

November 3, 2015

VIA EMAIL: [mdrent@lsuc.on.ca](mailto:mdrent@lsuc.on.ca)

Malcolm Mercer  
Chair, Professional Regulation Committee  
c/o Policy Secretariat  
Law Society of Upper Canada  
Osgoode Hall, 130 Queen Street West  
Toronto, ON  
M5H 2N6

Dear Mr. Mercer:

**RE: Call for Input on the Proposed Amendments to the *Rules of Professional Conduct***

As you know, The Advocates' Society (the "Society") is a not-for-profit association of over 5,000 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Society takes a keen interest in the proposed amendments as outlined in the Professional Regulation Committee's Call for Input on the *Rules of Professional Conduct* (the "Call for Input"). These proposed amendments were closely examined by Task Forces of the Society and discussed in detail at two recent meetings of the Society's Board of Directors. In this letter, I raise concerns with certain proposed amended *Rules* on behalf of the members of the Society.

**Conflicts of Interest**

Rules 3.4-1 states:

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

The "bright line" rule indicates that a law firm cannot act for a client whose immediate legal interest is adverse to that of another existing client, unless both clients consent. The bright line rule applies regardless of whether the matters are related or unrelated. The scope of the bright line rule is amplified and clarified in the Commentary paragraphs, designed to give guidance to lawyers.

However, there is uncertainty as to the proper standard to identify a conflict of interest. The Commentary under Rule 3.4-1 refers to the definition of “conflict of interest” in Rule 1.1-1, as “a conflict of interest exists when there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.” (emphasis added) The proposed addition to the Commentary at Section [3] reads as follows:

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

The Society believes that the differences between the language, while subtle, should be reconciled to provide adequate guidance with regard to this important concept.

The proposed amended Consent rule contained in Rule 3.4-2 reads as follows:

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

This proposed amendment removes the reference to “express or implied consent”. In addition, the proposed amendment, read with the proposed new Commentary at paragraph [2A], places the onus on the lawyer to advise a client to obtain independent legal advice “in some cases”, without further specificity on what those cases may be.

The Society does not believe that the Proposed Amended Commentary [6] under Rule 3.4-2 adequately captures the guidance given by the Supreme Court in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (“*McKercher*”), and *R. v. Neil*, 2002 SCC 70 (“*Neil*”), with respect to both inferring consent and determining under what circumstances there would be a reasonable expectation that the law firm would not act against the client in unrelated matters.

Accordingly, the Society believes that Rule 3.4-2 and the Proposed Amended Commentary [6] would be enhanced in the guidance it seeks to provide to lawyers by adding the following paragraphs as new paragraphs 7 (inferring consent) and 8 (client’s unreasonable expectation) to the Commentary:

[7] In some exceptional cases, consent of the client may be inferred, particularly where “professional litigants” are involved. For example, governments generally accept that private practitioners who represent them in civil or criminal matters will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled.

Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused.<sup>1</sup>

[8] In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. These cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. The bright line rule may not apply when it appears that a client could not reasonably expect its application.<sup>2</sup>

The importance of further guidance is particularly important in light of the Proposed Amended Commentary [11] under Rule 3.4-1, which reads:

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

## **Doing Business With a Client**

Proposed Amended Rules 3.4-28 to 3.4-30 read as follows:

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

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

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

**3.4-29** Subject to rule 3.4-30-36, where a transaction with a client of a lawyer involves lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other

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<sup>1</sup> *Neil* at para. 28.

<sup>2</sup> *McKercher* at para. 37.

pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, the lawyer shall in sequence,

- (a) disclose the nature of any conflicting interest or how and why it might develop later;
- (b) recommend that the client receives independent legal advice and consider whether the circumstances reasonably require independent legal representation with respect to the transaction; and
- (c) obtain the client's consent to the transaction if the client receives such disclosure and independent legal advice or independent legal representation.

**3.4-30** Rule 3.4-29 does not apply where

- (a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest; or
- (b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

Rule 3.4-29(c) appears to require a lawyer to confirm that his or her client obtained independent legal advice or representation prior to obtaining the client's consent to a particular transaction. Proposed Commentary [4] under these Rules confirms this burden, stating that a lawyer must show, among other things, that "independent legal advice was received by the client, where required". This places an unduly onerous burden on the lawyer that goes beyond the simple recommendation to a client that he or she receive independent legal advice.

### **Short-Term Legal Services**

The proposed amended definition of "short-term legal services" reads as follows (Proposed Amended Rule 3.4-16.2):

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

This definition does not resolve the uncertainty around whether "short-term legal services" includes unbundled legal services. The nature and size of the firm and a firm's experience with providing *pro bono* legal services should also be considered.

The Society also raises the concern that Proposed Amended Rule 3.4-16.4 may deter lawyers from acting in a *pro bono* capacity:

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

The Society expects that it would be mostly younger lawyers who would be engaged in the *pro bono* type of work contemplated by these Rules, and that this Rule would hinder these lawyers' seeking assistance from more senior lawyers within their firms or elsewhere.

The Society feels that the issue of client waiver of a conflict of interest should be closely examined. The Society believes that a prohibition on a *pro bono* client's waiver of a conflict of interest may limit the services that can be provided by *pro bono* counsel. A *pro bono* client who is informed of the consequences of waiving a conflict of interest and chooses to do so should be able to receive legal advice from *pro bono* counsel.

### **Incriminating Physical Evidence**

The Society believes there is uncertainty as to how far a lawyer's obligation extends with regard to "physical evidence", which has a broad definition under proposed Commentary [1] under Proposed Rule 5.1-2A ("physical evidence"... "includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution"). The Society is concerned with the difficulties inherent in identifying incriminatory evidence within a document or electronic medium, as well as the potential inadvertent modification of meta-data in an electronic document by a lawyer.

### **Advertising**

The Society supports the proposed changes to Rule 4.2.

The historical reluctance of the profession to engage in commercial expression has been replaced with a proliferation of advertising and marketing practices, some of which can be considered distasteful at best and misleading at worst. The Society recognizes that there is an important public purpose to create awareness of the availability of legal services and information to the public regarding their legal rights. Indeed, advertising which meets the profession's high standard of professionalism can enhance access to justice through the appropriate dissemination of information of legal services available to those who might be the most vulnerable.

The Society's concern, however, is with advertising that is misleading, deceptive and unprofessional. Such advertising is not acceptable as it can have a negative impact on the respect for the administration of justice as a whole. The public face of the profession is often viewed through advertising seen by the general public. The Society believes that advertising that is not done in a way that reflects the integrity and professionalism of the bar will damage the public's confidence in the legal profession.

The Society acknowledges that generally speaking, competition should not be unduly regulated or restricted. Having said that, ensuring the integrity of the justice system and maintaining a high degree of professionalism and integrity warrants oversight of advertising practices.

The Society is concerned with some advertising and marketing practices that have become more prevalent, particularly in the area of personal injury litigation. One of those practices includes lawyers and firms who act as brokers. These lawyers or firms advertise as leading plaintiff personal injury counsel but actually refer their legal work to other lawyers or firms. This type of practice is deceptive and should be regulated. Another concern is the advertising of awards and endorsements, the source of which may be questionable and can be misleading to the public.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'Martha McCarthy', written in a cursive style.

Martha McCarthy  
President