Space-Sharing Arrangements

(Updated: June 2017)

Contents

1. Types of Space-Sharing Arrangements

The common space-sharing arrangements are:

- ☐ space-sharing with lawyers (by far the most popular)
- ☐ space-sharing with non-lawyers
- ☐ executive suites

Space-Sharing with Lawyers

One advantage of sharing space with lawyers is that you will have colleagues close by to bounce ideas off. Another is that space-sharing offices are usually already set up to run as law offices, so the staff already knows about the ethics of confidentiality, handling trust funds and how to deal with lawyers who are under pressure.

There are two basic types of space-sharing arrangements:

- ☐ each lawyer is on the lease as a co-tenant and is responsible for a share of the rent and other expenses
- ☐ a lawyer or law firm rents office space to another lawyer, a group of lawyers or another firm (usually as a licensee, not a subtenant as the arrangement does not involve exclusive possession)

In the co-tenancy arrangement, you have more security but less flexibility because you are committed to a lease. You will have more opportunity to have input into how the office is run. However, you run the risk that one or more of your co-tenants may leave you "holding the bag."

In the licensor-licensee arrangement, as licensee you do not have security of tenure but the termination notice periods are usually very short and flexible. Your risk is that your licensor may decide to terminate on short notice. As well, you may be dealing with someone who views you as little more than a way to get relief from overhead.

Sharing Space with Non-lawyers

The past few years have seen a proliferation of arrangements where lawyers share space with non-lawyers such as accountants, psychologists, realtors, insurance agents and, in smaller centres, all manner of small businesses with extra office space.

From a practical point of view, you will be operating a solo practice in rental space. The main difference from normal rental space is that your space is usually not exclusively demised for your use.

Executive Suites

An executive suite is a space in an office building that is subdivided into smaller offices, which are then rented out for various terms to a variety of businesses, consultants, sales-people, marketers, engineers, lawyers. The rent usually depends on the location and prestige of the building, the size of your office, whether you have a window, and the ancillary services included in the rent.

Executive suites are usually rented on a month to month basis, so they give you maximum flexibility.

Executive suites arrangements usually include a variety of ancillary services, such as reception (usually included in the rent), secretarial (usually charged on an hourly basis), FAX and copier (charged on a per-use basis) and meeting rooms (sometimes included in rent, sometimes surcharged). Sometimes they also include basic furniture.

2. Ethical Issues in Space-Sharing Arrangements

Sharing Space with Lawyers

The Code of Conduct contains several provisions relevant to space-sharing arrangements (see part 5 of this article):

- ☐ If you share space with other lawyers, you are treated as a firm for ethical purposes unless you clearly and unequivocally indicate to your clients that you are independent practitioners. Even if you take steps to separate your practices, you are deemed to be a firm for the purpose of conflicts of interest and confidentiality. Code of Conduct (Definitions of "law firm").
- ☐ The rules on multiple representations (Rule 3.4-4, 3.4-5, Code of Conduct) apply when members of a space-sharing association represent clients in potential or actual conflicts of interest.
- ☐ Because you are a firm for ethical purposes, you can share fees (Rule 3.6-5 Code of Conduct).

The conflict of interest rules and the case law may combine to produce some surprising results when a new lawyer comes into a space-sharing arrangement because previous involvement by a new association member on the other side of a case being handled by an existing association member may prevent the existing association member from continuing to act. A system for screening for these conflicts will need to be established.

Sharing Space with Non-Lawyers

From an ethical perspective, there are two main concerns when you share space with non-lawyers.

The first is protection of client confidentiality from advertent or inadvertent disclosure. You must be extra cautious to ensure that confidential information does not get disclosed.

The second is ensuring that you don't breach the law and rules regarding unauthorized practice (Code of Conduct - Fees and Disbursements):

- ☐ You cannot pay referral fees except where referral of client to another (Rule 3.6-6 Code of Conduct).
- ☐ You cannot divide your fees with non-lawyers (Rule 3.6-7 Code of Conduct).
- ☐ You cannot accept finders fees except with disclosure to your client (Rule 3.6-7, Code of Conduct).

3. Business Issues in Space-Sharing Arrangements with Lawyers

1. Ethical standards

- ☐ Are you likely to have conflicts of interest with the other lawyers in the space?
- ☐ Are you willing to share your client list with the other lawyers in the space?
- ☐ Does the space-sharing agreement contain strong language on ethical standards?
- ☐ Does the space-sharing agreement require members of the group to advise the other lawyers when they received a complaint letter from the Law Society?

2. Is your practice compatible with the practices of the other lawyers in the space?

You don't want your practice to be so different that your clients will feel uncomfortable. For example, if you are pursuing a wills and estates practice, your clients may not feel comfortable sharing the reception area with the clients of a criminal lawyer.

3. Are you personally compatible with the other lawyers in the space.

You will be bumping into each other on a daily basis, so if you are not compatible, minor irritations can grow into major frustrations. Resist the temptation to gloss over personal and practice incompatibilities in your desire to get the space issue settled. Be brutally honest. You are better to spend more time at the beginning finding the right arrangement than to end up spending a lot of time and energy trying to get out of a bad one.

- ☐ Do the other lawyers in the space have good reputations? Do you share their values?
- ☐ Do they treat their clients the way you think they should?
- ☐ Do you trust them?
- ☐ Will you feel comfortable associating your name and reputation with them?
- ☐ Will you be able to work with them? Are there synergies with your practice?
- ☐ Will you feel comfortable referring work to them?
- ☐ Will you be able to resolve disputes with them?

4. Referrals and working together

- ☐ What are the policies on internal referrals and referral fees?
- ☐ What are the policies on working on files together?
- ☐ If you work on someone else's litigation file, when will you be compensated for your work?

5. New admissions

- ☐ Will you have a say in the decision to admit new members to the group?
- ☐ Will new admissions be expected to adhere to the same agreement?

6. Your legal status

- ☐ Will you be the tenant, a co-tenant or a subtenant with the right to exclusive possession of your space? or will you be a licensee? or will you have some other status?

7. Your space

- ☐ What space will you have for your office, your support staff, your filing and storage of closed files?
- ☐ Will you have exclusive possession of your space?
- ☐ What access to and use of common areas (e.g., reception area, board rooms, signing rooms) will you have?

8. What are the security arrangements for the building? the shared premises? your space within the shared premises?

9. Name

- ☐ What name will be used by the group?
- ☐ Who owns the name?
- ☐ If the name or a variant of it is used as an Internet domain name,
    - Who owns the domain name?
    - Will your business email address be based on the domain name?
    - Will you have to terminate use of that Internet address if you leave the arrangement?
    - Will emails be forwarded to a new email address for a reasonable length of time after termination of the arrangement?
- ☐ Are all members of the group required to use a common letterhead and business cards?

10. Holding out

- ☐ How do members of the group refer to each other (e.g., partner, associate, space-sharer, other)?
- ☐ How is the group held out to the public?
- ☐ How is the group represented in the Yellow Pages and other advertising media?
- ☐ Are you willing to be deemed a partner of the other lawyers in the space for liability purposes?

11. Signage

- ☐ What rights will you have with respect to signage? What will signage cost you?

12. Telephone answering and reception

- ☐ Is the phone answered professionally? What words are used?
- ☐ Is there an automated attendant system?
- ☐ Will you have and be expected to use a direct line? voice mail?
- ☐ Is the reception area appropriately decorated and furnished for your client base?
- ☐ Are visitors treated professionally?

13. Management

- ☐ Who manages the office?
- ☐ How are decisions made?

- ☐ What input will you have?
- ☐ Is there a policies and procedures manual for the office you will be expected to adhere to covering staff policies and standard legal procedures (for example, standard will precedent, standard trust conditions for real estate)

14. Who has primary legal responsibility for:

- ☐ rent and common expenses payable to the landlord
- ☐ other lease terms (e.g., insurance)
- ☐ casualty and liability insurance
- ☐ the phone system
- ☐ the computer system, including hardware, software, the Internet connection and domain name
- ☐ equipment leases
- ☐ maintenance contracts
- ☐ software licenses and support contracts
- ☐ equipment and software upgrades
- ☐ land titles, registry office, court reporter, medical report and other accounts and invoices

15. What additional services, furniture and equipment will be included in the arrangement, and how will you pay your share:

- ☐ receptionist services
- ☐ secretarial services
- ☐ accounting software
- ☐ accounting services
- ☐ paralegal services
- ☐ shared articling student and/or junior lawyer
- ☐ lawyer's office furniture
- ☐ support staff furniture and equipment
- ☐ photocopier
- ☐ fax
- ☐ scanner
- ☐ phone system
- ☐ software
- ☐ computer network
- ☐ Internet access
- ☐ other equipment
- ☐ file storage space
- ☐ furniture
- ☐ access to board, conference, meeting and signing rooms
- ☐ access to staff coffee room
- ☐ library and on-line research

16. Are the additional services, furniture and equipment of high quality?

17. Is the equipment used to provide ancillary services of high quality?

18. Are repair, maintenance and replacement of equipment and software included in the cost of ancillary services or billed separately?

19. Who will own items purchased out of pooled funds?

20. What other charges will you be expected to assume or share:

- ☐ postage
- ☐ photocopies
- ☐ faxes
- ☐ accounting services
- ☐ long distance tolls
- ☐ legal research library
- ☐ office supplies
- ☐ signage
- ☐ maintenance of equipment
- ☐ cost of on-line legal research
- ☐ letterhead and business cards
- ☐ utilities
- ☐ business tax
- ☐ shared marketing, promotion

21. On what basis will you be charged for additional services, furniture and equipment and other charges:

- ☐ included in a global monthly amount or share of billings
- ☐ cost recovery
- ☐ equal shares
- ☐ fee for service with profit margin for supplier?
- ☐ Be ready to pay your fair share, but watch out for "nickel-and-diming" agreements; they don't bode well for the future and can be very costly.

22. What costs will not be included in the agreement:

- ☐ support staff salaries and benefits
- ☐ Law Society dues and insurance
- ☐ auto expenses
- ☐ personal promotion expenses

23. Are promises of referral work and other inducements credible?

- ☐ Be skeptical about promises of referrals because they frequently fail to materialize.

24. "Work-for-space" arrangements.

Be wary. These agreements may look attractive because they appear to solve your space problem with very little outlay of cash. However, they can cause problems if the parties don't share the same expectations about how much work will be referred, when it will be done and how it will be valued. They can also play havoc if your plans for developing your practice change.

25. Are the consequences of non-payment spelled out in the agreement?

26. Is GST payable? By whom?

27. Trust and general accounts

The most common arrangement for space-sharing lawyers is that each member of the group maintains separate trust and general bank accounts and separate books and records, and they report separately to the Law Society.

If the members of a space-sharing association consider themselves to be a law firm they can share trust and general accounts and accounting records and filings. If one lawyer in the space sharing arrangement doesn't feel they will have the type of practice to warrant operating their own trust account, arrangement can be made with one of the other responsible lawyers to use their trust account.

- ☐ Will you be sharing a trust account?
- ☐ Who will have signing authority?
- ☐ If your clients' funds go into the trust account, you must have unhindered access to their funds
- ☐ Who will sign be the Responsible Lawyer
- ☐ Will you be sharing a general account?
- ☐ Will you be sharing an office expenses account?
- ☐ Who will do the accounting for the group expenses?

28. Are there standard fees for routine services that everyone in the office adheres to?

29. Is the staff treated with respect and fairness?

30. Is there a group benefits plan for you and your support staff?

31. The space-sharing agreement

- ☐ Is it clear and in writing?

You may think that "overflow secretarial" means a lot more than the busy lawyer who is paying the secretary's salary.

- ☐ Does it contain strong expectations with respect to ethical and competent performance by all members of the group?
- ☐ Does it contain a dispute resolution mechanism?
- ☐ Does it contain reasonable termination provisions with adequate procedural safeguards?
    - There is often bitterness and anger when these arrangements terminate, so a short notice period—no more than thirty days—is better than a long one.
- ☐ Does it deal with death? withdrawal? expulsion? the consequences of a lawyer being suspended or disbarred?
- ☐ Does it contain mutual indemnities regarding liabilities caused by one member of the group but imposed on others?

4. Business Issues in Space-sharing Arrangements with Non-lawyers and Executive Suites

1. Your space must be lockable or your files placed in lockable filing cabinets that are in fact locked when neither you nor your assistant are present (including at night, on weekends or for periods of time during the day).
2. Files must not be left in open areas where they may be perused. Similar security concerns apply to file storage.
3. If you share a photocopier or fax, you must be very careful not to leave documents on the copier (given the cost of fax machines now, there is no excuse for not getting one of your own and keeping it in a secure location). Or, consider a service that directs all faxes to e-mail.
4. If you are on a network, make sure your area of the network is secure with pass-words that are not available to persons other than you and your staff.
5. You must impress the importance of confidentiality on shared receptionists, book-keepers and other office services staff. When they are answering your phone, greeting your clients or doing your bookkeeping, they are subject to the same standards as if they were working in a law office.

   You have an ethical obligation to educate them about confidentiality and to supervise their work. Of particular concern: they must not disclose any information about your clients' affairs with anyone else in the office, including the person who pays their salary.
6. The supreme importance of confidentiality and the duties of shared staff should be discussed in detail with the proprietor of the space and negotiated into your written agreement.
7. Instruct the receptionist on the importance of not disclosing the names of callers to your law office (by, for example, announcing the names of callers in the presence of others working in the office) and make arrangements that ensure that your phone messages are not open to disclosure.
8. Make sure your mail is delivered **unopened** to you or your support staff.
9. Be careful not to unwittingly back into an unauthorized practice arrangement. You may carry on your separate practice of law in the same premises as another business, but you cannot create a single business entity that has non-lawyers as partners. Make it clear to clients who are referred internally that your law firm is independent of the referring business. You do not want to end up being sued for someone else's malfeasance because your businesses were so closely allied that the client thought you were partners.
10. Since you may be the only lawyer in the suite, there will be a risk that you will be-come isolated. Make sure you get out and meet with other lawyers by having coffee at the court house, attending CBA section lunches and LESA seminars, etc.
11. Before you go into an executive suite, consider whether your practice is compatible with those of the other businesses in the suite. Depending on your business plan, you may find marketing opportunities in an office suite, or you may find yourself in conflict with the other tenants.

12. Storage is also often a problem in these arrangements. Law practices generate paper, at times inordinate amounts of paper, and they need secure, convenient storage.

Resource Material from Code of Conduct

1.1-1 Definitions

Lawyer: It has long been understood that he term "lawyer" is defined in the Code to include the lawyer's firm and each firm member except where expressly stated otherwise or excluded by the context. However, a lawyer will not be responsible to the Law Society for the ethical misconduct of another member of the firm unless the lawyer had actual knowledge of the misconduct or the circumstances clearly indicate willful blindness.

"**lawyer**" means an active member of the Society, an inactive member of the Society, a suspended member of the Society, a student-at law and a lawyer entitled to practise law in another jurisdiction who is entitled to practise law in Alberta. A reference to "lawyer" includes the lawyer's firm and each firm member except where expressly stated otherwise or excluded by the context

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;
(b) in a partnership;
(c) as a clinic operated by Legal Aid Alberta;
(d) in a government, a Crown corporation or any other public body; or
(e) in a corporation or other organization;
(f) from the same premises, while expressly or impliedly holding themselves out to be practising law together and indicating a commonality of practice through physical layout of office space, firm name, letterhead, signage and business cards, reception and telephone-answering services, or the sharing of office systems and support staff;
(g) from the same premises and indicating that their practices are independent.

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and
(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

3.6-5 If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

3.6-6 If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and
(b) the client is informed and consents.

Commentary

[1] This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals, providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

[2] Lawyers may pay non-lawyers for direct and reasonable advertising costs (including a lawyer referral service), and are also allowed to compensate employees and other persons for general marketing and public relations services, whether by salary, profit sharing, bonus or otherwise, provided the compensation is not directly related to a specific client matter.

Conflicts of Interest

Statement of Principle

In each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences.

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

"Conflict" means the situation existing when the parties in question are prima facie differing in interest but there is no dispute among the parties in fact. Examples include vendor and purchaser, mortgagor and mortgagee, insured and insurer, estranged spouses, and lessor and lessee. "Potential conflict" means the situation existing when the parties in question are prima facie aligned in interest and there is no dispute among the parties in fact, but the relationship or circumstances are such that there is a possibility of differences developing. Examples are co-plaintiffs; co-defendants; co insured; shareholders entering into a unanimous shareholder agreement; spouses granting a mortgage to secure a loan; common guarantors; beneficiaries under a will; and a trustee in

bankruptcy or court appointed receiver/manager and the secured creditor who had the trustee or receiver/manager appointed.

Most lawyers prefer not to act for more than one party in a transaction. From the client's perspective, however, this preference may interfere with the right to freely choose counsel and may appear to generate unwarranted costs, hostility and complexity. In addition, another lawyer having the requisite expertise or experience may not be readily available, especially in smaller communities. Situations will therefore arise in which it is clearly in the best interests of the parties that a lawyer represent more than one of them in the same matter.

Yet professional loyalty remains an important aspect of the lawyer-client relationship, and many clients will be unhappy when their lawyer's attentions are divided. Acting in a conflict or potential conflict situation increases a lawyer's vulnerability to charges of professional misconduct. The apparent consent of those involved may be challenged on the grounds of misrepresentation or overreaching. Moreover, the client in a multiple representation context will expect to pay less than the normal fee for one client, creating another possible point of contention.

Consequently, although this rule permits multiple representation in certain circumstances, this type of retainer must be approached by a lawyer with caution, particularly if a conflict rather than potential conflict is involved. It will generally be more difficult for a lawyer to justify acting in a situation involving actual conflicting interests. In each case, the lawyer must assess the likelihood of being able to demonstrate after the fact that each client received representation equal to that which would have been rendered by independent counsel.

In determining whether it is in the best interests of the parties that a lawyer act for more than one party where there is no dispute but there is a conflict or potential conflict, the lawyer must consider all relevant factors, including the following:

(a) complexity of the transaction;

(b) whether there are terms yet to be negotiated and the complexity and contentiousness of those terms;

(c) whether considerable extra cost, delay or inconvenience would result from using more than one lawyer;

(d) availability of another lawyer of comparable skill;

(e) whether the lawyer is peculiarly familiar with the parties' affairs;

(f) probability that the conflict or potential conflict will ripen into a dispute due to the respective positions or personalities of the parties, the history of their relationship or other factors;

(g) likely effect of a dispute on the parties;

(h) whether it may be inferred from the relative positions or circumstances of the parties (such as a long standing previous relationship of one party with the lawyer) that the lawyer would be motivated to favour the interests of one party over another; and

(i) ability of the parties to make informed, independent decisions.

Furthermore, the requirement that the multiple representation be in the clients' best interests will not be fulfilled unless the lawyer has made an independent evaluation and has concluded that this is the case. It is insufficient to rely on the clients' assessment in this regard.

Although the parties to a particular matter may expressly request multiple representation, there are circumstances in which a lawyer may not agree. Examples include representing opposing arm's-

length parties in complex commercial transactions involving unique, heavily negotiated terms. In these situations, the advantages of retaining a single lawyer are outweighed by the risks.

Disclosure and consent – If a lawyer determines that multiple representation is permissible, the consent of the parties must then be obtained (See the definitions of "consent" and "disclosure" in the “Definitions”). Consent in this context will be valid only if full and fair disclosure has been made by the lawyer (to all parties together unless completely impractical) of the advantages and disadvantages of, first, retaining one lawyer and, second, retaining independent counsel for each party. Such disclosure must include the fact that no material information received in connection with the matter from one party can be treated as confidential so far as any of the other parties is concerned (see commentary below regarding multiple representations).

In addition, the lawyer must stipulate that if a dispute develops, the lawyer will be compelled to cease acting altogether unless, at the time the dispute develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact is ineffective since the party granting the consent will not at that time be in possession of all relevant information.

While it is not mandatory that either disclosure or consent in connection with multiple representation be in writing, the lawyer will have the onus of establishing that disclosure was sufficient and that informed consent was granted. Therefore, it is advisable to document the process in some manner (such as memorandum to file or follow up letter) and to obtain written confirmation from the client wherever possible.

If a lawyer is proposing to act for both a corporation and one or more of its shareholders, directors, managers, officers or employees, the lawyer must be satisfied that the dual representation is a true reflection of the will and desire of the corporation as a separate entity. Having met all preliminary requirements, a lawyer acting in a conflict or potential conflict situation must represent each party's interests to the fullest extent. The fact of multiple representation will not provide a justification for cutting corners or failing in other respects to fulfil the duties and responsibilities owed by lawyer to client.

Multiple representation without sharing of information

In certain circumstances, knowledgeable clients in a conflict or potential conflict situation may desire representation by the same firm without the mutual sharing of material information. It may be acceptable for a firm to agree to act in such a situation provided that an effective screening device can be erected and the clients are fully apprised of, and understand, the risks associated with the arrangement. Such advice must be given by counsel that is independent of the firm involved.

This kind of arrangement remains an exception to the general rule, however, and should be undertaken only when the justification is clear. In particular, multiple representation with or without the sharing of information is unacceptable in a dispute or when the risk of divergence of interests is high. Responsibility remains with the lawyers to consider the factors outlined in the earlier commentary to this rule and to independently judge the advisability of the representation. Furthermore, the lawyers and clients involved must consider beforehand the risk that the screening device may be breached, intentionally or otherwise, or that a lawyer acting for one of the clients will obtain information confidential to the other client through a legitimate outside source. In such a circumstance, it would be necessary for the firm to cease acting for all clients in the matter.

Single client in dual capacity

Special considerations apply when a lawyer is representing one client acting in two possibly conflicting roles. The consent of the client recedes in importance and the lawyer's independent assessment of the best interests of the client becomes more important. For example, a lawyer acting for an estate when the executor is also a beneficiary must be sensitive to divergence of the interests of the client in those two capacities. Such divergence could occur if the client is a surviving spouse who is the beneficiary of only part of the estate. It is obviously in the spouse's interests to apply to

the court to receive a greater share of the estate; however, this course of action is detrimental to the other beneficiaries and therefore inconsistent with the neutral role of executor. The lawyer would likely be obliged by this rule to refer the client elsewhere with respect to the application for relief since, despite the client's consent, the lack of independent representation would not operate in the client's best interests.

Disputes

3.4-2 A lawyer must not represent opposing parties in a dispute.

Commentary

[1] The existence of a dispute precludes joint representation, not only because it is impossible to properly advocate more than one side of a matter, but because the administration of justice would be brought into disrepute.

[2] It is sometimes difficult to determine whether a dispute exists. While a litigation matter qualifies as a dispute from the outset, parties who appear to have differing interests or who disagree are not necessarily engaged in a dispute. The parties may wish to resolve the disagreement by consent, in which case a lawyer may be requested to act as a facilitator in providing information for their consideration. At some point, however, a conflict or potential conflict may develop into a dispute. At that time, the lawyer would be compelled by Rule 3.4-1 to cease acting for more than one party and perhaps to withdraw altogether.

[3] In determining whether a dispute exists, a lawyer should have regard for the following factors:
• the degree of hostility, aggression and "posturing";

• the importance of the matters not yet resolved;

• the intransigence of one or more of the parties; and

• whether one or more of the parties wishes the lawyer to assume the role of advocate for that party's position.

[4] If clients have consented to a joint retainer, a lawyer is not necessarily precluded from advising clients on non-contentious matters, even if a dispute has arisen between them. When in doubt, a lawyer should cease acting.

Mediation or Arbitration

[5] This rule does not prevent a lawyer from mediating or arbitrating a dispute between clients or former clients where:

(a) the parties consent;

(b) it is in the parties' best interests that the lawyer act as mediator or arbitrator; and

(c) the parties acknowledge that the lawyer will not be representing either party and that no confidentiality will apply to material information in the lawyer's possession.

Current Clients
3.4-3 A lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client, even if the matters are unrelated, unless both clients consent.

Commentary

[1] This rule mirrors the bright line rule articulated by the Supreme Court of Canada.

[2] The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. For example, one client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests.

[3] A client is a current client if the lawyer is currently acting for the client, and may be a current client despite there being no matters on which the lawyer is currently acting. In determining whether a client is a current client, notwithstanding that the lawyer has no current files, the lawyer must take into consideration all the circumstances of the lawyer-client relationship, including, where relevant:

• the duration of the relationship;

• the terms of the past retainer or retainers;

• the length of time since the last representation was completed or the last representation assigned; and

• whether the client uses other lawyers for the same type of work.

[4] When determining if one client's legal interests are directly adverse to the immediate legal interests of another current client, a lawyer must consider the following factors:

• the immediacy of the legal interests;

• whether the legal interests are directly adverse;

• whether the issue is substantive or procedural;

• the temporal relationship between the matters;

• the significance of the issue to the immediate and long-term interests of the clients involved; and

• the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

[5] The bright line rule cannot be used to support tactical abuses. For example, it is inappropriate for a lawyer to raise a conflict of interest in order to disqualify an opposing lawyer for an improper purpose, or to inconvenience an opposing client.

[6] This rule will not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In exceptional cases, a client's consent that a lawyer may act against it may be implied. (See commentary to Rule 3.4-1)

[7] A lawyer's duty of candour requires that a lawyer inform a client about any factors relevant to the lawyer's ability to provide effective representation. If the lawyer is accepting a retainer that requires the lawyer to act against an existing client, the lawyer should disclose this information to the client even if the lawyer believes there is no conflict of interest.

[8] A lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping that client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client in order to avoid a conflict of interest with another more lucrative or attractive client.