THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

Submission to the Law Society of BC

on the

BC Code of Professional Conduct

Canadian Bar Association – BC Branch

Business of Law Committee
And
Solicitors' Practice Issues Committee

April 2013

10th floor, 845 Cambie Street, Vancouver, BC V6B 5T3

Preface

This submission was prepared by the Business of Law Committee and the Solicitors' Practice Issues Committee of the Canadian Bar Association B.C. Branch on the basis of comments received from members of the Canadian Bar Association B.C. Branch. The Canadian Bar Association BC Branch represents more than 6,800 lawyers, judges and law students in BC.

Introduction

On April 10, 2013, the Law Society of British Columbia ("LSBC") advised its members that the Benchers rescinded commentary [1] of rule 3.6-3 of the BC Code dealing with statements of account ("Commentary 1"). The Benchers have requested that the Ethics Committee of the LSBC consult the profession further about the commentary and then recommend either restoring the commentary in its current form, restoring it in modified form or permanently eliminating the commentary.

In response to the LSBC's invitation to lawyers to provide feedback on Commentary 1, the Business of Law Committee and the Solicitors' Practice Issues Committee of the Canadian Bar Association – B.C. Branch ("CBA-BC") hereby submit their joint views on Commentary 1. The submissions reflect comments received from CBA-BC members.

Further, CBA-BC has also received communications from its members concerning the expanded requirements for independent legal advice under the BC Code and therefore takes this opportunity to submit comments on this aspect of the BC Code as well.

Submissions on Commentary 1

Prior to its rescission, Commentary 1 to Rule 3.6-3 read:

> The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed, in writing to such costs.

Background and Origins

Commentary 1 was based on an identical provision found in the Model Code of the Federation of Law Societies, which provided the blueprint for the BC Code. We also understand that the provision in the Model Code originated from a similar commentary found under Rule 2.06(3) of the Law Society of Alberta Code of Conduct, Rule 2.06(3) (see: http://www.lawsociety.ab.ca/files/regulations/Code.pdf).

Further, it is our understanding that the Commentary 1 language has not been uniformly accepted among Canadian Law Societies, although the reasons for such differences are not known to us. For instance, the Professional Regulation Committee of the Law Society of Upper Canada does not include Commentary 1 or any equivalent in its consultation paper on the proposed changes to the Ontario Rules of Professional Conduct (see: http://www.lsuc.on.ca/rule-consultation).

Specific Issues

What Constitutes an "Other Charge"

As a general observation, the suggested limitation of "disbursements" to amounts being paid or required to be paid to third parties does not appear to be reflected by general or legal dictionary definitions. Therefore, based on comments received by the committees the proposed distinction between "disbursements" and "other charges" is not one that B.C. lawyers, and more importantly their clients, are familiar with or would draw.

Therefore, it may be preferable to abandon the distinction between "disbursements" and "other charges" in Commentary 1 and instead require lawyers to disclose the items for which they seek recovery (that would otherwise have been the term "other charges"). Alternatively, if the L.S.B.C. decides to retain the distinction, it may be advisable to require a description of these two terms in statement of account. Accordingly, if Commentary 1 were to be re-instated, it would be helpful to provide further guidance to lawyers on how to isolate and identify "other charges" by defining the concept and/or providing illustrative categories of charges. Further, guidance as to the purpose of the distinction would be of assistance for lawyers to apply the concept. For example, are "other charges" meant to reflect charges that are (1) subject to a mark-up by the lawyer; (2) profit-centres; (3) otherwise qualify as firm overhead?

The proposed distinction may add new complexities to categorizing and billing for file related costs. For instance, certain potential "other charges" may not lend themselves to easy association with a specific client or billing matter, (e.g. general aggregated expenses such as database subscriptions). Even without Commentary 1, the BC Code establishes billing transparency as a fundamental ethical obligation of lawyers. Transparency could, and in practice, is already achieved by identifying in advance individual or categories of recoverable expenses in retainer agreements or other communications with clients.

Requirement for a Written Agreement Identifying "Other Charges"

Concerns were also expressed about the logistics of requiring clients to agree in writing to "other charges" at least in some legal contexts, written retainer agreements are not the norm (e.g. criminal defence practice). While it is our view that written consent (in the form of retainer agreements or otherwise) from clients in respect of all fee and expense related matters is preferable, other forms of communicating and documenting such communications may be sufficient to meet the transparency objectives of the BC Code and to obtain informed consent from clients. Therefore, it is proposed that a more flexible alternative to the strict writing requirement, at least for certain circumstances, be considered.

There is also uncertainty, how the requirement for a written agreement with respect to "other charges" may affect existing retainers. The question that was raised is whether Commentary 1, if re-instated would apply retroactively to existing retainers and if so, from what date. If this provision were to apply retroactively to existing retainers, it could place a serious administrative burden and expense on firms (e.g. hundreds of registered and records office retainer agreements may need to be updated). In this respect, guidance is sought whether, as a matter of prudent practice, lawyers should review all existing retainer agreements entered into prior to the effective date of Commentary 1 and obtain written consent from clients with retainer agreements entered into prior to re-enactment that do not refer to "other charges" to ensure compliance with Commentary 1 and to retain the ability to bill for "other charges".

Ambiguity also exists with regard to estimated costs associated in the ordinary course of completing a real estate transaction or related/incidental real estate file matter, with such estimated costs only being able to be finalized after closing. The same problem arises with regard to specifying costs where a Registered and Record ("R&R") Office Agreement is entered into with a corporate client. In such instances, fees and disbursements are generally billed on set date annually, with disbursements or other charges associated in the ordinary course in such billing account only being able to be finalized at the date of billing (i.e. not as of the date of execution of the R&R Office Agreement). Finally, consideration should be given to some corporate legal file matters which have in-house costs (e.g., Minute Books) built into a flat fee, to which the client has agreed in writing before the cost has been incurred. If the lawyer is required to account for this cost within their flat fee, both the lawyers and the client will likely be burdened, unnecessarily, with additional file costs.

Alteration of Existing Firm Accounting Mechanisms

Another impact of introducing the new distinction between disbursements and "other charges" will require firm accounting mechanisms and software to be re-tooled. Both cost concerns and technical issues were identified in this respect. As indicated above, it is suggested that the LSBC may wish to consider whether it is possible to achieve the billing transparency objectives within the existing Rule 3.6 (in particular the requirements of fairness, reasonableness and timely disclosure in Rule 3.6-1) without creation of a separate billing category for "other charges".

Impact of Tax Rules on Proposed Distinction

If Commentary 1 is re-introduced in its current or similar form, members would also look to the LSBC for guidance on how "other charges" would be treated in the context of the recent re-introduction of the Provincial Sales Tax in British Columbia.

Effect on Contingency Fee Arrangements

If Commentary 1 is re-enacted, it would also be desirable if lawyers practicing under contingency fee arrangements were provided with assistance to understand the interaction of the new category of "other charges" with the existing rules pertaining to contingency arrangements. At present there appears to be uncertainty whether the existing rules would permit the recovery of "other charges".

Recoverability of "Other Charges" as Legal Costs

Another interface area which appears to require further clarification is the treatment of "other charges" in the context of recovering legal costs in litigation. It is understood that expenses which would be characterized as "other charges" under Commentary 1 have been recognized as costs recoverable from an opposing party in litigation. In this regard, concerns focus on seemingly contradictory situations where Commentary 1 would prohibit billing "other charges" to a lawyer's own client, but permit recovery from the opposing party as an element of a legal costs award. While the issues surrounding this area may fall more appropriately within the jurisdiction of the courts, it may nevertheless be relevant from the perspective of the LSBC. For example, would a lawyer who seeks recovery of "other charges" as part of a cost award be acting contrary to the BC Code if those charges could not otherwise be recovered from his or her own client.

Could the Commentary be Circumvented

Another live issue is to what extent Commentary 1 could be circumvented through the organization of a firm's affairs such that "other charges" are generated by a third party office management company to which the lawyer maintains an interest. It is proposed that if the "other charges" category is adopted that disbursements be limited to charges from arms-length third parties.

Summary

The Business of Law Committee and the Solicitors' Practice Issues Committee of the CBA-BC agree with the spirit of Commentary 1, namely that a lawyer's duties to the client and profession require that he or she is transparent about all fees charged. The approach that client consent is properly required for what are deemed to be "other charges" is supported. However, it is requested that the LSBC consider further clarifications with respect to the issues outlined above.

Submissions in respect of Retainer Agreements and Independent Legal Advice

As indicated above, CBA-BC has also received feedback in respect to the new requirements established by the BC Code to obtain independent legal advice in specific circumstances and it wishes to share these concerns with the LSBC.

Section 3.4 of the BC Code governs a lawyer's duty to avoid conflicts of interest. Outlined in this provision are requirements that the potential client seek independent legal advice prior to retaining the lawyer. In particular, Rule 3.4-4(b) of the BC Code in respect of concurrent representation was identified as an example for these new requirements.

From a client's perspective, obtaining independent legal advice ("ILA") prior to retaining their preferred counsel can be an onerous step. It is believed that a number of clients (notably sophisticated clients to whom the rule appears to be targeted (see e.g. commentaries [2] and [3] of Rule 3.4.-4) would question the value of such a hurdle. ILA may not be necessary provided the lawyer has fully and clearly disclosed any potential conflicts of interest and has properly reviewed with the client whether concurrent representation is in the client's best interest. Put differently, the question arises what the independent legal advice requirement add over and above the existing disclosure protections, in particular when compared with other situations in which the BC Code only contemplates that ILA be recommended.

Given that a different standard (i.e. that of requiring ILA) must be met in some situations, there appears to be uncertainty how compliance will affect lawyers, e.g. in concurrent representation situations. In particular, will the independent legal advice provisions operate as a full shield for the lawyer in the event of a dispute?

As an alternative to different ILA standards, it is suggested that it may be possible to achieve the underlying objectives through additional resources which could be made available by the LSBC both for lawyers and for clients with regard to retainers. Such resources could include: updated model retainer agreements (regular and contingency) which reflect the particular situations in which ILA is recommended under the BC Code as well as background materials or training modules that identify the major items traditionally included in retainer agreements. The objective of any such resources would be to empower clients to determine themselves if they have been presented with a mainstream or routine retainer agreement and to decide whether they should obtain independent legal advice. Lawyers could point potential clients to or provide them with LSBC approved materials which will buttress the lawyer's discussions with the potential client to ensure that informed consent is given.

Another approach for consideration may be to amend the existing requirements to allow for satisfaction of the independent legal advice requirements if: (a) the client receives independent legal advice; or (b) the client has expressly waived their opportunity to receive independent legal and has provided informed consent to the proposed representation.

Summary

The Business of Law Committee and the Solicitors' Practice Issues Committee of the CBA-BC wished to share specific concerns in respect of the ILA requirements under the BC Code which were brought to their attention and outline potential alternative approaches for consideration by the LSBC. Both committees appreciate that an impressive amount of work went into the preparation of the BC Code and that the brevity of time that the committees had to consider the above issues and to provide these comments can only generate an incomplete assessment of the underlying issues. Nevertheless, the committees believe that these submissions will be of interest to the LSBC in considering any future amendments to the BC Code.