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**Consultations with Real Estate Practitioners on
Proposed Amendments
to the *Rules of Professional Conduct***

INTRODUCTION

The Law Society Working Group on Real Estate Issues was created to address a range of issues arising in real estate practice. Members of the Working Group include Law Society benchers and representatives from the Ontario Bar Association Real Property Section and the County and District Law Presidents Association and the Ontario Real Estate Lawyers Association.

One of the primary concerns of the Working Group is mortgage fraud. The scope of the mortgage fraud problem and the joint effort among institutions, agencies and authorities to address the problem is set out in the Law Society's Report to Convocation on Mortgage Fraud ("Report on Mortgage Fraud") dated March 24, 2005. The Report on Mortgage Fraud should be read as background to the proposed rule amendments contained in this document. It may be obtained from the Law Society [website](#). As the Law Society indicated in this Report, the Law Society has identified changes to the *Rules of Professional Conduct* to minimize the potential for fraud. One of the purposes of these consultations is to receive feedback on the proposed new *Rules*. Three new rules are proposed, consisting of two amendments to rules 2.04 on Avoidance of Conflicts of Interest and one amendment to Rule 2.02 on Quality of Service.

In addition, the Law Society is seeking input on proposed amendments to Rule 2.04 (Conflicts of Interest) that would exempt a lawyer from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender. This issue was raised by the former chair of the Ontario Bar Association Real Property Section.

The current *Rules of Professional Conduct* may be accessed through the Law Society [website](#).

2. PROPOSED AMENDMENTS: MORTGAGE FRAUD

Proposed Amendment #1

A general prohibition against acting for both the vendor and the purchaser in a real estate transaction, with certain exceptions: New Rules 2.04(11.1) and (11.2)

Prohibition Against Acting for More Than One Party in a Real Estate Transaction

2.04 (11.1) Subject to sub-rule (11.2) a lawyer or two or more lawyers practicing in a law firm shall not act for or otherwise represent both transferor and transferee in an arm's length real estate transaction. For the purposes of this subrule, "arm's length" shall have the same meaning as defined in the *Income Tax Act (Canada)*.

2.04 (11.2) Provided there is no violation of this rule, a lawyer may act for or otherwise represent both a transferor and a transferee in a real estate transaction if

- (a) lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the real estate transaction, or
- (b) the transaction is pursuant to the administration and/or settlement of an estate.

The language in the new rule is borrowed from existing rule 2.04(12) (the "two lawyer rule" for mortgage/lending transactions).

Reasons for the Rule

The Law Society's Mortgage Fraud Team has identified certain real estate practices that those committing mortgage fraud are taking advantage of. One example is a lawyer or the lawyer's partner or associate/employed lawyer acting for both vendor and purchaser in a real estate transaction.

It is unclear how many real estate practitioners act for more than one of the vendor or purchaser parties in a residential real estate transaction, although it is recognized that it is customary for the lawyer acting for the purchaser/mortgagor to also act for the institutional lender in the placing of a mortgage to assist in funding the purchase price.

The proposed rules have been drafted to have a minimal impact on real estate practitioners, especially in smaller communities, while providing maximum impact on

mortgage fraud prevention. Real estate and mortgage work is a large part of the business of small firms and sole practices, especially in smaller communities.

If the Law Society is unable to demonstrate that it can regulate this problem, institutional lenders may lose confidence in the legal profession with the possible consequence that lenders will use only selected large law firms or in-house counsel for all mortgage work in the province.

Given the importance of real estate and mortgage work to many lawyers in smaller firms outside of the greater Toronto area, large-scale reductions in the availability of work will have a large impact on their practice. If this work is no longer available, the viability of these firms will be threatened and the communities they serve could lose their local services in all areas of practice.

Proposed Amendment #2
A requirement to make full disclosure to the lender: New Rule 2.04 (6.1)

2.04 (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the mortgagee or lender, in writing, before completion of the transaction,
all material facts that are relevant to the transaction
[or]
any information that could affect the lender's decision to advance funds.

Commentary *[if "all material facts that are relevant to the transaction" is used]*

"Material" means any unusual sales activities within the last year, or changes to the agreement of purchase and sale such as additional deposits or credits to the purchaser.

Reasons for the Rule

When acting for both a borrower and institutional lender, a lawyer must be mindful of his or her continuing obligations to the lender client. In that regard, information about the transaction that is known to the lawyer may prove to be crucial to the decision of the institutional lender to complete the transaction and may even assist in detecting fraud or other illegal activity.

In these circumstances the lawyer must adhere to the obligations imposed by Rule 2.04(6)

Proposed Amendment #3
A requirement to provide final reports to lenders within 90 days of the registration of the mortgage: New Rule 2.02 (14)

Requirement to Provide Final Reports to Lenders

2.02 (14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 90 days of the registration of the mortgage.

One other law society has a rule that deals with reports on mortgage transactions. The Law Society of British Columbia has a very specific rule (the equivalent of the Law Society's By-Laws) which requires a lawyer to make a written report to the Executive Director of the Law Society if he/she does not receive a discharge within 60 days of closing.

Reasons for the Rule

The rule codifies the expected practice in real estate transactions that a lawyer acting for a lender will report on the registration of the mortgage within a reasonable period of time.

3. PROPOSED AMENDMENTS TO THE JOINT RETAINER RULE FOR LOAN TRANSACTIONS WITH INSTITUTIONAL LENDERS

The proposed amendments to rule 2.04 on conflicts of interest would exempt a lawyer from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender.

The issue prompting the amendment, raised by a former chair of the Ontario Bar Association Real Property Section, relates to the way “consent” has been defined in the Rules since 2000. Under the joint retainer rules (rules 2.04(6) and following), the lawyer is required to give the proposed clients specified information and then under subparagraph 2.04(8), “obtain their consent.” “Consent” is defined in Rule 1.02 as a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent. The Rule on joint retainers expressly requires that the documenting of the consent occur *after* the disclosure about the retainer by the lawyer. Under the Rules prior to 2000, “consent” was not defined and the exact process was not specified in the Rules.

The Society learned that obtaining such consent from a financial institution is almost impossible in the residential context, but the general assumption is that lenders are consenting to the joint retainer by virtue of the fact that they provide loan documents to a lawyer knowing the lawyer is acting for the borrower.

The proposed amendment would take the form of new subrule 2.04(9), with corresponding changes in existing subrules 2.04(6) through (10). The proposed amendments are set out in the following pages. The amendments would apply to a retainer in which a lawyer is acting for both a lender and borrower in the circumstances described in rule 2.04(12)(c).¹ In these situations, the lenders will be informed of the identity of the borrower’s lawyer and proceed on the understanding that that lawyer will be acting for both borrower and lender. By virtue of the amendments, simultaneously with the lawyer’s receipt of instructions from the lender for the transaction, the lender will be deemed to have received the disclosure required under subrule (6) and the lawyer will be deemed to have received the lender’s consent under subrule (8) as defined in rule 1.02. In effect, the lender’s consent would be effective upon the lawyer’s acceptance of instructions from the lender to act in the transaction. The proposed rule contains some options that relate to a possible variation in the confirmation of the consent, and commentary is also proposed to address certain matters related to these circumstances.

¹ **2.04 (12)** Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if:...

(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business;

Proposed Amendments:

Exemption from the current disclosure and consent obligations with respect to an institutional lender client in circumstances in which the lawyer acts jointly for a borrower and an institutional lender: New Rule 2.04(9) and commentary

RULE 2.04 AVOIDANCE OF CONFLICTS OF INTEREST

...

(6) **Except as provided in subrule (9)**, before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

- (a) the lawyer has been asked to act for both or all of them,
- (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

(7) **Except as provided in subrule (9)**, where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) **Except as provided in subrule (9)**, where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

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- (9) If the joint retainer involves and is limited to a loan to a client, including any guarantee of that loan, from a lending client who is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business (“the lending client”),
- (a) the lending client’s consent is deemed to exist upon the lawyer’s receipt of written instructions from the lending client to act,
 - (b) the lawyer is not required to
 - (i) provide the advice in subrule (6) to the lending client before accepting the employment,
 - (ii) provide the advice in subrule (7) if the other client is the lending client,
 - (iii) obtain the consent of the lending client as described in subrule (8), including confirming the lending client’s consent in writing unless the lending client requires that its consent be reduced to writing,
- [optional, or include in commentary as “should confirm”:]*
- (c) where the lending client’s written instructions are silent with respect to its consent for the lawyer to act, the lawyer shall confirm the lending client’s consent in writing as soon as reasonably possible.

Commentary

Subrule (9) is intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

[optional, or include in rule as “shall provide written confirmation”:]

Notwithstanding the above, the lawyer should provide written confirmation of the terms of the joint retainer and of the consent to act where such confirmation does not appear in the documentation from the institutional lender relating to the transaction.

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