

**CONFLICTS OF INTEREST: DOING BUSINESS WITH CLIENTS -
TRANSACTIONS WITH CLIENTS, GIFTS, TESTAMENTARY INSTRUMENTS
REVISED RULES 3.4-27 to 3.4-39**

Doing Business with a Client

Definitions

3.4-27 In rules 3.4-27 to 3.4-41,

“independent legal advice” means a retainer in which:

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction,
- (b) the client’s transaction involves doing business with
 - (i) another lawyer, or
 - (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

“independent legal representation” means a retainer in which

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction, and
- (b) the retained lawyer will act as the client’s lawyer in relation to the matter;

Commentary

[1] If a client elects to waive independent legal representation and to rely on independent

legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

“**lawyer**” includes an associate or partner of the lawyer, related persons as defined by the *Income Tax Act* (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

“**related persons**” means related persons as defined in the *Income Tax Act* (Canada).

Transactions With Clients

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

3.4-29 Subject to rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence,

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

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.

Commentary

[1] The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

[2] In some circumstances, the lawyer may also be retained to provide legal services for the transaction in which the lawyer and a client participate. A lawyer should not uncritically accept a client’s decision to have the lawyer act. It should be borne in mind that if the lawyer accepts the retainer the lawyer’s first duty will be to the client. If the lawyer has any misgivings about being able to place the client’s interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer’s loyalty

to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

[3] If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

[4] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

Documenting Independent Legal Advice

[5] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by doing the following:

- (a) provide the client with a written certificate that the client has received independent legal advice,
- (b) obtain the client's signature on a copy of the certificate of independent legal advice; and
- (c) send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

3.4-31 A lawyer must not borrow money from a client unless

- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or
- (b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer:
 - (i) discloses to the client the nature of the conflicting interest;
 - (ii) requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation, and
 - (iii) obtains the authorization of benchers as required by the Law Society Rules.

3.4-32 Subject to rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer must:

- (a) disclose to the client the nature of the conflicting interest; and

- (b) require that the client obtain independent legal representation.

Commentary

[1] Whether a person is considered a client within rules 3.4-32 and 3.4-33 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

[2] Given the definition of "lawyer" applicable to these Doing Business with a Client rules, a lawyer's spouse or a corporation controlled by the lawyer would be prohibited from borrowing money from a lawyer's unrelated client. Rule 3.4-33 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer must make disclosure and require that the unrelated client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest is borrowing has independent legal representation.

Lending to Clients

3.4-33 A lawyer must not lend money to a client unless before making the loan, the lawyer

- (a) discloses to the client the nature of the conflicting interest;
- (b) requires that the client
 - (i) receive independent legal representation, or
 - (ii) if the client is a related person as defined by the *Income Tax Act* (Canada), receive independent legal advice;
- (c) obtains the client's consent, and
- (d) obtains the authorization of benchers as required by the Law Society Rules.

Guarantees by a Lawyer

3.4-34 Except as provided by rule 3.4-35, a lawyer retained to act with respect to a transaction in which a client is a borrower or a lender must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is the borrower or lender.

3.4-35 A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

- (b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or
- (c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:
 - (i) the lawyer has complied with **rules 3.4-28 to 3.4-36**; and
 - (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Payment for Legal Services

3.4-36 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a nonmaterial interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Commentary

[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Gifts and Testamentary Instruments

3.4-37 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

3.4-38 A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

3.4-39 Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift.