

PROFESSIONALISM AND ETHICS IN A COMMERCIAL LEASING PRACTICE

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Introduction

A lawyer's professional and ethical obligations are owed to their client, other parties to the transaction, other lawyers and the community.

Virtually all difficult ethical problems arise from a conflict between a lawyer's responsibilities to different stakeholders (clients, transacting parties and other lawyers), to the legal system and to the lawyer's own interests.

The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of professional judgment guided by the principles underlying the Rules.

Similar to previous discussions and commentary that have considered a lawyer's professional and ethical obligations, this roundtable will frame the discussion around the Rules of Professional Conduct and how they apply to current issues arising in a lawyers commercial leasing practice. Specifically, this discussion will focus on dealing with inadvertent disclosure of confidential information and using knowledge gained from prior deals.

Honesty and Integrity

The Rules regarding honesty and integrity are foundational to our analysis and all other ethical dilemmas faced in legal practice. Commentary under these rules establishes that Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession and public confidence in the administration of justice, and the profession, may be eroded by a lawyer's irresponsible conduct.

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

3.2-2 When advising clients, a lawyer shall be honest and candid.

You have a duty to be honest and candid, and **must make sure a client understands everything you communicate throughout**. Importantly, there is a corresponding duty to protect yourself and your firm.

3.2-7 A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct or instruct a client or any other person on how to violate the law and avoid punishment.

3.2-7.1 A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.

It is also important to be honest with yourself. It is prudent to avoid involvement with clients engaged in criminal activity, and a lawyer must never assist in or encourage dishonesty, crime, or illegal conduct. Set boundaries, recognize causes for terminating a relationship, know when it is justifiable to get out.

Confidentiality

Both inadvertent disclosure of confidential information and using knowledge from prior deals also engages the Rules regarding confidentiality:

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information **unless** (a) expressly or impliedly authorized by the client; (b) required by law or by order of a tribunal of competent jurisdiction to do so; (c) required to provide the information to the Law Society; or (d) otherwise permitted by rules 3.3-2 to 3.3-6.

Commentary [3] ...The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

[6] A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

[11.1] The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information

DEALING WITH INADVERTENT DISCLOSURE OF CONFIDENTIAL INFORMATION

This concept considers the following questions:

1. What are you required to do if you receive confidential information from opposing counsel in error?
2. What are your obligations if you inadvertently disclose confidential information?

Mistakes and Omissions

The Rules pertaining to mistakes and omissions inform our analysis on this issue:

7.2-10 A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably ought to know that the document was inadvertently sent shall promptly notify the sender.

Commentary [1] Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or legal practitioners acting for them. If a lawyer **knows or reasonably should know** that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take

protective measures...For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

7.8-1 When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall

- (a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise;
- (b) recommend that the client obtain legal advice from an independent lawyer concerning any rights the client may have arising from the error or omission; and
- (c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client.

7.8-2 A lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

The duty to report in this Rule is an ethical duty which is imposed on the lawyer to protect clients. **The duty to report arises whether or not the lawyer considers the claim to have merit.**

7.1-3 A lawyer shall report to the Law Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

...

- (f) any other situation where a licensee's clients are likely to be **severely prejudiced**.

USING KNOWLEDGE GAINED FROM PRIOR DEALS

This issue considers the following questions:

1. Is it okay to use another client's standard lease form?
2. Is it okay to use step-down clauses or mark-ups from another deal, or that are standard to another client?
3. The overstatement – how far can you go? E.g. "We have never agreed to . . ."; "No other tenant in the centre has . . .";

Alongside the Rules regarding confidentiality, this issue also engages the rules regarding honesty/candour and conflicts of interest:

Confidentiality

3.1-1 Commentary [11.1] The fiduciary relationship between a lawyer and a client **forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information**. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

Honesty and Candour

3.2- 2 Commentary [1.1] A lawyer has a duty of candour with the client on matters relevant to the retainer. This arises out of the rules and the lawyer's fiduciary obligations to the client. The duty of candour requires a lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter.

Consequently, a lawyer's ethical obligations require informing their client of the lawyer's use of their standard lease forms, step-down clauses or other documents.

Conflicts

3.4-1 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.

Commentary [1] As defined in rule 1.1-1, 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. In this context, "**substantial risk**" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur. 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. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[5] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries... 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. Aspects of the duty of loyalty owed to a current client are the duty to commit to the client's cause, **the duty of confidentiality, the duty of candour** and the duty to avoid conflicting interests.