

The Model Code Committee

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Why a new Code?

- Lawyer mobility
- Multiplicity of provincial codes
- National standards
 - Common law degrees
 - Admission requirements
 - Discipline
 - Ethics?
- Independence of the bar
- CBA has vacated the field

On-going Process

The FLSC National Standing Committee on the Model Code of Professional Conduct whose purpose is to

- (i) Monitor changes in the law of professional responsibility and legal ethics; and
- (ii) Receive feedback from the law societies and to make recommendations with respect to changes to the Model Code over time.

21st Century Code Making

- Statements of principle followed by exemplary rules and commentaries to provide context
- The Code is a reliable and instructive guideline that establishes minimum standards of professional conduct expected of the profession
- Rules of conduct should assist, not hinder lawyers in providing legal services to the public in a way that ensures the public interest is protected
- Accessible, clear, consistent with law and practice

Approach of the Model Code Committee

- Only make changes which are inconsistent with NU practice, procedure, law, Legal Profession Act or the Rules of the Law Society
- Changes proposed by the FLSC
- Gather feedback

A New Look

Ch. 1 – Interpretation and definitions

Ch. 2 – Standards of the Legal Profession

Ch. 3 – Relationships to Clients

Ch. 4 – Marketing of Legal Services

Ch. 5 – Relationship to the Administration of Justice

Ch. 5 – Relationship to Students, Employees and
Others

Ch. 6 – Relationship to Society and Other Lawyers

Ch. 7 – Relationship to the Society and other Lawyers

Part 3: Relationship to Clients

- Competence – currently set out in Chapter 2, Rules 1 & 2 of the CBA Code of Conduct
- Addition to the definition of “competent lawyer”:
 - “communicating **with the client** at all relevant stages of a matter in a timely and effective manner”

Limited Scope Retainers

- This is a new Rule:
- **3.2-1A Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.**
- May require commentary cross-referencing the Rules of Court

Language Rights

- New Rule:
- **3.2-2A A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.**
- May require amendment to reflect NU law and culture
- NWT change: “must” to “should” and to add “or arranges for an interpreter”.
- As drafted, the FLSC wording arguably precludes a person taking on a retainer even if they arrange for an interpreter. The inability to act unless fluent could create barriers to retaining legal counsel in the north.

Encouraging Compromise or Settlement

- Rule itself is part of CBA Code – Chapter 3, Commentary 6 & Chapter 9, Commentary 8
- Helpful practical advice on the considerations that should go into assessing settlement offers or compromise

“...A lawyer should not press settlement for personal reasons such as an overloaded calendar, lack of preparation, reluctance to face a judge or opposing counsel in a courtroom setting, or possible financial benefit due to the terms of a fee agreement.”

Threatening Criminal or Regulatory Proceedings

A form of the Rule is part of Chapter 3, Commentary 9 of CBA Code

3.2-5 A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten to initiate or proceed with a criminal or quasi-criminal charge; or to make a complaint to a regulatory authority.

EXAMPLE:

- Client is owed wages by his employer who is also an Accountant
- Proper: “should you fail to pay the outstanding wages by October 31, 2014, then my client will be taking this matter up with the Employment Standards Office”.
- Improper: “if you don’t pay the outstanding wages by October 31, 2014, then we are reporting you to the Professional Accountant’s Association”
- **Key: What is improper is doing so to gain a benefit for a client**

Dishonesty, Fraud by a Client

- Not a new rule:

When acting for a client, a lawyer must never 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.

- But, Commentary 4: Clarification that this Rule does not apply to conduct the legality of which is supportable by a reasonable & good faith argument (“Test Cases”)

Confidentiality

- New Comment on “Space Sharing”
- The intent of the addition is to provide more clarification on the expectations of lawyers who are space-sharing when it comes to Conflicts.
 - Permissible to share confidential information to ensure the adequacy of arrangements with respect to space sharing.
 - If conflict check reveals that a person against whom one lawyer wishes to act was previously represented by another lawyer, there may need to be a discussion about the nature of confidential information possessed by the previous lawyer

Public safety exception to confidentiality

- Clarification of exception for public safety – a lawyer may disclose confidential information when the lawyer believes an identifiable person/group is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Disclosure of Information on Change of Employment

- Consequential Amendment Recommended by the FLSC
- Permits disclosure for the purposes of detecting & resolving conflicts arising from a lawyer's change of employment, composition or ownership of a law firm
- Permitted only to the extent does not compromise solicitor-client privilege or otherwise prejudice the client:
 - May disclose names of persons & entities and may include a brief summary of issues and whether representation has ended;
 - Disclosure should be limited to as few lawyers as possible;
 - should use an undertaking & client consent to this type of disclosure can be in a retainer

Conflicts Of Interest

- Re-write by the FLSC October 2014
- Principles governing conflicts of interest are set out in the Supreme Court of Canada decisions of
 - [Canadian National Railway Co. v. McKercher LLP](#), [2013] 2 SCR 649
 - [R. v. Neil](#), [2002] 3 SCR 631
 - [Strother v. 3464920 Canada Inc.](#), [2007] 2 SCR 177
 - [Macdonald Estate v. Martin](#), [1990] 3 SCR 1235

The Bright Line Rule

“A lawyer must not act or continue to act for a client where there is a conflict of interest except as permitted under this Code.”

Commentary Tracks *McKercher & Neil*:

“...as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client **even if the matters are unrelated** unless the clients consent. ...cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. “

Pro Bono Summary Legal Services

- Exception to the Conflict Rules
- May provide Short Term Summary Legal Services without taking steps to determine if there is a conflict
- Short Term Summary 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”
 - Still a duty to protect confidential information
 - If you become aware of a conflict, still need to cease acting

Concurrent Representation

- *McKercher* – adverse “legal” interests
- Permits 2 or more lawyers in a firm to act for clients with competing “business” interests and may treat information received from each client as confidential
- Sets out criteria that must be complied with in order for the concurrent representation to occur

Joint Retainers clarified

- Treating spouses/partners preparing mutual wills as a Joint Retainer
- Process for on-going review of conflicts on joint retainer (co-plaintiffs, co-defendants, co-insureds, co-accused, shareholders on a USA, etc.)
- Factors for assessing when a joint retainer is in the best interests of the parties
- Informed consent
- Joint representation of lenders & borrowers
- Single client in multiple roles (executor/beneficiary)

Transferring Lawyers

Step 1:

Determining if the transferee possesses confidential information

Step 2:

Determining whether or not the new law firm is disqualified, and

Step 3:

Will Ethical Screen be effective

Guidelines for Screening

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.
5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.
6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

Doing Business with a Client

- A new approach
- Model Code uses the *Income Tax Act* Definition of Related Person
- Ross recommends anything but cross-referencing a 1600 page federal statute. Should amend the definition of “Related Person”

“related persons” means individuals connected to the lawyer by blood relationship, marriage or common-law partnership or adoption, and a corporation controlled by any of them or by the lawyer.”

Doing Business with a Client

- General prohibition on doing business with a client unless the transaction is fair and reasonable to the client
- In certain commercial transactions (lending, 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, recommending an investment, entering a common business venture) the lawyer must take the following steps in sequence:
 - Disclose the conflicting interest or how one might develop
 - Consider whether the circumstances reasonably require ILA
 - Obtain the client's consent after the client has the disclosure and ILA

Exception: Transaction with a corporation with publicly traded securities or borrowing from a Bank or other financial institution that lends money in the ordinary course of business

Doing Business with a Client

- Other types of circumstances:
 - Borrowing from Clients
 - Lending to Clients
 - Guarantees by Lawyers
 - Gifts & Testamentary Instruments
 - Payment for Legal Services
 - Judicial Interim Release

Preservation of Client's Property

- Additional Commentary on the application of trust money.
- Can't apply trust money until you render an account.
- Clarifies that trust money may be applied not only to the matter in respect of which it was received but to any other matter handled by the lawyer for the same client

Chapter 5 - Advocacy

Incriminating Physical Evidence Rule

- New Rule by the FLSC
- The “smoking gun” or What to do if you find incriminating videos in a secret hiding place in a ceiling light in your client’s bathroom”

Communicating with Witnesses

- Revised Rule from the FLSC & still in consultation phase
- Need for revision resulted from range of practices in place in different jurisdictions governing communicating with witnesses giving evidence
- **KEY PRINCIPLE:** rules governing communications with witnesses must prohibit improper coaching of witnesses and witness tampering
- Rules now address communicating while under oath, during discovery and other examination and dealing with expert witnesses
- Communicating with experts also being re-considered

Chapter 6

Relationship to Students, Employees & Others

- Obligation of Direct Supervision of staff and assistants to whom the lawyer delegates particular tasks
- List of tasks a Lawyer must not permit a non-lawyer to do
- Electronic Access to registries
- Duties of a Principal & Student

Harassment & Discrimination

- Currently part of CBA Code, Chapter 20 Non-Discrimination
- Principles of Human Rights Law & cases apply to the interpretation of the Rule
- Outright bar against sexual harassment, other forms of harassment or discriminate against any person

Chapter 7 highlights

- **7.2-10** A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.
- **7.2-1** A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.
- **7.2-3** A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Part 7: Relationship to the Society & Other Lawyers

- Consider revisions proposed by FLSC
- Concern that the previous version was discriminatory & stigmatized mental health issues
- Duty to Report clarified:
 - 7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:
 - (a) the misappropriation or misapplication of trust monies;
 - (b) the abandonment of a law practice;
 - (c) participation in criminal activity related to a lawyer's practice;
 - (d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;
 - (e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
 - (f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Errors & Omissions

- Rule
 - Inform client without admitting legal liability
 - Recommend the client obtain ILA on the matter
 - Advise the client of the possibility that the lawyer may no longer be able to act

Rule

- Must give notice to the insurer as soon as practicable of any circumstance that may give rise to a claim

Rule

- Duty to co-operate with the insurer

Next Steps

- Complete Review & Formatting
- Consider Member feedback
- Adoption at the AGM 2016
- How ongoing changes will be made