The Law Society of British Columbia

AMENDMENT PAGES

2022: No. 5 November

Highlights

Law Society Rules 2015:* The Executive Director now has discretion to issue a permit to an applicant seeking to practise the law of a foreign jurisdiction in BC, notwithstanding the applicant has not met all of the requirements (definition of "practitioner of foreign law" and Rules 2-29(1) to (5), 2-30(1) and (2), 2-31(5), 2-31 and 2-34(2): pp. 15 and 52-55).

**Historical notes are published only in the website version of the Rules.*

Code of Professional Conduct for British Columbia: The commentaries to rules 3.4-1 and 3.4-2 have been amended to better reflect Canadian law on conflicts of interest and to more closely align with the Federation of Law Societies' model code (pp. 25-30); the table of contents is updated (pp. i-vi)

Filing: File the amended pages in your *Member's Manual* as follows:

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After filing, insert this sheet at the front of the *Manual* for reference.

This amendment package updates the *Member's Manual* to **November 7, 2022**. The previous amendment package was 2022: No. 4 July.

To check that your copy of the Manual is up to date, consult the contents checklist on the next page. To print replacement pages, download the PDFs at Member's Manual on the Law Society website.

The Law Society Rules and *Code of Professional Conduct for British Columbia* can be accessed in the Support & Resources for Lawyers section of the Law Society website at **www.lawsociety.bc.ca**. Refer to the website for the most current versions of the Rules and Code.

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"officer" means the Executive Director, a Deputy Executive Director or other person appointed as an officer by the Benchers;

"Ombudsperson" means a person appointed by the Executive Director to provide confidential dispute resolution and mediation assistance to lawyers, articled students, law students and support staff of legal employers, regarding allegations of harassment or discrimination by lawyers and includes anyone employed to assist the Ombudsperson in that capacity;

"panel" means a panel established in accordance with Part 5 *[Tribunal, Hearings and Appeals]*;

"practice management course" means a course of study designated as such and administered by the Society or its agents and includes any assignment, examination or remedial work taken during or after the course of study;

"practice review" means an investigation into a lawyer's competence to practise law ordered under Rule 3-17 (3) (d) *[Consideration of complaints]* or 3-18 (1) *[Practice review]*;

"practice year" means the period beginning on January 1 and ending on December 31 in a year;

"practitioner of foreign law" means a person qualified to practise law in a foreign jurisdiction who provides foreign legal services respecting the laws of that foreign jurisdiction;

"prescribed form" means a form approved by the Executive Director;

"principal" means a lawyer who is qualified to employ and employs an articled student;

"pro bono legal services" means the practice of law not performed for or in the expectation of a fee, gain or reward;

"professional conduct record" means a record of all or some of the following information respecting a lawyer:

(a) an order under Rule 2-57 (5) *[Principals]*, prohibiting the lawyer from acting as a principal for an articled student;

(b) any conditions or limitations of practice or articles accepted or imposed under the Act or these rules;

(c) a decision by a panel or a review board to reject an application for enrolment, call and admission or reinstatement;

(d) a decision by the Credentials Committee to reject an application for an inter-jurisdictional practice permit;

(d.1) a consent agreement to resolve a complaint under Rule 3-7.1 *[Resolution by consent agreement]*;

(d.2) an administrative penalty assessed under Rule 4-59 *[Administrative penalty]* unless cancelled under Rule 4-60 *[Review and order]*;

(e) any suspension or disbarment under the Act or these rules, including resignation requiring consent under Rule 4-6 *[Continuation of membership during investigation or disciplinary proceedings]*;

(f) recommendations made by the Practice Standards Committee under Rule 3-19 *[Action by Practice Standards Committee]*;

(g) an admission accepted by the Discipline Committee under Rule 4-29 *[Conditional admission]*;

(h) an admission accepted and disciplinary action imposed by a hearing panel under Rule 5-6.5 *[Admission and consent to disciplinary action]*;

(i) any Conduct Review Subcommittee report delivered to the Discipline Committee under Rule 4-13 *[Conduct Review Subcommittee report]*, and any written dispute of that report considered by the Committee;

(j) a decision made under section 38 (4) (b) *[Discipline hearings]*;

(k) an action taken under section 38 (5), (6) or (7);

(l) an action taken by a review board under section 47 *[Review on the record]*;

(m) a payment made from the former special compensation fund on account of misappropriation or wrongful conversion by the lawyer;

(n) an order for costs made against the lawyer under Part 5 *[Tribunal, Hearings and Appeals]*;

(o) any failure to pay any fine, costs or penalty imposed under the Act or these rules by the time that it is to be paid;

(p) the outcome of an application made by the lawyer under the *Judicial Review Procedure Act* concerning a decision taken under the Act or these rules, including a predecessor of either;

(q) the outcome of an appeal under section 48 *[Appeal]*;

(r) any disciplinary or remedial action taken by a governing body or body regulating the legal profession in any other jurisdiction;

(s) a decision of or action taken by the Benchers on a review of a decision of a hearing panel;

"professional corporation" includes a law corporation and means a corporation that is a company, as defined in the *Business Corporations Act*, and that is in good standing under that Act or that is registered under Part 11 *[Extraprovincial Companies]* of the *Business Corporations Act*, through which a member of a profession, trade or occupation is authorized under a statute governing the profession, trade or occupation to carry on the business of providing services to the public;

"Protocol" means the Inter-Jurisdictional Practice Protocol signed on behalf of the Society on February 18, 1994, as amended from time to time;

"provide foreign legal services" means give legal advice in British Columbia respecting the laws of a foreign jurisdiction in which the person giving the advice is qualified;

(b) ensure that trust funds received are handled

(i) by a practising lawyer in a trust account controlled by the practising lawyer, and

(ii) in accordance with the Act and these rules.

Dispute resolution

2-26 If a dispute arises with a governing body concerning any matter under the Protocol, the Credentials Committee may do one or both of the following:

(a) agree with a governing body to refer the matter to a single mediator;

(b) submit the dispute to arbitration under Appendix 5 of the Protocol.

National Registry of Practising Lawyers

2-27 (1) The Executive Director must provide to the National Registry the current and accurate information about practising lawyers required under the National Mobility Agreement.

(2) No one may use or disclose information obtained from the National Registry except for a purpose related to enforcement of the Act and these rules.

Information sharing

Sharing information with a governing body

2-27.1 (1) This rule applies to information collected in accordance with the Act and these rules about a lawyer, former lawyer, law firm, articled student, applicant, visiting lawyer or a person who has applied to be a member of a governing body.

(2) Subject to subrule (3), when it appears to the Executive Director to be appropriate in the public interest, the Executive Director may provide information to a governing body.

(3) The Executive Director must not provide confidential or privileged information to a governing body under subrule (2) unless the Executive Director is satisfied that the information

(a) is adequately protected against disclosure, and

(b) will not be used for any purpose other than the regulation of the legal profession in the jurisdiction of the governing body.

Practitioners of foreign law

Definitions

2-28 In Rules 2-28 to 2-34,

"business day" means any calendar day or part of a calendar day in which a practitioner of foreign law provides foreign legal services;

"permit" means a practitioner of foreign law permit issued under Rule 2-29 *[Practitioners of foreign law]*;

"resident" has the meaning respecting a province or territory that it has with respect to Canada in the *Income Tax Act* (Canada).

Practitioners of foreign law

2-29 (1) A person who qualifies under section 17 *[Practitioners of foreign law]* may apply to the Executive Director for a permit to provide foreign legal services by delivering to the Executive Director

(a) a completed permit application in the prescribed form, including a written consent for the release of relevant information to the Society, and

(b) the application fee specified in Schedule 1.

(2) The Executive Director may issue a permit to a person applying under subrule (1) if the Executive Director is satisfied that the person

(a) is a member of the legal profession in one or more foreign jurisdictions,

(b) is not suspended or disbarred and has not otherwise ceased, for disciplinary reasons, to be a member of a governing body or of the legal profession in any foreign jurisdiction,

(c) is a person of good character and repute,

(d) has practised the law of a foreign jurisdiction for at least 3 of the past 5 years, or undertakes in writing to provide foreign legal services only under the supervision of a practitioner of foreign law who has practised law in that foreign jurisdiction for at least 3 of the past 5 years, and

(e) carries professional liability insurance or a bond, indemnity or other security

(i) in a form and amount at least reasonably comparable to the indemnity coverage required of lawyers under Rule 3-39 (1) *[Compulsory professional liability indemnification]*, and

(ii) that specifically extends to the activities of the practitioner of foreign law in providing foreign legal services.

(2.1) In exceptional circumstances, the Executive Director may issue a permit to a person applying under subrule (1) who does not meet the requirements set out in subrule (2) if the Executive Director is satisfied that it is in the public interest to do so.

(3) The Executive Director may attach conditions or limitations to a permit issued or renewed under this rule.

(4) [rescinded]

(5) A permit issued under this rule is valid for one year from the issue date shown on it.

(6) Despite subrule (5), a practitioner of foreign law permit ceases to be valid if the practitioner of foreign law

(a) is suspended as a result of proceedings taken under Part 4 *[Discipline]*, or

(b) ceases to comply with any of the requirements of this Part.

Conditions and limitations

2-30 (1) Subject to Rule 2-31 *[Providing foreign legal services without a permit]*, no one may provide foreign legal services or market a foreign legal practice in British Columbia without a permit issued under Rule 2-29 *[Practitioners of foreign law]*.

(2) A practitioner of foreign law who holds a current permit may provide foreign legal services respecting

(a) the law of a foreign jurisdiction in which the practitioner of foreign law is fully licensed to practise law, and

(b) trans-jurisdictional or international legal transactions.

(3) A practitioner of foreign law must not

(a) provide advice respecting the law of British Columbia or another Canadian jurisdiction, or

(b) deal in any way with funds that would, if accepted, held, transferred or otherwise dealt with by a lawyer, constitute trust funds, except money received on deposit for fees to be earned in the future by the practitioner of foreign law.

(4) The Act, these rules and the *Code of Professional Conduct* apply to and bind a practitioner of foreign law.

(5) A practitioner of foreign law must notify the Executive Director promptly if the practitioner of foreign law

(a) is the subject of criminal or professional discipline proceedings in any jurisdiction,

(b) ceases to be a member in good standing of the legal profession in any jurisdiction, or

(c) fails to complete satisfactorily any continuing legal education program required of the practitioner of foreign law as a member of the legal profession in a foreign jurisdiction.

Providing foreign legal services without a permit

2-31 (1) Subject to the other requirements of this rule, a practitioner of foreign law may provide foreign legal services without a permit for a maximum of 30 business days in any calendar year.

(2) Subject to subrule (3), to qualify to provide foreign legal services without a permit, a practitioner of foreign law must at all times

(a) qualify for a permit under Rule 2-29 (2) *[Practitioners of foreign law]*,

(b) comply with Rules 2-30 (3) to (5) *[Conditions and limitations]*,

(c) not be subject to conditions of or restrictions on membership in the governing body of the practitioner of foreign law or on qualification to practise law in any jurisdiction imposed as a result of or in connection with proceedings related to discipline, competency or capacity,

(d) not be the subject of criminal or disciplinary proceedings in any jurisdiction,

(e) have no criminal or disciplinary record in any jurisdiction, and

(f) not establish an economic nexus with British Columbia.

(3) A practitioner of foreign law who provides foreign legal services without a permit must, on request,

(a) provide evidence to the Executive Director that the practitioner of foreign law has complied with and continues to comply with this rule, and

(b) disclose to the Executive Director each governing body of which the practitioner of foreign law is a member.

(4) For the purposes of this rule, an economic nexus is established by actions inconsistent with a temporary basis for providing foreign legal services, including but not limited to doing any of the following in British Columbia:

(a) providing foreign legal services beyond 30 business days in a calendar year;

(b) opening an office from which foreign legal services are offered or provided to the public;

(c) becoming resident;

(d) holding oneself out or allowing oneself to be held out as willing or qualified to provide legal services, except as a practitioner of foreign law without a permit.

(5) A practitioner of foreign law who practises law in a law firm in the home jurisdiction of the practitioner of foreign law and provides foreign legal services in or from an office in British Columbia affiliated with that firm does not, for that reason alone, establish an economic nexus with British Columbia.

(6) A practitioner of foreign law who becomes disqualified under subrule (4) must cease providing foreign legal services forthwith, but may apply under Rule 2-29 *[Practitioners of foreign law]* for a permit.

(7) On application by a practitioner of foreign law, the Executive Director may allow the practitioner of foreign law to begin or continue to provide foreign legal services pending consideration of an application under Rule 2-29 *[Practitioners of foreign law]*.

Dual qualification

2-32 A lawyer, other than a retired or non-practising member, who is qualified to practise law in a foreign jurisdiction may provide foreign legal services without obtaining a permit, provided the lawyer maintains professional liability insurance that

(a) specifically extends to the lawyer's activities in providing foreign legal services, and

(b) is in a form and amount at least reasonably comparable to the indemnity coverage required of lawyers under Rule 3-39 (1) *[Compulsory professional liability indemnification]*.

Marketing of legal services by practitioners of foreign law

2-33 A practitioner of foreign law who is not a member of the Society must do all of the following when engaging in any marketing activity as defined in the *Code of Professional Conduct*, section 4.2 *[Marketing]*:

(a) use the term "practitioner of foreign law";

(b) state the foreign jurisdiction in which the practitioner of foreign law holds professional legal qualifications, and the professional title used in that jurisdiction;

(c) not use any designation or make any representation from which a recipient might reasonably conclude that the practitioner of foreign law is a member of the Society.

Renewal of permit

2-34 (1) In order to renew a practitioner of foreign law permit, a practitioner of foreign law must apply to the Executive Director for a renewal of the permit before it expires.

(2) A renewal application must include

(a) a completed permit renewal application in the prescribed form, including a written consent for the release of relevant information to the Society,

(b) evidence satisfactory to the Executive Director that the practitioner of foreign law continues to meet the requirements set out in Rule 2-29 (2) *[Practitioners of foreign law]* or, in exceptional circumstances, that it is in the public interest to issue the permit under Rule 2-29 (2.1), and

(c) the renewal fee specified in Schedule 1.

(3) The Executive Director may renew the permit of a practitioner of foreign law who has complied with the Act and these rules.

(4) Subject to subrule (5), a permit renewed under subrule (3) is valid for one year.

(5) Rule 2-29 (6) *[Practitioners of foreign law]* applies to a permit renewed under subrule (3).

(6) A practitioner of foreign law who fails to pay when due the fee for renewal of a permit under subrule (2), including applicable taxes, or any part of it, must pay the late payment fee specified in Schedule 1.

Canadian legal advisors

Scope of practice

2-35 (1) A Canadian legal advisor may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law, or

(b) where expressly permitted by federal statute or regulation

(i) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(ii) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(2) A Canadian legal advisor must not engage in the practice of law except as permitted under subrule (1).

Requirements

2-36 (1) A member in good standing who is admitted as a Canadian legal advisor has all the duties and responsibilities of a practising lawyer under the Act, these rules and the *Code of Professional Conduct*.

(2) A Canadian legal advisor must

(a) be a member in good standing of the Chambre authorized to practise law in Québec,

(b) undertake to comply with Rule 2-35 *[Scope of practice]*, and

(c) immediately notify the Executive Director in writing if the Canadian legal advisor ceases to be authorized to practise law in Québec.

Non-resident partners

Inter-jurisdictional law firms

2-37 (1) A lawyer who practises law as a member of an inter-jurisdictional law firm must ensure that the firm does the following respecting the firm's practice of law in British Columbia:

(a) complies with the Part 3, Division 7 *[Trust Accounts and Other Client Property]*;

(b) makes its books, records and accounts, wherever they are located, available on demand by the Society or its designated agent.

(2) An inter-jurisdictional law firm is subject to discipline under Part 4 *[Discipline]* in the same way as a law corporation, except that the penalties that a panel may impose are the following:

(a) a reprimand of the firm;

(b) a fine in an amount not exceeding $100,000;

(c) an order prohibiting members of the firm who are not members of the Society from practising in British Columbia.

(3) On certification by a governing body that an inter-jurisdictional law firm has failed to pay, by the date on which it was due, a fine imposed under a provision similar to subrule (2), the Credentials Committee may make an order prohibiting lawyers from practising as members of the firm.

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[Appendix D rescinded 11/2016 – see rules 3.4-17 to 3.4-23]

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3.4 Conflicts

Duty to avoid conflicts of interest

3.4-1 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

[0.1] In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

[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. 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].

[2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client 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.

[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.

Representation

[4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The fiduciary relationship, the duty of loyalty and conflicting interests

[5] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest.

[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 legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client.

Other duties arising from the duty of loyalty

[7] The lawyer's duty of confidentiality is owed to both current and former clients, with the related 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.

[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.

[9] The duty of candour requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer.

Identifying conflicts

[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.

Examples of areas where conflicts of interest may occur

[11] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer provides legal advice to a small business on a series of commercial transactions and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

(i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

(i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning the client's affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by the lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

(e) A lawyer or a lawyer's law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

(i) These two roles may result in a conflict of interest or other problems because they may

1. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

2. obscure legal advice from business and practical advice,

3. jeopardize the protection of lawyer and client privilege, and

4. disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See rules 3.4-42 and 3.4-43 on space-sharing arrangements.

(i) The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

The role of the court and law societies

[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.

[[6] and [8] amended 10/2021; [1] to [3] and [5] to [8] amended, [9] to [12] added 09/2022]

Consent

3.4-2 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.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2.1] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf 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 stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

[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.

Lawyer belief in reasonableness of representation

[7] The requirement that the lawyer reasonably believes that the lawyer is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

[[7] amended 10/2021; [2.1] added, [6] amended 09/2022]

Dispute

3.4-3 Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent representation with protection of confidential client information

3.4-4 Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

[1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

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