



April 7, 2014

Via email: ghume@harrisco.com; jstrawcz@flsc.ca

Gavin Hume, Q.C.
Chair, Standing Committee on the
Model Code of Professional Conduct
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Frederica Wilson
Senior Director, Regulatory and Public Affairs
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Dear Mr. Hume and Ms. Wilson:

Re: Proposed Amendments to the FLSC *Model Code of Professional Conduct*

Thank you for seeking the input of the Canadian Bar Association on proposed changes to the Federation's *Model Code of Professional Conduct* set out in your memo of October 29, 2013.

The CBA's comments on proposed changes to Commentary to Rules 3.4-1 and 3.4-2 were delivered on January 22, 2014 in a letter from CBA President Fred Headon.

The CBA's Ethics and Professional Responsibility Committee (the Committee) considered the remaining proposals (in consultation with the Criminal Justice Section with respect to incriminating physical evidence) and provides comments here on those proposals, with the exception of the proposed amendments regarding short-term limited legal services. The Committee is currently consulting with the CBA Access to Justice Committee on the proposals pertaining to short-term limited legal services and we will provide our input by May 5, 2014. Please advise if this extended deadline is problematic for you.

Doing Business with Clients

In general, the Committee supports the Federation's attempt to improve readability and comprehension with a single rule on transactions with clients as articulated in 3.4-28. We agree that the general prohibition of transactions with clients unless they are "fair and reasonable to the client" is appropriate.

The noted concern that the rule might be overly broad is apt. Accordingly, the Committee supports the inclusion of a "nominal value" exception in 3.4-29. We are also concerned, however, that the steps articulated in 3.4-29 are too restrictive in practical application.

While the Committee agrees that requirements in 3.4-29(a) (disclosure) and (c) (obtaining consent) are appropriate, the requirement in 3.4-29(b) that the lawyer must invariably require the client to receive independent legal advice will prove impractical in some situations, and unnecessarily expensive for the client. Where advantages of the transaction to the client do not justify the cost and inconvenience of independent legal advice, the proposed rule acts as an effective prohibition to the transaction. There will be circumstances where the sophistication of the client or the nature of the transaction is such that an invariable requirement imposes unnecessary.

We recommend that 3.4-29(b) be redrafted so that the lawyer must consider whether advising the client to receive independent legal advice is appropriate, relying on the protection offered by the general rule in 3.4-28 that the transaction be fair and reasonable to the client, and commentary (4) which would bring the good faith of the lawyer in question in any disciplinary proceedings. Further, we suggest that commentary [4] be revised to incorporate the guidance from commentary [1] to 3.4-32 that the lawyer considers the nature of the transaction and the sophistication of the client in assessing what is appropriate.

The specific requirements, outlined in 3.4-29 to 3.4-37, for either independent legal advice or independent legal representation depending on the type of transaction, seem reasonable with the exception of 3.4-34 (lending money to the client). The requirement as drafted is that the client must receive ILR or ILA; we recommend that the lawyer be required to consider whether this is necessary in the circumstances, having regard to the general rule that the transaction be fair and reasonable and the sophistication of the client. We suggest that the phrase “*where circumstances reasonably require it*” precede the words “requires that the client” (receive ILA/ILR) in 3.4-34(b).

General Conflicts Rules

The Committee supports the revision to the definition of client in 1.1-1 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”. While the *Model Code* is drafted on the assumption that clients of the firm are clients of each lawyer in the firm for conflicts and other purposes, this should be stated clearly.

We agree with the Federation’s proposal to move the “disclosure” definition out of the general definition section, as it is relevant only to the conflict of interest rules, adding the content to the commentary to 3.4-2 accordingly. While it might be useful to have a definition of disclosure within the conflicts rules (like that of “consent” in 3.4-2 for example), having it included in the commentary is satisfactory. The proposed addition of paragraph [2A] to the commentary to 3.4-2, addressing the requirements for ILA when consenting to conflicts, is aimed at ensuring that consent is genuine and not coerced and will provide useful guidance for the lawyer in doubt.

The Committee supports the proposed change to the commentary to 3.4-10 (acting against former clients) which aims to more clearly articulate what constitutes the misuse of confidential information.

Incriminating Physical Evidence

The Committee, and the CBA Criminal Justice Section, supports the inclusion of the proposed rules. While recognizing the utility of drafting broadly given the wide range of possible scenarios, we have a few suggestions to enhance clarity for lawyers relying on the rules and commentary.

Commentary [1] defines “evidence” for the purposes of the rule. As written, the commentary could be interpreted as applying to copies of documents and other evidence. While possession of a copy of physical evidence could not be considered “concealment, destruction or alteration” of

physical evidence as prohibited by the rule, the more detailed commentary could be read to apply to such copies. Commentary [1] should be revised to make clear that this is not the intent of the rule or the commentary.

We recommend that the second sentence in Commentary [2] be revised to add the word “solely” before “exculpatory” so that the phrase reads “whether such evidence is in fact solely exculpatory”. This change will highlight more clearly the obligation to deal appropriately with evidence that has both incriminating and exculpatory features.

Commentary [3] indicates that a lawyer could be charged with "obstructing justice". Because there are a variety of possible charges, we recommend rewording to state the lawyer "...may be subject to *criminal prosecution including* a charge of obstructing the course of justice." This commentary also states that the duties of loyalty and confidentiality should be balanced with the duty owed to the administration of justice. This statement may be wrongly interpreted as suggesting that the duties owed to a client may justify concealment, destruction or alteration of incriminating physical evidence. We recommend that it be deleted.

Commentary [4] describes what a lawyer in possession of such evidence should do. To articulate more clearly that there are more than three options, we suggest that the wording be changed to: “These options *may* include”. Also, to clarify that the lawyer cannot merely maintain possession of incriminating evidence, we suggest that the following be added at the end of Commentary [4]: “*A lawyer cannot merely continue to keep possession of the incriminating physical evidence.*”

We are of the view that physical evidence that is itself illegal (child pornography, illegal narcotics etc.) should not be voluntarily taken into possession by the lawyer as that could constitute an offence. We recommend a further commentary be added in that regard.

Conclusion

We appreciate the opportunity to provide input on these proposed changes to the Federation’s *Model Code* and encourage the Federation to consult broadly with the public, the profession and the law societies on these and future amendments to the *Model Code*. Please let me know if you have any questions regarding our recommendations.

Yours truly,

(original signed by Sarah MacKenzie for Malcolm Mercer)

Malcolm Mercer
Chair, Ethics and Professional Responsibility Committee