



New Model Code of Professional Conduct: The Impact on Estate Lawyers

By: Ian M. Hull & Nick Esterbauer

The Model Code of Professional Conduct¹ (the “**Model Code**”) was introduced in December 2011 and amended in 2012 by the Federation of Law Societies of Canada, with the goal of eliminating any significant interprovincial differences in rules of conduct for Canadian lawyers. The Model Code was itself, in part, based on the Law Society of Upper Canada’s *Rules of Professional Conduct* (the “**Ontario Rules**”), but makes some noteworthy introductions and distinctions from the most recent version of the Ontario Rules.

The primary motivation for the creation of the Model Code has been the increased mobility of lawyers throughout Canada. Lawyers are more likely now than ever before to move a practice from one province to another during their careers, or to have an interprovincial law practice. While the impact of the implementation of the Model Code is not yet known, it is expected to result in a set of consistent rules that better reflect the national and international ethical standards for the practice of law. The Model Code is already in the process of being implemented by the majority of Canada’s provincial law societies, including the Law Society of Upper Canada, and is introducing several important updates to the standard to which lawyers across the country are to be held. To date, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, Nova Scotia, and Newfoundland have adopted some or all of the changes proposed in the Model Code with respect to the practice of wills and estates, with changes to most professional conduct codes already in force or coming into effect during the course of 2014.

Amongst the most important changes adopted in the amended Ontario Rules are new standards with

respect to conflicts of interest, with the introduction of provisions that specifically address this issue within the practice of estate planning.²

In the context of estates, the Model Code eliminates uncertainty with respect to provisions that can be included within a will to the benefit of a drafting solicitor. On the subject, it advises:

Testamentary Instruments and Gifts

3.4-37 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.

3.4-38 Unless the client is a family member of the lawyer or the lawyer’s partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

3.4-39 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

The Model Code serves as a guideline to promote uniformity in codes of conduct implemented by law societies throughout the country. Several other provinces, including British Columbia and Nova Scotia, have adopted provisions identical to this section of the Model Code. In Ontario, however, modifications have been made to the updates proposed within the Model Code of Professional Conduct.

The Ontario Rules were amended on October 24, 2013 to reflect the updated Model Code. The amended *Rules of Professional Conduct*³ include the following with respect to conflicts of interest in the practice of wills and estates:

Testamentary Instruments and Gifts

3.4-37 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

3.4-38 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

According to the report⁴ of the Law Society of Upper Canada committee responsible for the amendments, the Ontario Rules were updated in a way that reflects the province's unique practice environment.

Most notably, Rule 3.4-39 has been excluded entirely from the relevant section of the Ontario Rules. The Law Society of Upper Canada did not feel that this provision, and the resulting limitation of testamentary freedom, was necessary.

Further, the requirement that a will not include a direction that the drafting solicitor is to be consulted for assistance in the administration of the estate, pursuant to Rule 3.4-37 of the Model Code, is not implemented in the Ontario Rules. Instead, the new provision requires a lawyer who includes such a provision in a client's will to advise an estate

trustee that these provisions are not enforceable, and that other lawyers can instead be consulted. The committee report discloses that this altered rule was introduced in recognition of testamentary freedom and because of the often cost-effective nature of retaining a lawyer who is already familiar with an estate to assist in its administration. A testator has the right to express his or her wish that a particular lawyer be consulted, even if this request is not enforceable.

The Ontario Rules have already been amended to reflect the updated standards of the Model Code, but are not yet in force. The new rules with respect to the practice of wills and estates in Ontario will come into effect on October 1, 2014⁵, when estate lawyers across the province will be required to follow the modified provisions relating to the preparation of testamentary instruments. Prior to October, lawyers should make themselves familiar with these new guidelines, as well as other changes to the amended Rules of Professional Conduct that may be relevant to their practice areas.

¹ Federation of Law Societies of Canada, Model Code of Professional Conduct (12 December 2012), online: Federation of Law Societies of Canada <http://www.flsc.ca/_documents/Model_codeWT-Crevdec2012FI.pdf>.

² Law Society of Upper Canada, Implementation of the Model Code of Professional Conduct: Changes to the Current Rules and Commentary (October 2013), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/uploadedFiles/Model%20Code,%20summary%20of%20changes%20from%20LSUC%20rules%20October%202013%20V2.pdf>>.

³ Law Society of Upper Canada, Proposed Amended Rules Implementing the Federation of Law Societies of Canada's Model Code of Professional Conduct, online: Law Society of Upper Canada <http://lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convoc13_prcrulesclean.pdf>.

⁴ Law Society of Upper Canada, "Proposed Amendments to the Rules of Professional Conduct Arising from Implementation of the Federation of Law Societies Model Code of Professional Conduct" Convocation – Professional Regulation Committee Report (2013) 192, online: Law Society of Upper Canada <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convoc13_prcpreportremodelcode.pdf>.

⁵ Law Society of Upper Canada, New Rules of Professional Conduct, online: Law Society of Upper Canada <<http://www.lsuc.on.ca/new-rules/>>.

Breakfast Series

Our next Breakfast Series will be held on Thursday, June 12, 2014. The speakers are Ian M. Hull, Terry Fallis and David Freedman. The title of the seminar is "Social Media for Lawyers". The Breakfast Series meeting is being held at the Ontario Bar Association, 2nd Floor, 20 Toronto Street, Salons 2 & 3, Toronto, Ontario. Breakfast begins at 8:15 a.m. with the Presentation to follow at 8:30 a.m. A fee of \$30.00 (\$26.55 + \$3.45 HST) is payable to Hull & Hull LLP upon registration by cheque, VISA or MasterCard. To register, please contact Sarah Koslicki at (416) 369-4779 or by e-mail to skoslicki@hullandhull.com.



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EDITOR: Suzana Popovic-Montag

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