Professionalism Issues in the Practice of Competition Law

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Hypothetical Facts

- ACME Co, a widget producer, is a member of the Widget Council of Canada ("WCC"), an industry trade association comprised of virtually all of the widget producers in Canada
- Cartella, ACME's VP & Head of Sales, is its representative at WCC

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Hypothetical Facts – Scenario 1

- Widget customers have complained that it is too difficult for customers (i.e., consumers) to engage in comparative price shopping because widget producers all price widgets differently
  - Some have an all-in price while others have a base price and charge separately for extra features
- In response, WCC has been involved in a benchmarking exercise, collecting information from members with respect to industry pricing (e.g., those who charge all-in prices vs. those who use surcharges, as well as the types and amounts of surcharges)
- Goal is to produce a suggested pricing schedule

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Hypothetical Facts – Scenario 1 (cont'd)

- Having received competition law compliance training, Cartella is concerned whether this WCC exercise is in compliance with Canadian competition laws
- Cartella approaches ACME's in-house counsel, Kaw Shus, for advice
- In turn, ACME's in-house counsel brings in competition law counsel, Noel Itall to speak to WCC

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Scenario 1 - Discussion

- Applicable Substantive Law:
  - *Competition Act*: s.45 (conspiracy)
  - Criminal Code: ss. 21 & 22 (aiding, abetting and counselling)
- Applicable Professional Rules of Conduct
  - Rule 2.02 - Dishonesty, Fraud, etc. by Client
  - Rule 2.04 - Avoidance of Conflicts

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Scenario 1 – Discussion (cont'd)

- Conduct of WCC and its members may violate s.45 of the *Competition Act* and ss. 21 & 22 of the Criminal Code
  - Can lead to inference of agreement to fix prices
  - Not always a clear line between criminal and non-criminal conduct (e.g., existence of ancillary restraint defence)

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Scenario 1 – Discussion (cont'd)

- Rule 2.02 - Dishonesty, Fraud, etc. by Client
  - A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment
  - When a lawyer knows that the client intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, the lawyer must:
    - advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal
    - if necessary, escalate to CLO and CEO
    - if still necessary, further escalate to board of directors, board of trustees or appropriate board committee
    - if the client, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter (resign in case of in-house counsel)

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Scenario 1 – Discussion (cont'd)

- Rule 2.04 Avoidance of Conflicts of Interest
  - A lawyer shall not advise or represent more than one side of a dispute
  - A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents

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Scenario 1 – Discussion (cont'd)

- Rule 2.04 Avoidance of Conflicts of Interest
  - A lawyer who has acted for a client in a matter shall not thereafter act against the client (or against persons who were involved in or associated with the client in that matter)
    - in the same matter
    - in any related matter
    - subject to limited exception (below), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

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Scenario 1 – Discussion (cont'd)

- Rule 2.04 Avoidance of Conflicts of Interest (Cont'd)
  - Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if
    - the former client consents to the lawyer's partner or associate acting, or
    - the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
      - adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur
      - extent of prejudice to any party
      - good faith of the parties
      - availability of suitable alternative counsel
      - issues affecting the public interest

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Scenario 1 – Discussion (cont'd)

- Rule 2.04 Avoidance of Conflicts of Interest (Cont'd)
  - Role of ACME's in-house counsel, Kaw Shus, is clear – he acts for ACME
  - Role of ACME's external competition law counsel, Noel Itall, in speaking to WCC should be clarified
    - For whom does he act?
      - If ACME, then any advice provided to ACME but communicated to WCC and its members may result in loss of privilege
      - Also, if he/she doesn't make it clear at the outset that he/she acts only for ACME, may be disqualified from acting adverse to WCC and its members
      - If WCC, then he/she can land in a conflict situation subsequently

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Hypothetical Facts – Scenario 2

- At 8:00 on Monday morning, officers from the Competition Bureau show up at ACME's offices in Toronto with a search warrant
- The Bureau officers indicate that they are conducting the search in furtherance of a criminal investigation into alleged price fixing by widget producers

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Scenario 2 - Discussion

- Execution of Search Warrant
  - Bureau usually will wait for outside counsel to arrive, but will secure server and offices of key personnel
  - Avoid Obstruction!
    - In-house and external counsel must be careful so as not to counsel or aid in obstruction - Rule 2.02
    - Cannot destroy, hide or remove documents/evidence
    - Cannot tip off others widget producers who may be subject of same investigation
    - But ACME and employees not obligated to respond to questions from Bureau officers
  - There will be opportunity to assert solicitor client privilege (easier if privileged documents are segregated in ACME's filing system)

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Scenario 2 – Discussion (cont'd)

- Next steps
  - Conduct internal investigation to ascertain facts
  - Consider immunity/leniency scenarios
  - Dealing with employees
    - Caution re obstruction – Rule 2.02
    - Careful re who is the client – Rule 2.04
      - Employees involved in illegal conduct may be subject to personal prosecution
      - Make sure employees know that counsel acts for the company, not individual employees
      - If employees may be subject to prosecution individually, should advise them that they may want to seek independent legal advice
      - Tricky balance – need employee's cooperation to obtain information about what happened, but if employee told to get independent legal counsel, may choose to, or be advised to, not co-operate with company's internal investigation
      - Once employee has independent counsel, cannot communicate with employee without his/her counsel (Rules 4.03, 6.03(7))

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Scenario 2 – Discussion (cont'd)

- Bureau Investigation
  - Dealing with Others under Investigation
    - Careful re obstruction – Rule 2.02 (see above)
    - Careful re conflict of interest – Rule 2.04
      - In context of a conspiracy investigation, cannot act for 2 or more alleged co-conspirators
      - While interests may align at the outset in terms of mounting joint defence, the prospect of immunity/leniency, means conflict of interest can arise
    - Careful re common interest privilege
      - Joint Defence Agreements ("JDA's") uncommon in context of criminal defence

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Scenario 2 – Discussion (cont'd)

- Follow On Class Actions
  - Dealing with Other Defendants
    - Similar considerations as above re who is the client and conflict of interest – Rules 2.02 and 2.04
    - Common Interest Privilege
      - JDA's more common in context of defence against follow on class action, although:
        - Scope of cooperation often kept narrow (e.g., re legal and procedural issues)
        - Provisions for notice, termination and return of shared info if interest of member of JDA diverges from common interest (e.g., if a member cooperates with competition authorities or plaintiff)

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Hypothetical Facts – Scenario 3

- ACME concludes that its plan of organic growth was not working
- Now it wants to pursue growth through an acquisition or joint venture with another widget producer
- The widget industry is relatively concentrated with the top 4 players accounting for 90% of the widget market

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Scenario 3 – Discussion

- Competition law issues to consider by parties to transaction:
  - Mandatory pre-merger notification?
    - Need to assess whether thresholds are exceeded - Part IX of *Competition Act*
  - Substantive competition issues?
    - Need to assess whether merger/collaboration would substantially lessen or prevent competition and applicability of efficiencies defence (ss.90.1, 92 and 96 of *Competition Act*)
- Consider other potential regulatory filings/approvals (e.g., *Bank Act*, *Investment Canada Act*, *Canada Transportation Act*)

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Scenario 3 – Discussion (cont'd)

- Cooperation by parties essential
- However,
  - In transactions involving competitors, information sharing and gun-jumping could lead to violation of conspiracy and bid-rigging provisions of the *Competition Act*
  - Failure to notify is also an offence
- Therefore, counsel need to
  - Implement due diligence protocol to minimize risk
  - Be careful with respect to notifiability analysis and advice

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Scenario 3 – Discussion (cont'd)

- JDA – to facilitate cooperation and information sharing by parties and their counsel, while preserving privilege
  - Identify common interest
  - Must clarify solicitor-client relationships and address potential conflicts to address Rules 2.02 and 2.04
  - Provide for external counsel only access to competitively sensitive information – clients must consent

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Scenario 3 – Discussion (cont'd)

- Can both parties use same counsel?
  - Rule 2.04 – joint retainers
    - Possible with clients' consent – but practical difficulties
      - Cannot withhold info of one client from the other, without consent of those involved
      - Potential conflicts could require withdrawal by counsel
    - In practice, not advisable where there are substantive competition law concerns because of conflicts of interest
      - E.g. each party may want the other to bear some or all competition law closing risks

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Hypothetical Facts

Scenario 4

- ACME, which accounts for 60% of the widget market, is re-negotiating its contract with XYZ to license XYZ's software which is a critical input into widgets
- When it comes to widgets, there are very few substitutes to XYZ's software
- ACME sees an opportunity to gain a comparative advantage over other widget producers by entering into a licensing arrangement with XYZ that is exclusive (i.e., XYZ cannot license the same software to other widget producers)

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Scenario 4 - Discussion

- Potential *Competition Act* issues:
  - Refusal to deal (s.75)
  - Abuse of dominance (ss.78 and 79)
  - However, such conduct is not illegal in and of itself, although can be prohibited if Competition Tribunal finds anti-competitive effect

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Scenario 4 – Discussion (cont'd)

- Rule 2.02 - assisting in illegal conduct by client
  - Not applicable as refusal to deal and abuse of dominance are not illegal in and of themselves
  - However, if Competition Tribunal has already prohibited conduct, care should be had in advising ACME in respect of conduct which may violate prohibition order

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The Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in (a) the lawyer's knowledge, skill, or judgment, (b) the lawyer's attention to the interests of clients, (c) the records, systems, or procedures of the lawyer's professional business, or (d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

2.02 QUALITY OF SERVICE

Honesty and Candour

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organization

(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Commentary

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

[New – March 2004]

Encouraging Compromise or Settlement

(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal Proceedings

(4) A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client.

Dishonesty, Fraud etc. by Client

(5) When acting for a client, a lawyer shall not

(a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;

(b) advise the client on how to violate the law and avoid punishment.

(5.0.1) When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

(5.0.2) A lawyer shall not use his or her trust account for purposes not related to the provision of legal services.

[Amended – April 2011]

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client. A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate. The requirement in subrule (5.0.1) is especially important where a lawyer has suspicions or doubts about whether he or she might be assisting a client in crime or fraud.

To obtain information about the client and about the subject matter and objectives of the retainer, the lawyer may, for example, need to verify who are the legal or beneficial owners of property and business entities, verify who has the control of business entities, and clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

A client or another person may attempt to use a lawyer's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a lawyer to be aware of his or her obligations under these subrules and the Law Society's By-laws that regulate the handling of trust funds.

A *bona fide* test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

[Amended – April 2011]

Dishonesty, Fraud, etc. when Client an Organization

(5.1) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

(a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,

(b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,

(c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and

(d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.

(5.2) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and

(c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

Rules 2.02 (5.1) and (5.2) speak of conduct that is dishonest, fraudulent, criminal or illegal, and this conduct would include acts of omission as well as acts of commission. Indeed, often it is the omissions of an organization, for example, to make required disclosure or to correct inaccurate disclosures that would constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, would invoke these rules.

Once a lawyer acting for an organization learns that the organization has acted, is acting, or intends to act in a wrongful manner, then the lawyer may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, then the lawyer reports the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter in accordance with rule 2.09. In some but not all cases, withdrawal would mean resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

[New – March 2004]

Client Under a Disability

(6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

A lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.

[Amended – September 2011]

Legal Services Under a Limited Scope Retainer

2.02 (6.1) Before providing legal services under a limited scope retainer, a lawyer shall

advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.

[New - September 2011]

(6.2) When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

[New - September 2011]

Commentary

Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer. In certain circumstances, such as when the client is in custody, it may not be possible to give him or her a copy of the document. In this type of situation, the lawyer should keep a record of the limited scope retainer in the client file and, when practicable, provide a copy of the document to the client. A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the lawyer is providing services to the client under a full retainer.

A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed. See rule 6.03(7.1)

[New - September 2011]

(6.3) Subrule (6.2) does not apply to a lawyer if the legal services are

(a) legal services or summary advice provided as a duty counsel under the *Legal Aid Services Act, 1998* or through any other duty counsel or other advisory program operated by a not-for-profit organization;

(b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;

(c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government funded program;

(d) summary advice provided by the lawyer to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or

(e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New - September 2011]

Commentary

The consultation referred to in subrule (6.3)(d) may include advice on preventative, protective, pro-active or procedural measures relating to the client's legal matter, after which the client may agree to retain the lawyer.

[New - September 2011]

Medical-Legal Reports

(7) A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary

The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medical-legal reports to the client.

(8) A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report, but if the client insists, the lawyer shall produce the report.

(9) Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in subrule (8), the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.

Title Insurance in Real Estate Conveyancing

(10) A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

(11) A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client.

(12) A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

(13) If discussing TitlePLUS insurance with the client, a lawyer shall fully disclose the relationship between the legal profession, the Society, and the Lawyers' Professional Indemnity Company (LawPRO).

Reporting on Mortgage Transactions

(14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

(15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

[New - February 2007]

2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

Commentary

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

In some situations, the authority of the client to disclose may be implied. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

A lawyer may have an obligation to disclose information under subrule 4.06(3)(Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of rule 2.03.

The rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client and legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, there are some very exceptional situations identified in the following subrules where disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare, and, even in these situations, the lawyer should not disclose more information than is required.

Justified or Permitted Disclosure

(2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

(3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

Commentary

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rules 2.02 (5.1) and (5.2), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 2.02 (1.1)) and the lawyer should comply with subrules 2.02 (5.1) and (5.2), which set out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

[Amended – March 2004]

(4) Where it is alleged that a lawyer or the lawyer's associates or employees are

(a) guilty of a criminal offence involving a client's affairs,

(b) civilly liable with respect to a matter involving a client's affairs, or

(c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

(5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

Literary Works

(6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client's or former client's consent.

> Commentary
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> The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person or to the disadvantage of the client.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

A "conflict of interest" or a "conflicting interest" means an interest

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

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

Commentary

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture financial interests that do not compromise a lawyer's duties to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest, because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

[Amended - May 2001, March 2004, October 2004]

Avoidance of Conflicts of Interest

(2) A lawyer shall not advise or represent more than one side of a dispute.

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

Commentary

A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

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.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:

a. The vulnerability of the client, both emotional and economic;

b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;

c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;

d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;

e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.

While subrule 2.04(3) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

[Amended – March 2004, October 2004]

Acting Against Client

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if

(a) the former client consents to the lawyer's partner or associate acting, or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,

(ii) the extent of prejudice to any party,

(iii) the good faith of the parties,

(iv) the availability of suitable alternative counsel, and

(v) issues affecting the public interest.

Commentary

The term "client" is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

(6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[Amended – February 2007]

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but

(c) the lawyer would have a duty to decline the new retainer, unless;

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

(6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip" where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

[New – February 2007]

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

[Amended – February 2007]

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

[Amended – February 2007]

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in subrule (6) to the lending client before accepting the employment,

(b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or

(c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

[New – February 2007]

(9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

(i) no legal advice is required, and

(ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Affiliations Between Lawyers and Affiliated Entities

(10.1) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office,

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

(10.2) Where there is an affiliation, after making the disclosure as required by subrule (10.1), a lawyer shall obtain the client's consent before accepting a retainer under subrule (10.1).

(10.3) Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

In reference to clause (a) of subrule (10.1), see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

[Amended – January 2008]

Prohibition Against Acting for Borrower and Lender

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

(a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,

(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,

(d) the consideration for the mortgage or loan does not exceed $50,000, or

(e) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act (Canada).*

[Amended - May 2001]

Multi-discipline Practice

(13) A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

[Amended - June 2009]

Unrepresented Persons

(14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(a) urge the unrepresented person to obtain independent legal representation,

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

(c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Short-term limited legal services

(15) In this subrule and subrules (16) to (19)

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

"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.

(16) 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.

(17) 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.

(18) A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of subrule (16) (a) or (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 subrule (16) and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

(19) 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

Short term limited legal service 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 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 *pro bono* services described in subrule (15) 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.

Subrules (15) to (19) apply in circumstances in which the limited nature of the legal services being provided by a lawyer 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 and an existing or former client of the lawyer, the lawyer's firm or 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.

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 PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by a lawyer representing a *pro bono* client, as defined in subrule (15), 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.

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). Subrule (17) extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) 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:

- 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;

- 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

- 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.

Subrule (18) 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]

2.04.1 LAWYERS ACTING FOR TRANSFEROR AND TRANSFEREE IN TRANSFERS OF TITLE

2.04.1 (1) Subject to subrule (3), an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

(2) Subrule (1) does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 2.04.

(3) So long as there is no violation of rule 2.04, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the Land Registration Reform Act permits the lawyer to sign the transfer on behalf of the transferor and the transferee,

(b) the transferor and transferee are "related persons" as defined in section 251 of the Income Tax Act (Canada), or

(c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer

[Effective March 31, 2008]

2.05 CONFLICTS FROM TRANSFER BETWEEN LAW FIRMS

Definitions

2.05 (1) In this rule

"client" includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them,

[Amended - June 2007]

"confidential information" means information obtained from a client that is not generally known to the public, and

> Commentary
>
> The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

"matter" means a case or client file but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.