, on the subject of lending to clients. As amended, the Rule would require a lawyer to fulfill three conditions before lending money to a client, as follows:

(a) disclosure of the nature of the conflicting interest to the client;
(b) the client must receive ILR; and
(c) the lawyer must obtain the client's consent to the loan.

If the client is related to the lawyer, they would be required to receive ILA and to consent to the loan.

The Committee further proposes amendments to the Commentary which would remind lawyers of best practices regarding documenting a client's decision to decline ILA as well as regarding vulnerable clients. These amendments are consistent with earlier recommendations.

Rules 3.4-33.1 – Rule 3.4-33.3 – Syndicated Mortgages

These Rules on syndicated mortgages would remain unchanged. The Committee proposes however that the definition of "related persons" be removed, as guidance on this point is now provided in Rule 3.4-27, as discussed earlier in this document.

The definition of "syndicated mortgage" (a mortgage having more than one investor) remains in its current position.

Rule 3.4-34 and 3.4-35 – Guarantees by a Lawyer

The Committee proposes to amend the Rule regarding the circumstances in which a lawyer may give a personal guarantee. Currently, the Rule provides "except as provided by rule 3.4-26, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender".

The Committee is proposing to narrow the scope of application of the Rule. It would provide that a lawyer may give a personal guarantee if the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business. In the alternative, the lawyer may give a personal guarantee if the transaction is for the benefit of a non-profit or charitable institution, and other circumstances outlined in Rule 3.4-36(b) are described. Finally, a lawyer may give a personal guarantee if the lawyer has entered into a business venture with a client, and a lender requires personal guarantees from all participants as a matter of course; other conditions that must be fulfilled are described in Rule 3.4-35(c).

Rule 3.4-36 – Payment for Legal Services

This rule on the subject of payment for legal services, which previously appeared as Rule 3.4-30, is unchanged.

The Committee proposes the adoption of the commentary for this rule included in the Model Code rule: "The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest", which previously appeared in the Law Society's commentary following Rule 3.4-28.

Rules 3.4-37- 3.4-41 - Testamentary Instruments and Gifts and Judicial Interim Release

In 2013, when Convocation amended the Rules to adopt the Model Code, Model Code Rule 3.4-37 was not adopted. It provides that "a lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice". The Committee is not proposing any change in this regard.

The Standing Committee has amended the rules governing the drafting of testamentary instruments. The amended version of Rule 3.4-38 provides that "unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift". The Committee proposes that this change be adopted by the Law Society.

No changes are proposed to Rules 3.4-40 or 41.

Next Steps

The Professional Regulation Committee will carefully consider all responses it receives to the call for input regarding the conflicts rules in formulating amendments for Convocation's consideration in the fall of 2015.

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING SHORT-TERM LEGAL SERVICES

Introduction

Convocation approved changes to the Rules of Professional Conduct to implement the Model Code of the Federation of Law Societies of Canada in October 2013. These changes came into force on October 1, 2014.

In October 2014 the Council of the Federation of Law Societies of Canada, based on recommendations of the Standing Committee, approved changes to the Model Code in the area of conflicts of interest – short-term summary legal services. The 2014 amendments are intended to "facilitate the important access to legal services work of a wide range of non-for-profit legal service providers".[14]

The following material explains changes to the Rules of Professional Conduct being proposed by the Professional Regulation Committee for Convocation's consideration. A blackline is attached to this report as Appendix 5. A "clean" version appears at Appendix 6.

The amendments being proposed by the Committee are intended to respond to requests from *pro bono* legal services providers for amendment to the Rules of Professional Conduct in this area. They are also consistent with the Model Code changes in this area.

Overview of Proposed Amendments

The purpose of Rules on conflicts of interest regarding the provision of short-term limited legal services is to facilitate access to legal services by a wide range of non-for-profit legal service providers. "Short-term limited legal services" are also described as 'brief services", and generally refer to court-based programs provided by non-profit legal services providers on a pro bono basis.

In 2010, the Rules of Professional Conduct were amended to provide a modified standard for conflicts of interest for lawyers participating in Pro Bono Law Ontario's court-based brief services program by permitting a lawyer to provide brief services to a person in such programs unless the lawyer knows of a conflict of interest that would prevent him or her from acting.

Pro Bono Law Ontario (PBLO) launched the Small Claims Duty Counsel Project to provide brief services including legal merit assessments, form-completion assistance and duty counsel to low-income unrepresented litigants appearing before Small Claims Court in Toronto.

[14] Federation of Law Societies of Canada, "Federation Model Code of Professional Conduct", online at http://flsc.ca/national-initiatives/model-code-of-professional-conduct/federation-model-code-of-professional-conduct/.

PBLO's Law Help Centre at the Superior Court of Ontario in Toronto was opened as a two-year pilot project, developed in partnership with the Ministry of the Attorney General and the Advocates Society, assists low-income unrepresented litigants with civil matters for which a legal aid certificate was not available. The program permits members of the public to obtain basic procedural information, form completion assistance, summary advice, and duty counsel services.

These PBLO projects were established pursuant to PBLO's Best Practices Manual for Pro Bono Programs. The Manual included a number of requirements for the programs covering communication to volunteers about their professional and ethical duties, policies and procedures to identify and address conflicts of interest, and intake and coordination systems.

PBLO's activities have expanded to include a variety of programs at various levels of Courts, as well as non court-based programs. The Rules of Professional Conduct have not been amended since these developments, the Committee wishes to ensure that the ethical framework in place is current.

Proposed Amendments and Expansion of the Programming Eligible for Modified Conflicts Standard

Prior to the 2010 amendments to the Rules of Professional Conduct, the Rules provided that a conflicts check be performed before a lawyer could provide short-term limited legal services. Some walk-in applicants were required to wait up to three hours to find out whether they could speak with a volunteer lawyer.

The amendments provided for a modified conflicts of interest standard for lawyers in this setting, which was narrowly construed to apply to brief services for PBLO's court-based programs. Where the legal services provided were of limited scope and brief duration, a different conflicts screening standard, where lawyers and firms would not need to screen for conflicts before participating in the limited legal services provided by the Law Help Centre, was established.

The amendments currently being considered would extend this approach to a broader range of programming.

Rule 3.4-16.2 of the Rules of Professional Conduct currently provides:

> 'short term limited legal services' means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

The Committee's proposes to amend this definition of, as follows:

> 3.4-2A In rules 3.4-2A to 3.4-2D, 'short term legal services' means advice or representation to a client under the auspices of a *pro bono* or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

This amendment, which is consistent with the approach in the Model Code, is intended to remove impediments to the provision of short-term legal services and to improve access to these services by members of the public. It is also consistent with requests made by *pro bono* service providers of short term legal services to the Law Society of Upper Canada, described below.

Requests for Expanded Scope of Programming Qualifying for the Modified Conflicts standard

During the 2012 Call for Input on the Model Code of the Federation of Law Societies of Canada, Legal Aid Ontario asked that LAO lawyers providing "brief service" and criminal and duty counsel be included in the definition of "short term limited legal services". "Brief service" may include assisting a client by requesting a brief adjournment from the court to allow a client time to file documents, assisting a client by providing basic procedural information about how the client might address his or her legal concerns, and explaining the differences between negotiation, mediation, and court process. [15]

In addition, in 2014, PBLO asked that the definition of "short-term limited legal services" in the Rules of Professional Conduct be expanded to include all programs fulfilling the following criteria:

(a) *pro bono* summary legal services are being provided;

(b) there is no expectation either by the lawyer or the client that the lawyer will provide continuing legal representation in the matter.

In the event that the regulatory framework in this area is amended, the expanded definition of "short term legal services" in the Rules of Professional Conduct would include family, criminal, and human rights law advice.

[15] Legal Aid Ontario submission to the Law Society of Upper Canada Call for Input on the Model Code of the Federation of Law Societies of Canada, August 30, 2012.

Waiver

The Model Code provisions in the area of short-term summary legal services differ from the Law Society of Upper Canada's Rules of Professional Conduct by permitting a lawyer to seek the consent of a client to act where the lawyer becomes aware of a conflict of interest. The Professional Regulation Committee has carefully considered this issue, and believes, consistent with its decision in 2010, that the Rules should not permit the lawyer to seek consent in these circumstances.

Amendments to the Competence Commentary

The Committee is proposing to delete the following Rule:

3.4-16.6 In providing short-term limited legal services, a lawyer shall

(a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and
(b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

The content of this Rule would be moved to the commentary to Rule 3.1.2 (Competence). New paragraph [7B] of Commentary would provide

> In providing short-term legal services under Rules 3.4-16.2 to 16.5, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term legal services may be required or are advisable, and encourage the client to seek such further assistance.

Use of the Phrase "Limited"

The Committee is recommending that this phrase be removed from the Rules and Commentary. In the Committee's view, the phrase "short term legal services" adequately conveys the nature of the programming being offered to which the modified conflicts of interest standard applies.

Next Steps

The changes discussed in this report would significantly expand the range of short-term legal services to which the modified conflicts of interest standard applies. The Professional Regulation Committee will carefully consider the input it receives in response to this call for input in formulating proposals for Convocation's consideration.

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING INCRIMINATING PHYSICAL EVIDENCE

Introduction

In October 2013, Convocation approved changes to the Rules of Professional Conduct to implement the Model Code. These changes came into force on October 1, 2014.

The Federation's Standing Committee on the Model Code ("Model Code") monitors changes in the law of professional responsibility and legal ethics, receives and considers feedback from the Law Societies and other interested parties regarding the Model Code, and makes recommendations to the Federation's Council with respect to any changes to the Model Code.

In October 2014, the Standing Committee proposed amendments to the Code to include a new Rule 5.1-2A which provides specific guidance for lawyers on the subject of incriminating physical evidence. These changes were approved by Federation Council. The Commentary following the Rule provides guidance on the scope and application of the Rule. A blackline showing changes to be made to the Rules of Professional Conduct is attached to this document as Appendix 7. A "clean" version appears at Appendix 8.

Overview of Proposed Amendments – New Rule 5.1-2A

Rule 3.5-7 of the Rules of Professional Conduct of the Law Society of Upper Canada currently provide "if a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction". Rule 2.07(6), previously in force until the amendments of October 1, 2014, contained identical wording. The Commentary to the Rule is reproduced below:

> The lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with relevant constitutional and statutory provisions such as those found in the Income Tax Act (Canada) and the Criminal Code.

New rule 5.1-2A prohibits the concealment, destruction or alteration of incriminating physical evidence. The commentary following the Rule provides detailed guidance on the scope and application of the Rule. It elaborates on the types of evidence covered by the Rule, addresses the tension between the lawyer's duties to the client and the administration of justice in these circumstances, and provides options drawn from the case-law (specifically those described in *R*. v. *Murray*[16]) regarding the manner in which a lawyer might deal with such evidence. The

[16] Mr. Murray was charged with the criminal offence of wilfully attempting to obstruct justice for concealing videotapes that contained evidence against his client, Paul Bernardo, who was charged with murder and

Commentary also discusses issues relating to the protection of client confidentiality and privilege.

In addition to review of applicable case law, the Standing Committee also reviewed relevant rules on the subject, including ABA Model Rule 3.4(1), which in its commentary provides that applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes to conduct a limited examination that will not alter or destroy material characteristics of the evidence. The law may also require that the lawyer turn over the evidence to the authorities.[17]

The Commentary to new rule 5.1-2A contains language concerning the non-destructive testing of evidence. The Commentary advises lawyers to proceed with caution to ensure that there is no concealment, destruction, or alternation of the evidence. Paragraph [6] of Commentary notes that the act or opening or copying electronic materials can alter them.

Ethical Guidance Regarding Lawyers' Duties With Respect to Incriminating Physical Evidence

Gavin McKenzie in his book on lawyers and ethics summarizes Canadian lawyers' duties with respect to physical evidence as follows:

1. The duty of confidentiality provides no justification for taking or keeping possession of incriminating physical evidence.
2. Lawyers should avoid taking possession of such evidence.
3. Lawyers' duty of confidentiality requires them not to disclose the existence of evidence that is not in their possession.
4. Lawyers have no duty to assist the Crown by producing physical evidence.
5. Where incriminating physical evidence comes into their possession, however, lawyers have a duty not to destroy, alter or conceal it.

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other related offences. Mr. Murray was acquitted. In *R*. v. *Murray*, Justice Gravely held that a lawyer who came into possession of inculpatory evidence had three legally justifiable options:

(a) to immediately turn over the incriminating physical evidence to the authorities;
(b) to deposit it with the presiding trial judge;
(c) to notify the authorities about the existence of the videotapes, and then litigate this matter if required.

[2000] O.J. No. 2182, paragraph 125, online at https://www.canlii.org/en/on/onsc/doc/2000/2000canlii22378/2000canlii22378.html?autocompleteStr=R.%20v.%20Murray&autocompletePos=4.

[17] American Bar Association, Model Rules of Professional Conduct, Rule 3.4: Fairness to Opposing Party and Counsel, online at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html.

6. Their duty not to conceal physical evidence requires lawyers to turn over to law enforcement authorities physical evidence that consists of the instrumentalities or proceeds of crime.
7. In other cases, it is permissible for lawyers to return the evidence to its source, provided that they advise the source of the legal consequences that may follow if the evidence is destroyed, altered, or concealed, but provided that they do not have reasonable grounds to believe that the evidence will not be destroyed, altered, or concealed if it is returned.[18]

David Layton and Michael Proulx, writing in *Ethics and Criminal Law*, express the view that the guidance in current Rules in this area is "cryptic". In their view, the new Model Code Rule and Commentary represent a "welcome trend of providing Canadian lawyers with better and more comprehensive guidance regarding the proper approach to take when confronted with physical evidence of a crime". [19]

Additional Amendments Proposed by the Professional Regulation Committee

Retaining Independent Legal Counsel

Paragraph [3] of the Model Code describes three options to be considered by a lawyer in possession of incriminating physical evidence. Paragraph [4] of the Model Code refers to the possibility that the lawyer may retain independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence.

The Committee is of the view that the retaining of independent legal counsel should be given greater prominence in the Commentary than is the case in the Model Code.

In an article published in 2009, Austin Cooper, Q.C., suggested that

> …one might ask, how should counsel guide themselves when faced with the problem of evidence that may be incriminating of their clients without placing themselves at risk of prosecution? I suggest that if a serious issue arises in this area counsel would be wise to consult promptly with senior counsel in confidence for independent advice as to how to deal with the matter.[20]

The Committee therefore proposes to amend the commentary to the Rules of Professional Conduct by moving the reference to the retaining of independent counsel from paragraph [4] (where it appears in the Model Code) to paragraph [3], of the Rules of Professional Conduct,

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[18] Gavin McKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, (Toronto: Carswell, 2014), 5th edition, pp. 7-11 and 7-12.
[19] David Layton and Michael Proulx, *Ethics and Criminal Law*, 2nd ed., (Toronto, Irwin Law, 2015), p. 492.
[20] "The Ken Murray Case: Defence Counsel's Dilemma", Criminal Law Quarterly, Vol, 47, online at http://www.criminal-lawyers.ca/criminal-defence-news/the-ken-murray-case-defence-counsel-s-dilemma.

where it would become the first option to be considered by a lawyer in possession of incriminating physical evidence. Paragraph [3] would therefore provide

> A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:
>
> (a) retaining independent legal counsel who
>
> (i) is not to be informed of the identity of the client,
> (ii) is to be instructed not to disclose the identity of the instructing lawyer, and
> (iii) is to advise the lawyer and is to disclose or deliver the evidence, if necessary;
>
> (b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously;
>
> (c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or
>
> (d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

Other Amendments

The Committee also suggested the following other amendments to the Model Code, reflected in the Blackline:

(a) The word “physical” should be inserted in front of “evidence” in the first paragraph of Commentary to Rule 5.1-2A, to ensure consistent drafting of the Rule and Commentary.
(b) The word “mere” should be removed in the first paragraph of Commentary paragraph [3] (the Model Code provides “a lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence”.

Next Steps

Amendments to the Rules of Professional Conduct must be approved by Convocation. The Professional Regulation Committee will carefully consider the input it receives in formulating proposals for Convocation's consideration.

CHANGES TO THE RULES ON ADVERTISING

Introduction

The Law Society of Upper Canada's Professional Regulation Committee is responsible for developing policy options for Convocation's consideration regarding rules of professional conduct for Ontario lawyers. The Committee is proposing changes to the Rules of Professional Conduct provisions regarding marketing, including advertising.

In 2008, the Rules of Professional Conduct were amended to provide a less prescribed and a more principles-based approach to guidance on this subject. The context of these changes were recommendations made by the Competition Bureau in 2007, in which the Bureau suggested that Law Societies lift any unnecessary restrictions on advertising. Since that time, there appears to have been a significant increase in the incidence and scope of lawyer advertising and regulatory concerns have prompted a review of these Rules. A blackline, showing changes that would be made to the Rules of Professional Conduct if these changes were to be adopted by Convocation, is attached as Appendix 9. A "clean" version is attached as Appendix 10.

The Committee's view is that advertising serves a public purpose in creating awareness of available legal service providers, but must be in the best interests of the public and must maintain the integrity of the profession. With these considerations in mind, the Committee is seeking input on these changes.

Current Regulatory Framework

The current regulatory framework, in place since 2007, provides guidance on lawyer advertising and marketing and includes the following:

(a) Section 4.2 of the Rules of Professional Conduct addresses marketing. Rule 4-2-0 provides "in this rule, 'marketing' includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos".

(b) Rule 4-2-1 provides that a lawyer may market legal services if the marketing is demonstrably true, accurate and verifiable, is neither misleading, confusing, or deceptive, nor likely to mislead, confuse, or deceive, and is in the best interests of the public and consistent with a high standard of professionalism.

(c) The Commentary to Rule 4.2-1 includes a list of marketing practices that may contravene the Rule. These examples include

    (i) stating an amount of money that the lawyer has recovered for a client, or referring to the lawyer's degree of success in past cases, unless mention is also made that past results are not necessarily indicative of future results, and that the

amount recovered and other litigation outcomes will depend on the facts in individual cases;

(ii) suggesting qualitative superiority to other lawyers;

(iii) raising expectations unjustifiably;

(iv) suggesting or implying the lawyer is aggressive;

(v) disparaging or demeaning other persons, groups, organizations or institutions;

(vi) taking advantage of a vulnerable person or group; and

(vii) using testimonials or endorsements which contain emotional appeals.

(d) Rule 4.1-1 provides "A lawyer shall make legal services available to the public in an efficient and convenient way". The Commentary provides additional guidance to lawyers participating in the Legal Aid Plan.

(e) Rule 4.2-2 provides that a lawyer may advertise fees charged for legal services if

(i) the advertising is reasonably precise as to the services offered for each fee quoted;

(ii) the advertising states whether other amounts, such as disbursements, and taxes will be charged in addition to the fee; and

(iii) the lawyer strictly adheres to the advertised fee in each applicable case.

Issues Raised About Advertising

The Law Society of Upper Canada has been made aware of the following issues:

(a) Lawyers sometimes use endorsements and awards in their advertising. This advertising may refer to professional publications and awards conferred by consumer organizations. The advertisements often contain insufficient detail about the award which means that it is difficult for members of the public to determine whether the lawyer paid to receive the award (either directly or indirectly through advertising); nor is it clear whether the lawyer received the award based on merit or any selection criteria.

(b) Some advertisements contain exaggerated comparisons to other lawyers and statements or suggestions that the lawyer is aggressive.

(c) Some advertisements contain statements about fee arrangements, such as contingency fees, without a disclaimer. The advertising contains no reference to the client's

responsibility to pay the lawyer's disbursements. For example, the client may well be required to cover the costs incurred by the lawyer such as photocopying, even if the litigation is unsuccessful.

(d) Some advertising may contain misleading information about the size of the firm, the number of offices or the areas of practice. The fact that the lawyer will likely refer the work to others is not indicated in the advertisement. The nature of the service provided to the client is in fact a referral for legal services, and not legal representation.

(e) In some cases the location and context of lawyer advertising may indicate a lack of professionalism.

Proposed Amendments – New Rule 4.1-1.1

The proposals described below are intended to provide a strengthened regulatory framework and more detailed guidance to lawyers on advertising and marketing.

The Committee recommends that a new Rule 4.2-1.1 be added to the Rules which would generally incorporate the current commentary to Rule 4.2-1. The Committee is also proposing new commentary to Rule 4.2-1.1. Key features of the proposed new framework are as follows:

(a) Paragraph [1] explains that Rule 4.2-1 contains general requirements for the marketing of legal services. Rule 4.2-1.1 provides a list of marketing practices which would contravene 4.2-1, but is not an exhaustive list.

(b) Paragraph [2] provides examples of marketing practices which may contravene these requirements.

(c) Paragraph [3] emphasizes that marketing must be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public and has a negative impact on the reputation of lawyers, the legal profession, and the administration of justice. In light of the role of the profession to recognize and protect the dignity of individuals and the diversity of the Ontario community, marketing practices should conform to the requirements of human rights laws in force in Ontario.

(d) Paragraph [4] provides some examples of marketing practices that may be inconsistent with a high degree of professionalism. These include images, language or statements that are violent, racist, or sexually offensive, that take advantage of a vulnerable person or group, or refer negatively to other lawyers, the legal profession, or the administration of justice.

(e) The Committee is also proposing new Commentary. Paragraph [2] would provide guidance regarding marketing practices that may contravene Rule 4.2-1. The following examples are included:

(i) failing to disclose that the legal work is routinely referred to other lawyers for a fee rather than being performed by the lawyer;
(ii) misleading about the size of the lawyer's practice or the areas of law in which the lawyer provides services;
(iii) referring to fee arrangements offered to clients without qualifications; and
(iv) advertising, awards and endorsements from third parties without disclaimers or qualifications.

Next Steps

The Professional Regulation Committee will carefully consider all responses it receives to the call for input regarding the advertising rules in formulating amendments for Convocation's consideration in the fall of 2015.

APPENDIX 1

BLACKLINE SHOWING AMENDMENTS PROPOSED BY THE PROFESSIONAL REGULATION COMMITTEE

SECTION 3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Commentary

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest~~In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer~~. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. This rule protects all of these duties from impairment by a conflicting duty or interest.

[3] A client may be unable to judge whether the lawyer's duties have actually been compromised. Even a well-intentioned lawyer may not realize that performance of his or her duties has been compromised. Accordingly, the rule addresses the risk of impairment rather than actual impairment. The risk contemplated by the rule is more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation. However, the risk need not be likely or probable. Except as otherwise provided in Rule 3.4-2, it is for the client and not the lawyer to decide whether to accept this risk.

Personal Interest Conflicts

[4] A lawyer's own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a lawyer is asked to advise the client in respect of a matter in which the lawyer, the lawyer's partner or associate or a family member has a material direct or indirect financial interest. But other situations may not be so obvious.

For example, the judgment of a lawyer who has a close personal relationship, sexual or otherwise, with a client who is in a family law dispute is likely to be compromised. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. Lawyers should carefully consider their relationships with their clients and the subject matter of the retainer in order to determine whether a conflicting personal interest exists. If the lawyer is a member of a firm and concludes that a conflicting personal interest exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work without the involvement of the conflicted lawyer.

[2] ~~A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest~~.

[3] ~~In order to assess whether there is a conflict of interest, the lawyer is required to consider the lawyer's duties to current, former and joint clients, third persons, as well as the lawyer's own interests~~.

Representation

[4] ~~Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client~~.

~~**The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests**~~

~~**[5]** The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Aspects of the duty of loyalty owed to a current client are the duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests. Current clients must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship~~.

Current Client Conflicts

[5] Duties owed to another current client can also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict. Conflicts may also arise in a joint retainer where the jointly represented clients' interests diverge. Acting for more than one client in separate but related matters may risk impairment because of the nature of the retainers. The duty of confidentiality owed to one client may be inconsistent with the duty of candour owed to another client depending on whether information obtained by the lawyer during either retainer would be relevant to both retainers. These are examples of situations where conflicts of interest involving other current clients may arise.

[6] A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. The bright line rule holds that a lawyer cannot act directly adverse to the immediate legal interests of a current client, whether the client matters are related or unrelated, without the clients' consent. The main area of application of the bright line rule is in civil and criminal proceedings. However, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. The bright line recognizes that the lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. This type of conflict may also arise outside a law partnership, in situations where sole practitioners, who are in space-sharing associations and who otherwise have separate practices, hold themselves out as a law firm and lawyers in the association represent opposite parties to a dispute.

A lawyer should understand that there may be a conflict of interest arising from the duties owed to another current client even if the bright line rule does not apply. In matters involving another current client, lawyers should take care to consider not only whether the bright line rule applies but whether there is a substantial risk of impairment. In either case, there is a conflict of interest.

Former Client Conflicts

[7] Duties owed to a former client, as reflected in Rule 3.4-10, can impair client representation and loyalty. As the duty of confidentiality continues after the retainer is completed, the duty of confidentiality owed to a former client may conflict with the duty of candour owed to a current client if information from the former matter would be relevant to the current matter. Lawyers also have a duty not to act against a former client in the same or a related matter even where the former client's confidential information is not at risk. In order to determine the existence of a conflict of interest, a lawyer should consider whether the representation of the current client in a matter includes acting against a former client.

Conflicts arising from Duties to Other Persons

[8] Duties owed to other persons can impair client representation and loyalty. For example, a lawyer may act as a director of a corporation as well as a trustee. If the lawyer acts against such a corporation or trust, there may be a conflict of interest. But even acting for such a corporation or trust may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, make it difficult if not impossible to distinguish between legal advice from business and practical advice, or jeopardize the protection of lawyer and client privilege. Lawyers should carefully consider the propriety, and the wisdom of wearing "more than one hat" at the same time.

Other Issues To Consider

[9] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation or in a transaction can give rise to new conflicts of interest that must be addressed.

[10] Addressing conflicts may require that other rules be considered, for example

(a). the lawyer's duty of commitment to the client's cause, reflected in Rule 3.7-1, prevents the lawyer from withdrawing from representation of a current client, especially summarily and unexpectedly, in order to circumvent the conflict of interest rules;

(b) the lawyer's duty of candour, reflected in Rule 3.2-2, requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer. Even where a lawyer concludes that there is no conflict of interest in acting against a current client, the duty of candour may require that the client be advised of the adverse retainer in order to determine whether to continue the retainer;

(c) the lawyer's duty of confidentiality, reflected in Rule 3.3-1 and owed to current and former clients, may limit the lawyer's ability to obtain client consent as permitted by Rule 3.4-2 because the lawyer may not be able to disclose the information required for proper consent. Where there is a conflict of interest and consent cannot be obtained for this reason, the lawyer must not act; and

(d) rule 3.4-2 permits a lawyer to act in a conflict in certain circumstances with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

[11] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary and other principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by the Law Society even where a court dealing with the case may decline to order disqualification as a remedy.

~~**[6]** [FLSC - not in use]~~

~~**[7]** Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include~~

~~(a) the immediacy of the legal interests;~~

~~(b) whether the legal interests are directly adverse;~~

~~(c) whether the issue is substantive or procedural;~~

~~(d) the temporal relationship between the matters;~~

~~(e) the significance of the issue to the immediate and long-term interests of the clients involved; and~~

~~(f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.~~

~~Examples of Conflicts of Interest~~

[8] Conflicts of interest can arise in many different circumstances. The following are examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists:

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

(i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

(i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning their affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by their lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

(e) A lawyer or their law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

(i) affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

(ii) obscure legal advice from business and practical advice,

(iii) jeopardize the protection of lawyer and client privilege, and

(iv) disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other licensees in cost sharing or other arrangements represent clients on opposite sides of a dispute. See rule 3.3-1, Commentary [7]

[New and amended – October 2014]

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is ~~express or implied~~ consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes ~~it is reasonable for the lawyer to conclude~~ that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

~~(a) Express consent must be fully informed and voluntary after disclosure.~~

~~(b) Consent may be implied and need not be in writing where all of the following apply:~~

~~(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel,~~

~~(ii) the matters are unrelated,~~

~~(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the representation of the other client, and~~

~~(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.~~

Commentary

[0.1] ~~Rule 3.4-2 permits a client to accept the risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived~~.

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable and not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf 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. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

~~**Implied consent**~~ **Consent and the Bright Line Rule**

[6] The bright line rule, referred to in the Commentary to Rule 3.4-1, does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. No issue of consent arises in such circumstances absent a substantial risk of material and adverse effect on the lawyer's loyalty to or representation of a client. Where such a risk exists, consent is required even though the bright line rule does not apply. ~~In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *R. v. Neil* and in *Strother v. 3464920 Canada Inc*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the representation of the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.~~

APPENDIX 2

CLEAN VERSION SHOWING AMENDMENTS PROPOSED BY THE PROFESSIONAL REGULATION COMMITTEE

SECTION 3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Commentary

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. Rule 3.4-1 protects the duties owed by lawyers to their clients and the lawyer-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. This rule protects all of these duties from impairment by a conflicting duty or interest.

[3] A client may be unable to judge whether the lawyer's duties have actually been compromised. Even a well-intentioned lawyer may not realize that performance of his or her duties has been compromised. Accordingly, the rule addresses the risk of impairment rather than actual impairment. The risk contemplated by the rule is more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation. However, the risk need not be likely or probable. Except as otherwise provided in Rule 3.4-2, it is for the client and not the lawyer to decide whether to accept this risk.

Personal Interest Conflicts

[4] A lawyer's own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a lawyer is asked to advise the client in respect of a matter in which the lawyer, the lawyer's partner or associate or a family member has a material direct or indirect financial interest. But other situations may not be so obvious.

For example, the judgment of a lawyer who has a close personal relationship, sexual or otherwise, with a client who is in a family law dispute is likely to be compromised. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. Lawyers should carefully consider their relationships with their clients and the subject matter of the retainer in order to determine whether a conflicting personal interest exists. If the lawyer is a member of a firm and concludes that a conflicting personal interest exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work without the involvement of the conflicted lawyer.

Current Client Conflicts

[5] Duties owed to another current client can also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict. Conflicts may also arise in a joint retainer where the jointly represented clients' interests diverge. Acting for more than one client in separate but related matters may risk impairment because of the nature of the retainers. The duty of confidentiality owed to one client may be inconsistent with the duty of candour owed to another client depending on whether information obtained by the lawyer during either retainer would be relevant to both retainers. These are examples of situations where conflicts of interest involving other current clients may arise.

[6] A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. The bright line rule holds that a lawyer cannot act directly adverse to the immediate legal interests of a current client, whether the client matters are related or unrelated, without the clients' consent. The main area of application of the bright line rule is in civil and criminal proceedings. However, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. The bright line recognizes that the lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. This type of conflict may also arise outside a law partnership, in situations where sole practitioners, who are in space-sharing associations and who otherwise have separate practices, hold themselves out as a law firm and lawyers in the association represent opposite parties to a dispute.

A lawyer should understand that there may be a conflict of interest arising from the duties owed to another current client even if the bright line rule does not apply. In matters involving another current client, lawyers should take care to consider not only whether the bright line rule applies but whether there is a substantial risk of impairment. In either case, there is a conflict of interest.

Former Client Conflicts

[7] Duties owed to a former client, as reflected in Rule 3.4-10, can impair client representation and loyalty. As the duty of confidentiality continues after the retainer is completed, the duty of confidentiality owed to a former client may conflict with the duty of candour owed to a current client if information from the former matter would be relevant to the current matter. Lawyers also have a duty not to act against a former client in the same or a related matter even where the former client's confidential information is not at risk. In order to determine the existence of a conflict of interest, a lawyer should consider whether the representation of the current client in a matter includes acting against a former client.

Conflicts arising from Duties to Other Persons

[8] Duties owed to other persons can impair client representation and loyalty. For example, a lawyer may act as a director of a corporation as well as a trustee. If the lawyer acts against such a corporation or trust, there may be a conflict of interest. But even acting for such a corporation or trust may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, make it difficult if not impossible to distinguish between legal advice from business and practical advice, or jeopardize the protection of lawyer and client privilege. Lawyers should carefully consider the propriety, and the wisdom of wearing "more than one hat" at the same time.

Other Issues To Consider

[9] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation or in a transaction can give rise to new conflicts of interest that must be addressed.

[10] Addressing conflicts may require that other rules be considered, for example

(a) the lawyer's duty of commitment to the client's cause, reflected in Rule 3.7-1, prevents the lawyer from withdrawing from representation of a current client, especially summarily and unexpectedly, in order to circumvent the conflict of interest rules;

(b) the lawyer's duty of candour, reflected in Rule 3.2-2, requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer. Even where a lawyer concludes that there is no conflict of interest in acting against a current client, the duty of candour may require that the client be advised of the adverse retainer in order to determine whether to continue the retainer;

(c) the lawyer's duty of confidentiality, reflected in Rule 3.3-1 and owed to current and former clients, may limit the lawyer's ability to obtain client consent as permitted by Rule 3.4-2 because the lawyer may not be able to disclose the information required for proper consent. Where there is a conflict of interest and consent cannot be obtained for this reason, the lawyer must not act; and

(d) rule 3.4-2 permits a lawyer to act in a conflict in certain circumstances with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

[11] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary and other principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by the Law Society even where a court dealing with the case may decline to order disqualification as a remedy.

[New and amended – October 2014]

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable and not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf 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. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Consent and the Bright Line Rule

[6] The bright line rule, referred to in the Commentary to Rule 3.4-1, does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. No issue of consent arises in such circumstances absent a substantial risk of material and adverse effect on the lawyer's loyalty to or representation of a client. Where such a risk exists, consent is required even though the bright line rule does not apply.

[New – October 2014]

APPENDIX 3

PROPOSED AMENDMENTS PROPOSED BY THE PROFESSIONAL REGULATION COMMITTEE TO THE DOING BUSINESS WITH A CLIENT RULES IN THE RULES - BLACKLINE

Doing Business with a Client

3.4-27 ~~[FLSC – not in use]~~

For the purposes of rules 3.4-29 to 3.4-36, a lawyer is related to a person if the person and the lawyer are related persons as set out in subsections 251(2) to (6) of the *Income Tax Act* (Canada) and includes

(a) associates and partners of the lawyer; and
(b) trusts and estates in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

3.4-28 A lawyer ~~must~~shall ~~-~~not enter into a transaction with a client unless the transaction is fair and reasonable to the client.~~, the client consents to the transaction and the client has independent legal representation with respect to the transaction~~.

Commentary

[1] ~~This provision applies to any transaction with a client, including~~

~~(a) lending or borrowing money;~~

~~(b) buying or selling property;~~

~~(c) accepting a gift, including a testamentary gift;~~

~~(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;~~

~~(e) recommending an investment; and~~

~~(f) entering into a common business venture.~~

~~**[2]** The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest~~.

3.4-28.1(1) A lawyer shall not, through a person related to the lawyer, do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-29 to 3.4-36.

(2) If a lawyer is or becomes aware that a client of the lawyer, through a person who is related to the lawyer, proposes to enter a transaction described in Rules 3.4-29 to 3.4-36, the lawyer shall take the same steps as the lawyer is required to take under those rules with respect to conflicts of interest as if the transaction were between the lawyer and the client.

Transactions with Clients

3.4-29 Subject to rule 3.4-30-36, where a transaction with a client of a lawyer involves lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, the lawyer shall in sequence, ~~if a client intends to enter into a transaction with their lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must~~

(a) disclose ~~and explain~~ the nature of ~~the~~ any conflicting interest ~~to the client or, in the case of a potential conflict,~~ or how and why it might develop later;

(b) recommend ~~and require~~ that the client receives independent legal advice and consider whether the circumstances reasonably require independent legal representation with respect to the transaction; and

(c) obtain the client's consent to the transaction ~~after~~ if the client receives such disclosure and independent legal advice or independent legal representation. ~~if the client requests the lawyer to act, obtain the client's consent.~~

~~Commentary~~

~~[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.~~

~~[2] A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.~~

~~[3] Generally, in disciplinary proceedings under this rule, the burden will rest on the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.~~

~~[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-31.~~ [moved]

3.4-30 Rule 3.4-29 does not apply where

(a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest; or

(b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

Commentary

[1] ~~If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.~~ The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

[2] In some circumstances, a lawyer may be retained to provide legal services for a transaction in which the lawyer and a client participate. The ~~A~~ lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

[3] If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

[~~3~~4] Generally, in disciplinary proceedings under ~~this r~~Rules 3.4-29 to 3.4-36, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

Documenting Independent Legal Advice

[5] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by:

(a) providing the client with a written certificate that the client has received independent legal advice;

(b) obtaining the client's signature on a copy of the certificate of independent legal advice; and

(c) sending the signed copy to the lawyer with whom the client proposes to transact business.

Documenting a Client's Decision to Decline Independent Legal Advice

[6] If the client declines the opportunity to obtain independent legal advice, the lawyer should obtain the client's signature on a document indicating that the client has declined the advice.

[7] If the client is vulnerable and declines independent legal advice, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

[4] ~~If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-31~~.

~~Payment for Legal Services – moved~~

~~**3.4-301** When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must shall require recommend but need not require that the client receive independent legal advice before accepting a retainer.~~

~~Commentary~~

~~[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.~~

Borrowing from Clients

3.4-312 A lawyer ~~must~~ shall not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company, or any similar corporation whose business includes lending money to members of the public; or

(a) the client is a person related to the lawyer and the lawyer ~~lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or~~

~~(b)~~

(i) discloses to the client the nature of the conflicting interest; and

(ii) requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation.

~~the client is a related person as defined in section 251 of the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation~~.

Commentary

[1] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Documenting Independent Legal Advice

[2] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by:

(a) providing the client with a written certificate that the client has received independent legal advice;

(b) obtaining the client's signature on a copy of the certificate of independent legal advice; and

(c) sending the signed copy to the lawyer with whom the client proposes to transact business.

Documenting a Client's Decision to Decline Independent Legal Advice or Independent Legal Representation

[1] If the client declines the opportunity to obtain independent legal advice or independent legal representation, the lawyer should obtain the client's signature on a document indicating that the client has declined the advice or representation.

[2] If the client is vulnerable and declines independent legal advice, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

3.4-32 Subject to Rule 3.4-31**,** if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest proposes to borrow money from a client of the lawyer, the lawyer shall:

(a) disclose to the client the nature of the conflicting interest; and

(b) require that the client receive independent legal representation.

Commentary

[1] Whether a person is considered a client within rules 3.4-32 and 3.4-33 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

[2] Rule 3.4-33 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer should make disclosure and require that the client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest in borrowing has independent legal representation**.**

Documenting a Client's Decision to Decline Independent Legal Representation

[3] If the client declines the opportunity to obtain independent legal representation, the lawyer should obtain the client's signature on a document indicating that the client has declined the representation.

[4] If the client is vulnerable and declines independent legal representation, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

Certificate of Independent Legal Advice

3.4-323 A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

3.4-334 Subject to rule 3.4-321, if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer shall must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

3.4-345 **Subject to Rule 3.4-31,** iIf a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer shall:lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain to the client the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Lending to Clients

3.4-33 6A lawyer shall not lend money to a client unless, before making the loan, the lawyer

(a) discloses to the client the nature of the conflicting interest; and

(b) requires that the client

(i) receive independent legal representation; or

(ii) if the client is a person related to the lawyer, receives independent legal advice; and

(c) obtains the client's consent to the loan.

Commentary

Documenting a Client's Decision to Decline Independent Legal Representation

[1] If the client declines the opportunity to obtain independent legal representation, the lawyer should obtain the client's signature on a document indicating that the client has declined the representation.

[2] If the client is vulnerable and declines independent legal representation, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

In Rules 3.4-334.1 and 3.4-334.3

~~"related persons" means related persons as defined in section 251 of the *Income Tax Act* (Canada); and~~

"syndicated mortgage" means a mortgage having more than one investor.

3.4-334.1 A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument;~~,~~

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment;~~,~~ or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

[1] A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof;

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or *inter vivos* trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment; and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

[2] A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-14 applies, the lawyer may act for both.

Disclosure

3.4-334.2 Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

3.4-334.3 A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

3.4-3475 Except as provided by rule 3.4-36, a lawyer shall ~~must~~ not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-356 A lawyer may give a personal guarantee in the following circumstances

(a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business ~~lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public~~, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with rules 3.4-28 to 3.4-36 ~~the rules in Section 3.4 (Conflicts), in particular, rules 3.4-27 to 3.4-36 (Doing Business with a Client),~~ and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Payment for Legal Services

3.4-36 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

Commentary

[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Testamentary Instruments and Gifts

3.4-37 [FLSC – not in use].

3.4-3~~8~~7 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

3.4-3938 Unless the client is a family member of the lawyer ~~or the lawyer's partner or associate~~, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

[New – October 2014]

~~3.4-39 [FLSC - not in use]~~

Judicial Interim Release

3.4-40 Subject to Rule 3.4-41, a lawyer shall not in respect of any accused person for whom the lawyer acts

(a) act as a surety for the accused;

(b) deposit with a court the lawyer's own money or that of any firm in which the lawyer is a partner to secure the accused's release;

(c) deposit with any court other valuable security to secure the accused's release; or

(d) act in a supervisory capacity to the accused.

3.4-41 A lawyer may do any of the things referred to in rule 3.4-40 if the accused is in a family relationship with the lawyer and the accused is represented by the lawyer's partner or associate.

[New – October 2014]

APPENDIX 4

CLEAN VERSION SHOWING PROPOSED AMENDMENTS TO THE DOING BUSINESS WITH A CLIENT RULES IN THE RULES OF PROFESSIONAL CONDUCT

Doing Business with a Client

For the purposes of rules 3.4-29 to 3.4-36, a lawyer is related to a person if the person and the lawyer are related persons as set out in subsections in 251(2) to (6) of the *Income Tax Act* (Canada) and includes

(a) associates and partners of the lawyer; and
(b) trusts and estates in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

3.4-28 A lawyer shall not enter into a transaction with a client unless the transaction is fair and reasonable to the client.

3.4-28.1(1) A lawyer shall not, through a person related to the lawyer, do indirectly what the lawyer is prohibited from doing directly under Rules 3.4-29 to 3.4-36.

(2) If a lawyer is or becomes aware that a client of the lawyer, through a person who is related to the lawyer, proposes to enter a transaction described in Rules 3.4-29 to 3.4-36, the lawyer shall take the same steps as the lawyer is required to take under those rules with respect to conflicts of interest as if the transaction were between the lawyer and the client.

Transactions with Clients

3.4-29 Subject to rule 3.4-30-36, where a transaction with a client of a lawyer involves lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, the lawyer shall in sequence,

(a) disclose the nature of any conflicting interest or how and why it might develop later;

(b) recommend that the client receives independent legal advice and consider whether the circumstances reasonably require independent legal representation with respect to the transaction; and

(c) obtain the client's consent to the transaction if the client receives such disclosure and independent legal advice or independent legal representation.

3.4-30 Rule 3.4-29 does not apply where

(a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest; or

(b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

Commentary

[1] The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

[2] In some circumstances, a lawyer may be retained to provide legal services for a transaction in which the lawyer and a client participate. The lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

[3] If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

[4] Generally, in disciplinary proceedings under Rules 3.4-29-3.4-36, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

Documenting Independent Legal Advice

[5] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by:

(a) providing the client with a written certificate that the client has received independent legal advice;

(b) obtaining the client's signature on a copy of the certificate of independent legal advice; and

(c) sending the signed copy to the lawyer with whom the client proposes to transact business.

Documenting a Client's Decision to Decline Independent Legal Advice

[6] If the client declines the opportunity to obtain independent legal advice, the lawyer should obtain the client's signature on a document indicating that the client has declined the advice.

[7] If the client is vulnerable and declines independent legal advice, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

Borrowing from Clients

3.4-31 A lawyer shall not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company, or any similar corporation whose business includes lending money to members of the public; or

(b) the client is a person related to the lawyer and the lawyer

(i) discloses to the client the nature of the conflicting interest; and

(ii) requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation.

Commentary

[1] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Documenting Independent Legal Advice

[2] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by:

(a) providing the client with a written certificate that the client has received independent legal advice;

(b) obtaining the client's signature on a copy of the certificate of independent legal advice; and

(c) sending the signed copy to the lawyer with whom the client proposes to transact business.

Documenting a Client's Decision to Decline Independent Legal Advice or Independent Legal Representation

[3] If the client declines the opportunity to obtain independent legal advice or independent legal representation, the lawyer should obtain the client's signature on a document indicating that the client has declined the advice or representation.

[4] If the client is vulnerable and declines independent legal advice, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

3.4-32 Subject to Rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest proposes to borrow money from a client of the lawyer, the lawyer shall:

(a) disclose to the client the nature of the conflicting interest; and

(b) require that the client receive independent legal representation.

Commentary

[1] Whether a person is considered a client within rules 3.4-32 and 3.4-33 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

[2] Rule 3.4-33 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer should make disclosure and require that the client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest in borrowing has independent legal representation**.**

Documenting a Client's Decision to Decline Independent Legal Representation

[3] If the client declines the opportunity to obtain independent legal representation, the lawyer should obtain the client's signature on a document indicating that the client has declined the representation.

[4] If the client is vulnerable and declines independent legal representation, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

Lending to Clients

3.4-33 A lawyer shall not lend money to a client unless, before making the loan, the lawyer

(a) discloses to the client the nature of the conflicting interest; and

(b) requires that the client

(i) receive independent legal representation; or

(ii) if the client is a person related to the lawyer, receives independent legal advice; and

(c) obtains the client's consent to the loan**.**

Commentary

Documenting a Client's Decision to Decline Independent Legal Representation

[1] If the client declines the opportunity to obtain independent legal representation, the lawyer should

obtain the client's signature on a document indicating that the client has declined the representation.

[2] If the client is vulnerable and declines independent legal representation, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

In Rules 3.4-33.1 and 3.4-33.3

"syndicated mortgage" means a mortgage having more than one investor.

3.4-33.1 A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument;

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment; or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

[1] A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof;

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or *inter vivos* trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment; and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

[2] A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-14 applies, the lawyer may act for both.

Disclosure

3.4-33.2 Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

3.4-33.3 A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

3.4-34 Except as provided by rule 3.4-36, a lawyer shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-35 A lawyer may give a personal guarantee in the following circumstances

(a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer’s spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with rules 3.4-28 to 3.4-36 and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Payment for Legal Services

3.4-36 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

Commentary

[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Testamentary Instruments and Gifts

3.4-37 [FLSC – not in use].

3.4-38 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

3.4-39 Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

[New – October 2014]

Judicial Interim Release

3.4-40 Subject to Rule 3.4-41, a lawyer shall not in respect of any accused person for whom the lawyer acts

(a) act as a surety for the accused;

(b) deposit with a court the lawyer's own money or that of any firm in which the lawyer is a partner to secure the accused's release;

(c) deposit with any court other valuable security to secure the accused's release; or

(d) act in a supervisory capacity to the accused.

3.4-41 A lawyer may do any of the things referred to in rule 3.4-40 if the accused is in a family relationship with the lawyer and the accused is represented by the lawyer's partner or associate.

[New – October 2014]

APPENDIX 5

SHORT-TERM LEGAL SERVICES - BLACKLINE SHOWING AMENDMENTS PROPOSED BY THE PROFESSIONAL REGULATION COMMITTEE

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should

(a) decline to act;

(b) obtain the client's instructions to retain, consult, or collaborate with a licensee who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[7B] In providing short-term legal services under Rules 3.4-16.2-16.5, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term legal services may be required or are advisable, and encourage the client to seek such further assistance.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

Short-term ~~Limited~~ Legal Services

3.4-16.2 In this rule and rules 3.4-16.3 to 3.4-16.6,

"*pro bono* client" means a client to whom a lawyer provides short-term ~~limited~~ legal services;

"short-term ~~limited~~ legal services" means advice or representation to a client under the auspices of a *pro bono* or not-for-profit legal services provider ~~*pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court~~, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

3,4-16.3 A lawyer may provide short-term legal services without taking steps to determine whether there is a conflict of interest.

3.4-16.3 A lawyer must not provide or must cease providing short-term legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

~~**3.4-16.3** A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless~~

~~(a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or~~

~~(b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer's firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.~~

3.4-16.4 ~~A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client's confidential information is made to the lawyer acting for the other clients.~~

3.4-16.4 A lawyer who provides short-term ~~limited~~ legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

3.4-16.5 A lawyer who is unable to provide short-term ~~limited~~ legal services to a *pro bono* client because of the operation of rules 3.4-16.2 to 3.4-16.5 ~~3.4-16.3(a) or 3.4-16.3(b)~~ shall cease to provide short term ~~limited~~ legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in rule 3.4-16.4~~3~~ and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

3.4-16.6 ~~In providing short-term limited legal services, a lawyer shall~~

~~(a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and~~

~~(b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.~~

Commentary

[1] Short term ~~limited~~ legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider ~~Pro Bono Law Ontario (PBLO)~~ and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short-term legal ~~*pro bono*~~ services described in rule 3.4-16.2 are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] ~~Rules 3.4-16.2 to 3.4-16.6 apply in circumstances in which the limited nature of the legal services being provided by a lawyer~~ The limited nature of short-term legal services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term ~~limited~~ legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client or between the lawyer and the client receiving short-term ~~limited~~ legal servicesand an existing or former client of the lawyer, the lawyer's firm or the *pro bono* or not for profit legal services provider~~PBLO~~. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term ~~limited~~ legal services.

[3] The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to the *pro bono* or not for profit legal services provider ~~PBLO~~ for legal assistance.

[4] The personal disqualification of a lawyer participating in ~~PBLO's~~ a short term legal services program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a *pro bono* client, as defined in rule 3.4-16.2, will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term ~~limited~~ legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term ~~limited~~ legal services.

[6] In the provision of short-term legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the *pro bono* or not-for-profit legal services provider to receive its services.

[7~~6~~] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-26) to the situation of a law firm acting against a current client of the firm in providing short term ~~limited~~ legal services. Measures that the lawyer providing the short-term ~~limited~~ legal services should take to ensure the confidentiality of information of the client's information include

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

(b) identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[8~~7~~] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

APPENDIX 6

CLEAN VERSION – SHORT TERM LIMITED LEGAL SERVICES SHOWING AMENDMENTS PROPOSED BY THE PROFESSIONAL REGULATION COMMITTEE

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should

(a) decline to act;

(b) obtain the client's instructions to retain, consult, or collaborate with a licensee who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[7B] In providing short-term legal services under Rules 3.4-16.2-16.5, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term legal services may be required or are advisable, and encourage the client to seek such further assistance.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

Short-term Legal Services

3.4-16.2 In this rule and rules 3.4-16.3 to 3.4-16.6,

"*pro bono* client" means a client to whom a lawyer provides short-term legal services;

"short-term legal services" means advice or representation to a client under the auspices of a *pro bono* or not-for-profit legal services provider, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

3.4-16.3 A lawyer may provide short-term legal services without taking steps to determine whether there is a conflict of interest.

3.4-16.4 A lawyer must not provide or must cease providing short-term legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

1**3.4-16.5** 3.4-16.4 A lawyer who provides short-term legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

3.4-16.6 A lawyer who is unable to provide short-term legal services to a *pro bono* client because of the operation of rules 3.4-16.2 to 3.4-16.5 shall cease to provide short term legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in rule 3.4-16.4 and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

Commentary

[1] Short term legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short-term legal services described in rule 3.4-16.2 are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] The limited nature of short-term legal services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client or between the lawyer and the client receiving short-term legal services and an existing or former client of the lawyer, the lawyer's firm or the *pro bono* or not for profit legal services provider. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term legal services.

[3] The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to the *pro bono* or not for profit legal services provider for legal assistance.

[4] The personal disqualification of a lawyer participating in a short term legal services program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a *pro bono* client, as defined in rule 3.4-16.2, will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term legal services.

[6] In the provision of short-term legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the *pro bono* or not-for-profit legal services provider to receive its services.

[7] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-26) to the situation of a law firm acting against a current client of the firm in providing short term legal services. Measures that the lawyer providing the short-term legal services should take to ensure the confidentiality of information of the client's information include

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

(b) identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[8] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

APPENDIX 7

INCRIMINATING PHYSICAL EVIDENCEBLACKLINE SHOWING CHANGES TO THE RULES OF PROFESSIONAL CONDUCT

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

Commentary

[1] The lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with relevant constitutional and statutory provisions such as those found in the *Income Tax Act (Canada)* and the *Criminal Code.*

~~**[2], [3] and [4]** [FLSC – not in use]~~

[Amended – October 2014]

[. . .]

5.1-2 When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent,

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

(m) needlessly abuse, hector, or harass a witness,

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge,

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

[Amended – October 2014]

Commentary

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to secure a civil advantage for the client. See also rules 3.2-5 and 3.2-5.1 and accompanying commentary.

[4] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

[Amended – October 2014]

Incriminating Physical Evidence

5.1-2A A lawyer ~~must~~ shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "physical evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its ~~mere~~ existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

(a) retaining independent legal counsel who

(i) is not to be informed of the identity of the client,

ii) is to be instructed not to disclose the identity of the instructing lawyer, and

iii) is to advise the lawyer and is to disclose or deliver the evidence, if necessary;

(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. ~~This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence~~. (moved)

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

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APPENDIX 8

INCRIMINATING PHYSICAL EVIDENCE - CLEAN VERSION SHOWING CHANGES TO THE RULES OF PROFESSIONAL CONDUCT

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

Commentary

[1] The lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with relevant constitutional and statutory provisions such as those found in the *Income Tax Act (Canada)* and the *Criminal Code.*

[Amended – October 2014]

[. . .]

5.1-2 When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent,

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

(m) needlessly abuse, hector, or harass a witness,

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge,

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

[Amended – October 2014]

Commentary

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to secure a civil advantage for the client. See also rules 3.2-5 and 3.2-5.1 and accompanying commentary.

[4] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

[Amended – October 2014]

Incriminating Physical Evidence

5.1-2A A lawyer shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "physical evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

(a) retaining independent legal counsel who

(i) is not to be informed of the identity of the client,

ii) is to be instructed not to disclose the identity of the instructing lawyer, and

iii) is to advise the lawyer and is to disclose or deliver the evidence, if necessary;

(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

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APPENDIX 9

BLACKLINE – ADVERTISING CHANGES PROPOSED BY THE PROFESSIONAL REGULATION COMMITTEE

SECTION 4.2 MARKETING

Marketing of Professional Services

4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

4.2-1 A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable;

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

4.2-1.1 For greater certainty, the following marketing practices would contravene the requirements of Rule 4.2-1:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) suggesting or implying the lawyer is aggressive;

(d) disparaging or demeaning other persons, groups, organizations or institutions;

(e) taking advantage of a vulnerable person or group;

(f) referring to awards or endorsements unless accompanied by information sufficient for the public to make an informed assessment of the award including: the source of the award, the nomination process and any fees paid by the lawyer, directly or indirectly;

(g) using testimonials which contain emotional appeals.

Commentary

[1] Rule 4.2-1 contains general requirements for marketing of legal services and Rule 4.2-1.1 sets out a list of marketing practices which would contravene Rule 4.2-1. Rule 4.2-1.1 is not an exhaustive list of marketing practices which may contravene Rule 4.2-1.

[2] Rule 4.2-1 establishes, among other things, requirements for communication in the marketing of legal services. Examples of marketing practices which may contravene these requirements include:

(a) failing to disclose that the legal work is routinely referred to other lawyers for a fee rather than being performed by the lawyer

(b) misleading about the size of the lawyer's practice or the areas of law in which the lawyer provides services

(c) referring to fee arrangements offered to clients without qualifications

(d) advertising awards and endorsements from third parties without disclaimers or qualifications.

[3] Rule 4.2-1 also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of lawyers, the legal profession and the administration of justice. The Law Society has acknowledged in the Rules the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in force in Ontario.

[4] Examples of marketing practices which may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, take advantage of a vulnerable person or group or refer negatively to other lawyers, the legal profession or the administration of justice.

~~Examples of marketing that may contravene this rule include~~

~~(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;~~

~~(b) suggesting qualitative superiority to other lawyers;~~

~~(c) raising expectations unjustifiably;~~

~~(d) suggesting or implying the lawyer is aggressive;~~

~~(e) disparaging or demeaning other persons, groups, organizations or institutions;~~

~~(f) taking advantage of a vulnerable person or group;~~

~~(g) using testimonials or endorsements which contain emotional appeals.~~

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

[Amended – October 2014]

APPENDIX 10

ADVERTISING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT– CLEAN VERSION

SECTION 4.2 MARKETING

Marketing of Professional Services

4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

4.2-1 A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable;

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

4.2-1.1 For greater certainty, the following marketing practices would contravene the requirements of Rule 4.2-1:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) suggesting or implying the lawyer is aggressive;

(d) disparaging or demeaning other persons, groups, organizations or institutions;

(e) taking advantage of a vulnerable person or group;

(f) referring to awards or endorsements unless accompanied by information sufficient for the public to make an informed assessment of the award including: the source of the award, the nomination process and any fees paid by the lawyer, directly or indirectly;

(g) using testimonials which contain emotional appeals.

Commentary

[1] Rule 4.2-1 contains general requirements for marketing of legal services and Rule 4.2-1.1 sets out a list of marketing practices which would contravene Rule 4.2-1. Rule 4.2-1.1 is not an exhaustive list of marketing practices which may contravene Rule 4.2-1.

[2] Rule 4.2-1 establishes, among other things, requirements for communication in the marketing of legal services. Examples of marketing practices which may contravene these requirements include:

(a) failing to disclose that the legal work is routinely referred to other lawyers for a fee rather than being performed by the lawyer

(b) misleading about the size of the lawyer's practice or the areas of law in which the lawyer provides services

(c) referring to fee arrangements offered to clients without qualifications

(d) advertising awards and endorsements from third parties without disclaimers or qualifications.

[3] Rule 4.2-1 also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of lawyers, the legal profession and the administration of justice. The Law Society has acknowledged in the Rules the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in force in Ontario.

[4] Examples of marketing practices which may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, take advantage of a vulnerable person or group or refer negatively to other lawyers, the legal profession or the administration of justice.

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

[Amended – October 2014]