THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet du président

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Via email: jstrawcz@flsc.ca

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Dear Mr. Hume and Ms. Wilson:

Re: Proposed changes to Commentary to *Model Code* Rules 3.4-1 and 3.4-2

Thank you for seeking the input of the Canadian Bar Association on proposed changes to the Federation's *Model Code of Conduct* pertaining to conflicts of interest and incriminating physical evidence. We encourage the Federation to consult broadly with the public, the profession and the law societies on these and future amendments to the *Model Code*.

I am writing with the CBA's comments, developed with members of the CBA Conflicts Task Force, on proposed revisions to the Commentary to Rules 3.4-1 and 3.4-2, as a result of the Supreme Court of Canada's decision in *CNR v. McKercher*[1]. The other proposed changes to the Federation's *Model Code of Conduct,* set out in your memo of October 29, 2013, will be addressed under separate cover before the new deadline of April 7, 2014.

Model Rule 3.4-1

Model Rule 3.4-1 provides that: "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."

The *Model Code* defines a conflict of interest as meaning "the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person." (Rule 1.1-1)

[1] *Canadian National Railway Co. v. McKercher LLP,* 2013 SCC 39 (CanLII)

It is critical that the Commentary to Model Rule 3.4-1 be clear that a conflict of interest can arise because of self-interest or because of a duty owed to another current client, to a former client or to any third party. Since the Supreme Court's decision in *R. v. Neil*[2], the focus of discussion and debate has primarily been on conflicts of interest that arise when acting directly adverse to the immediate legal interests of a client. However, conflicts of interest can arise from the duty owed to a current client in the absence of direct adversity to the client's immediate legal interests; and, as stated, conflicts of interest can also arise because of self-interest or duties owed to former clients or third parties.

The proposed new Commentary to Model Rule 3.4-1 fails to sufficiently reflect this breadth and risks confusing lawyers by focusing on one aspect of conflicting interests. Commencing with discussion of the "bright line" rule in commentaries [1] and [2], and limiting identification of conflicts in commentary [10] to the context of acting adversely to a client's immediate legal interests, has the effect of narrowing the understanding of the rule inappropriately. Commentary [6] also contributes to the overemphasis on this one scenario.

The CBA recommends that commentary [3], which describes the different types of conflicts, appear as the first commentary so that the breadth of the Model Rule is made clear at the outset.

> Commentary [1] (formerly [3]):
>
> This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party.

Commentary [2] should follow but should not begin with reference to the "bright line rule", but rather with the general assessment of "substantial risk" of a conflict. Also, while recognizing that the phrase "concurrent representation of clients" is taken from *McKercher*, use of the word "concurrent" in this commentary is potentially confusing given the title of Model Rule 3.4-4. The CBA recommends the rephrasing set out below.

> Revised Commentary [2]: ~~In cases where the bright line rule is inapplicable,~~ The lawyer or law firm will ~~still~~ be prevented from acting for one client adverse to another current client if so acting would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

With regard to commentary [1], the CBA recommends it appear in third position and that the statement from para. 35 of the *McKercher* decision that "[t]he main area of application of the bright line rule is in civil and criminal proceedings" be inserted immediately before the words "[h]owever, the bright line rule …". Adding this sentence would assist in understanding the meaning of "legal interests" (as was the intent of the Court, as evident from para. 35 of *McKercher*) and provide necessary context for assessment of reasonable expectations. Without knowing the main area of application of the bright line rule, it is not possible to understand what is exceptional.

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[2] *R. v. Neil,* [2002] 3 SCR 631

The CBA also recommends that the reference to Rule 3.4-2 and commentary [6] be deleted from commentary [1] (now [3]). Model Rule 3.4-2 deals with consent. Consent is only required if Model Rule 3.4-1 applies. Where it would be unreasonable for a client to expect that a lawyer would not act, there can be no conflict of interest and consent will not be required. Further, while assessing reasonable expectations is an objective exercise, assessing consent, whether express or implied, requires an unnecessary subjective examination.

Revised Commentary [3] (formerly [1]): ~~Lawyers have an ethical duty to avoid conflicts of interest.~~ Some cases involving conflicts of interest will fall within the scope of the bright line rule 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. <u>The main area of application of the bright line rule is in civil and criminal proceedings.</u> However, the bright line rule 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. ~~See also rule 3.4-2 and commentary [6].~~

It is recommended that commentary [6], if it includes content not covered adequately elsewhere, be moved to follow commentary [1], as repositioned in the third position, given that commentary [6] provides the rationale for the "bright line" rule described in commentary [1].

Commentary [4] (formerly [6]: A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship. The relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client.

The CBA recommends that commentary [7] not refer to the two mentioned duties as "related", as this is likely inaccurate except to the extent that both duties are owed to current and former clients. In addition, it would be helpful to explain the point of the commentary by stating that the existence of either of these duties owed to another current or former client may give rise to a substantial risk of material impairment of client representation. As drafted, this may not be obvious to the reader. Further, it would be useful to specifically cross-reference Model Rule 3.4-10,which emphasizes the importance of being aware of the potential for conflicts throughout the duration of a retainer.

Revised Commentary [7] reads: The lawyer's duty of confidentiality is owed to both current and former clients, ~~with the related~~ <u>as is the</u> duty not to attack the legal work done during a retainer or to undermine the former client's position on a matter that was central to the retainer. These duties can <u>give rise to a substantial risk of material impairment of client representation. See also rule 3.4-10.</u>

With respect to Commentary [8], the first sentence risks suggesting that the duty of commitment permits dropping a client so long as the client is not dropped summarily and unexpectedly. The CBA recommends deleting the words "summarily and unexpectedly". The applicability of the second sentence is also doubtful as, following the logic of *McKercher* at paras. 63 to 65, it is the repute of the administration of justice that matters where the retainer is improperly terminated, not the feelings of the client. The CBA recommends that this sentence be deleted. In addition it would be useful to specifically cross-reference to Model Rule 3.7-1, which addresses withdrawal from representation.

Revised Commentary [8]: The lawyer's duty of commitment to the client's cause prevents the lawyer from ~~summarily and unexpectedly~~ dropping a client to circumvent conflict of interest rules. ~~The client may legitimately feel betrayed if the lawyer ceases to act for the client to avoid a conflict of interest.~~ See also rule 3.7-1.

Regarding Commentary [9], the CBA recommends that the commentary more closely follow *McKercher* to clarify the point being made and that a cross-reference to Model Rule 3.2-2, regarding the duty of honesty and candour, be added.

Revised Commentary [9]: The duty of candour requires a lawyer or law firm ~~to advise an existing client of all matters relevant to the retainer~~ to disclose any factors relevant to the lawyer's ability to provide effective representation including a retainer adverse to the client, whether or not the lawyer considers that a conflict of interest arises. Where the duty of confidentiality owed to the new client would prohibit disclosure, the lawyer is not permitted to act for the new client. See also rule 3.2-2.

The CBA recommends that the factors in commentary [10] be deleted or repositioned under commentary [1], now [3], because they apply only when the "bright line" rule is engaged and diminish the general point made by commentary [10] that a lawyer must continue to be alive to potential conflicts throughout the duration of a retainer. Including the factors in commentary [10] could mislead a lawyer into thinking that these factors are relevant beyond locating the "bright line".

Revised Commentary [10]: 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. ~~Factors for the lawyer's consideration in determining whether a conflict of interest exists include:~~

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

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

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

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

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

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

The CBA recommends that the words "apply fiduciary principles developed by the courts" in commentary [12] be deleted. The reference to fiduciary principles is superfluous and not entirely accurate. For example, in *MacDonald Estate*[3] and *Celanese*[4], the Supreme Court of Canada disqualified law firms that owed no fiduciary duty to the moving party (which was never their client). Disqualification pursuant to the supervisory role over court proceedings does not depend on the existence of a fiduciary relationship. It is also arguable, given the reasoning in *McKercher*, that the "bright line" rule is a rule protecting the administration of justice rather than a fiduciary rule. The commentary need not, and should not, attempt to address this difficult and rather theoretical issue.

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3 *Macdonald Estate v. Martin*, [1990] 3 SCR 1235

4 *Celanese Canada Inc. v. Murray Demolition Corp*., [2006] 2 S.C.R. 189,

The CBA also recommends that this commentary indicate that, while a court declining to disqualify is not necessarily a defence in a law society prosecution, the reasons given by a court in declining to disqualify may be relevant to the issue of sanction. The important point is that the courts and the law societies have complementary jurisdictions with considerations in common, but with each responsible for its own determinations.

Revised Commentary [12]: These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts ~~apply fiduciary principles developed by the courts to~~ govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court dealing with the case may decline to order disqualification as a remedy, although the reasons given by the court in declining to disqualify may be relevant to the issue of sanction.

Model Rule 3.4-2

Model Rule 3.4-2 reads:

"A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

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

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

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

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

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

The CBA recommends that commentary [6] to Rule3.4-2, which deals with implied consent, be revised to delete the words struck out below. As discussed previously, where it is unreasonable for a client to expect that the lawyer would not act against the client in an unrelated matter, there is no conflict of interest. Where there is no conflict of interest, there is no requirement for consent and Rule 3.4-2 is irrelevant. The words we recommend be deleted confuse the objective question of reasonable expectations as a limit to the scope of the "bright line" rule with the subjective question of consent, implied or express.

Revised Commentary [6]: In limited circumstances consent may be implied, rather than expressly granted. ~~In some cases it may be unreasonable for a client to claim that it expected that the loyalty of the lawyer or law firm would be undivided and that the lawyer or law firm would refrain from acting against the client in unrelated matters. In considering whether the client's expectation is reasonable, the nature of the relationship between the lawyer and client, the terms of the retainer and the matters involved must be considered.~~ Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information.

> The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

It may be that Rule 3.4-2(b) and commentary [6] are no longer appropriate given the reasons in *McKercher*. Presumably, a client would reasonably expect that a lawyer could act adverse to the client's interests in the circumstances described in Rule 3.4-2(b), in which case Rule 3.4-2 would never apply as there would be no conflict of interest requiring consent.

Conclusion

Thank you for the opportunity to provide input on the proposed revisions to the conflicts provisions of the Federation's *Model Code*. Please let me know if you have any questions about our recommendations. As mentioned previously, we will provide the CBA's comments before the April 7, 2014 deadline on the other changes proposed in the Federation's October 29, 2013 memo.

Yours truly,

Fred Headon