

Code of Conduct Update

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INTRODUCTION

The purpose of lawyer regulation is to protect the public and, in particular, those members of the public who hire lawyers. Regulation is accomplished, in part, by establishing ethical codes of conduct. The business of law can accordingly never be considered as a matter entirely separate from lawyers' ethical obligations.

This paper addresses recent changes to the *Code of Conduct*, as well as highlighting recent cases which have considered lawyers' ethical and professional obligations, and the intersection between the two.

CODE OF CONDUCT AMENDMENTS

Background

The Federation of Law Societies of Canada (FLSC") first adopted its *Model Code of Professional Conduct* in 2009. The goal of the FLSC is to develop consistent national ethical standards for members of the legal profession in Canada. The Law Society of Alberta ("LSA") has been involved in the development and implementation of the *Model Code* at the national level from the beginning. The LSA supports the implementation of national standards, and accordingly implemented a new *Code of Conduct* on November 1, 2011, which largely reflects the *Model Code*. Amendments followed in 2012 and 2015, in response to further FLSC amendments to the *Model Code*.

The LSA has endeavoured to uphold national ethical principles where possible, while also maintaining a number of Alberta standards and practices. In addition, the LSA strives to ensure that the Alberta *Code of Conduct* is consistent with binding case law and relevant statutes. As a result, the LSA has not adopted the entirety of the Model Code.

The development of the conflict of interest rules has been particularly challenging and these rules have been, and continue to be, the subject of significant attention since the implementation of the *Model Code*. At the time of the LSA's initial implementation of the national model, the Federation

was engaged in a dialogue with a number of stakeholders, including the Canadian Bar Association, regarding the conflicts of interest rules and the interpretation of the Supreme Court of Canada's decision in *R v. Neil*, [2002] 3 S.C.R. 631. Accordingly, the conflict of interest rules in the Federation's *Model Code* were not finalized until December of 2011.

As a consequence, the initial version of the *Code of Conduct* adopted by the LSA retained conflict rules that had been contained in the former *Code of Professional Conduct*. When the FLSC developed its final version of the conflict rules, the LSA adopted new conflict of interest rules, effective December 1, 2012. The LSA's conflict of interest rules differed significantly from those of the FLSC, and continue to do so. The LSA has consistently sought to reflect core principles articulated in the *Model Code*, while also providing Alberta lawyers with clear and succinct guidance which is consistent with leading case authorities.

The LSA has continued to be engaged with the Federation in the ongoing review and development of the *Model Code* through participation in the Standing Committee on the *Model Code of Professional Conduct* and through a committee known as the Model Code of Conduct Law Society Liaisons. Steve Raby, Q.C., is the LSA's representative on the Standing Committee, while Practice Advisors, Ross McLeod, Q.C. and Nancy Carruthers, are members of the staff liaison group. These groups work together to identify potential amendments to the *Model Code* which may then be considered and implemented by the member law societies.

The FLSC has been seeking ongoing feedback with regard to the conflict of interest rules since 2012. The decision of the Supreme Court of Canada, in *Canadian National Railway Co. v. McKercher LLP*¹, prompted further proposed changes to the *Model Code*. The LSA provided feedback regarding those amendments in April of 2014. We also provided feedback in 2014 on the introduction of new rules regarding language rights and the possession of incriminating physical evidence.

After completing its consultation process, the FLSC Council approved a series of amendments to the *Model Code* in October of 2014. The redlined version of the most recent Federation amendments is found at the following link:

http://www.flsc.ca/_documents/CODEModelRedlineOct2014.pdf

The LSA adopted further changes to the *Code of Conduct*, which became effective on June 1, 2015, in response to the FLSC's amendments. Many of the Alberta amendments are consistent with the Federation's recent changes, though the proposed amendments to the conflict of interest rules do

¹ [2013] 2 S.C.R. 649

not track the Federation's model. For example, the Federation's *Model Code* conflict of interest chapter continues to include 41 rules, while the *Alberta Code of Conduct* has 15. The *Model Code* rules are, in our view and in some cases, inconsistent with case law. In other cases, they are overly complex or, in our opinion, do not establish appropriate ethical standards. Our amendments are consistent with the spirit of the Federation's rules to the greatest possible extent. We have, however, maintained that our form of conflict rules are preferable, providing succinct and clear guidance and preserving various aspects of Alberta practice and ethical standards.

Summary and Discussion

The most recent amendments to the *Alberta Code of Conduct* are attached as Appendix "A". The highlights of the amendments are described below²:

1. **Definitions and Rule 2.06(8)** – The definition of "interprovincial law firm" has been deleted, and the reference to it has been replaced in Rule 2.06(8) of the *Code* with "interjurisdictional law firm". No formal definition of an interjurisdictional law firm is required.
2. **New Rule 2.02(13)** – This rule deals with a lawyer's obligation to advise clients of the right to proceed in the official language of the client's choice. The LSA adapted the Federation's draft to clarify language rights which are applicable in this jurisdiction, and in Alberta courts.
3. **New Rule 2.03(7)** – This rule provides guidance regarding the protection of confidential client information during lawyers' transfers between firms, as well as during firm mergers and acquisitions. Alberta's version differs slightly from the FLSC's. The FLSC *Model Code* suggests the new law firm should provide an undertaking to the transferring lawyer's firm regarding its handling of confidential client information. In addition, it suggests that the client's consent to disclosure of confidential information should be sought, either in the initial retainer or during the lawyer's transfer. The LSA decided that those requirements were impractical and did not reflect the processes which Alberta firms follow when attempting to detect and resolve conflicts created by lateral hires. Furthermore, the additional steps do not increase the protection offered to clients.
4. **Rule 2.04(1)** – This rule has been amended to incorporate the Federation's language regarding "The Role of the Court and Law Societies" (Appendix "A", page 35) and "Consent and Disclosure" (Appendix "A", page 36). The role of the court and law societies is addressed in the *McKercher* decision, *supra*. The Supreme Court of Canada stated that courts have the

² The summary provided is based on the submissions in the report of the Professional Responsibility Committee to the Benchers at the April 2015 meeting.