

REAL ESTATE, JOINT RETAINERS, CONFLICTS,
PROHIBITION AGAINST ACTING FOR BORROWER AND LENDER
OR TRANSFEROR AND TRANSFEREE

RULES: 2.04 (6) - (10), 2.04 (11) AND (12) & 2.04.1

INTRODUCTION

Rules 2.04 (6) to (10), “the joint retainer rule”, and rules 2.04(11) and (12), “the two-lawyer rule”, are rules which directly impact on the practice of real estate. Rule 2.04 is found in the section entitled “Avoidance of Conflict of Interest”. The emphasis in this section is on *avoidance* of conflict and not merely on conflict situations. The rule dealing with joint retainers imposes duties on a lawyer *both* prior to accepting a joint retainer *and* during the course of the joint retainer. In order to fulfill these duties, a lawyer will need to address the requirements of this rule at various stages in a real estate transaction and to establish procedures to ensure compliance. The two-lawyer rule prohibits a lawyer from acting for both borrower and lender in a mortgage or loan transaction except in very limited defined circumstances.

JOINT RETAINERS

What is a joint retainer?

A joint retainer is one in which a lawyer accepts employment from more than one client in a matter or transaction. The joint retainer rule applies in all situations in which a lawyer is requested to act for more than one client in a matter or transaction¹ and not merely in situations where a lawyer is requested to act on **both sides** of a transaction or in situations where there was the presence or possibility of a conflicting interest.

What are a lawyer’s obligations prior to accepting employment on a joint retainer?

Rule 2.04 (6) provides that *before* a lawyer accepts employment on a joint retainer, 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

Rule 2.04 (6) is expressed in mandatory language and focuses on the relationship between the lawyer and the client.

¹ Task Force on Review of the Rules of Professional Conduct, *Final Report of the Task Force on Review of the Rules of Professional Conduct* (April 28, 2000) (Co-Chairs: Gavin A. Mackenzie and W.A. Derry Millar) at 32.

Who are the clients?

The term “client” is defined in rule 1.02 as including a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work. To ensure compliance with this rule, the lawyer will need to determine who his clients are in the matter or transaction. The answer to this question will not always be obvious and the lawyer may need to analyze the facts and in some cases research the law. For example, when a lawyer acts for a corporation in a real estate transaction, is the lawyer also acting for the shareholders or officers of the corporation? The answer to this question depends upon the particular facts of the situation.

When shall the lawyer obtain the consent of the clients?

Once the lawyer has complied with the requirements of rule 2.04 (6) and the clients are satisfied that the lawyer act, pursuant to rule 2.04 (8), the lawyer must then obtain the consent of the clients to act.

What constitutes “consent”?

The term “consent” is defined in rule 1.02 as follows:

- (a) a consent in writing , provided that where more than one person consents, each may sign a separate document recording his or her consent, or
- (b) an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent

Prior to accepting employment from more than one client in a matter or transaction, the lawyer will either meet with the clients and have each client execute a consent or acknowledgment or will obtain the client’s oral consent and ensure that each client receives a letter recording his or her consent.

Are there any exceptions to the requirement to obtain written consent of the clients?

There is one exception to this requirement, outlined in rules 2.04(8.1) and (8.2). In situations where a lawyer is retained jointly by an institutional lender (a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business) and another client in respect of a mortgage or loan from that lending client to the other client, the lawyer is not required to provide the advice contained in rule 2.04(6) to the lending client nor obtain its written consent unless the lending client requires that its consent be reduced to writing. In such circumstances, the lending client’s consent to the joint retainer is deemed to exist when the lawyer receives written instructions from the lending client to act in the transaction.

When shall a lawyer recommend that a client obtain independent legal advice on the joint retainer?

The joint retainer rule also deals with a lawyer’s obligation to recommend that a client obtain independent legal advice with respect to the joint retainer.

The commentary to rule 2.04(6) provides that in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer **should** recommend that the client obtain independent legal advice to ensure that the client's consent to the joint retainer was informed, genuine and un-coerced.

In addition, rule 2.04(7) provides that in situations where a lawyer has a continuing relationship with a client for whom the lawyer regularly acts and before the lawyer accepts joint employment for that client and another in a matter or transaction, the lawyer **shall**

- (a) advise the other client of the continuing relationship with the one client, and
- (b) recommend that the other client obtain independent legal advice about the joint retainer

As outlined in rules 2.04(8.1) and (8.2), in situations where the lawyer is retained jointly by an institutional lender and another client in respect of a mortgage or loan from that lending client to the other client, the lawyer is not required to provide this advice nor recommend independent legal advice to the lending client.

What constitutes independent legal advice?

The term "independent legal advice" is defined in rule 1.02 as a retainer where

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction
- (b) the client's transaction involves doing business with
 - i. another lawyer
 - ii. a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
 - iii. a client of the other lawyer
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view

This definition of independent legal advice clarifies when a lawyer may give independent legal advice and what his or her obligations are when giving such advice. A lawyer who is requested to give independent legal advice must not have a conflicting interest with respect to the client's transaction. A conflicting interest is defined in rule 2.04 (1) as an interest

- (a) that would be likely to adversely affect a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client

Once a lawyer determines that he or she can accept the retainer to give independent legal advice, then the lawyer must comply with the remaining requirements of the definition of independent legal advice in rule 1.02. Finally, the commentary to the rule provides that the lawyer giving independent legal advice has a responsibility that should not be lightly assumed or perfunctorily discharged.

What happens when an issue contentious between clients arises?

During the course of the retainer, the lawyer must be vigilant about potential contentious issues that may arise between clients. Rules 2.04 (9) and (10) set out the procedure to be followed when a contentious issue does arise. The lawyer shall

- (a) not advise the clients on the contentious issue, and
- (b) refer the clients to other lawyers, unless no legal advice is required and the clients are sophisticated, in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate

In addition, when clients consent to the joint retainer, they may also agree that if a contentious issue arises, the lawyer may advise one of them about the contentious matter and refer the other or others to another lawyer.

PROHIBITION AGAINST ACTING FOR BORROWER AND LENDER - RULE 2.04(11) AND (12)

This rule prohibits a lawyer, or two or more lawyers practising in partnership or association, from acting for both the borrower and the lender in a mortgage or loan transaction except in limited defined circumstances. This rule was implemented in response to submissions by the Lawyers' Fund For Client Compensation Committee. In its submissions to the Task Force, the Committee indicated that investment type claims have always had a significant impact on the Fund and have represented about 70% to 75% of all claims received by the Fund. The Committee further indicated that the most common form of investment claim occurred when a client utilized the services of a lawyer in order to invest in mortgages registered against real property.²

When does the two-lawyer rule apply?

The two-lawyer rule is expressed in mandatory terms. It applies to all mortgage or loan transactions and not merely secured transactions.

When may a lawyer act for both lender and borrower in the same mortgage or loan transaction?

A lawyer or law firm may only act or otherwise represent both a borrower and lender in a mortgage or loan transaction where one of the following circumstances exists:

² *Ibid*, at 37.

- (a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price (vendor take back mortgage situation)
- (c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business
- (d) the consideration for the mortgage or loan does not exceed \$50,000.00, or
- (e) the lender and borrower are not at “arm’s length” as defined in the *Income Tax Act (Canada)*

Where a lawyer determines that one of these limited defined circumstances applies, the lawyer **must** also comply with the remaining provisions of rule 2.04.

In addition, new subrule 2.04(6.1) provides that when a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

PROHIBITION AGAINST ACTING FOR TRANSFEROR AND TRANSFEREE - RULE 2.04.1

Following consultations with the profession on new rules for real estate practice, Convocation approved rule 2.04.1 of the *Rules of Professional Conduct* requiring that an individual lawyer not act for both the transferor and the transferee in a transfer of real property. The two lawyers may practice in the same law firm so long as the general rules on conflicts of interest in rule 2.04 are observed. This new two-lawyer rule came into effect March 31, 2008.

When does this new two-lawyer rule apply?

This new two-lawyer rule is mandatory terms and applies to all transfers of title to real property.

When may a lawyer act for both lender and borrower in the same mortgage or loan transaction?

In certain limited circumstances one lawyer may represent both the transferor and the transferee in a transfer of title to real property provided there is no violation of the conflicts of interest rule 2.04. These exceptions are as follows:

- a transfer where the transferor and the transferee are the same and the change is being made to effect a change in legal tenure
- a transfer being registered to give effect to a severance of land prior to the expiry of a consent under the *Planning Act* or pursuant to a municipal by-law
- a transfer from an estate trustee to a person who is beneficially entitled

- a transfer where the transferor and the transferee are related persons as defined in section 251 of the *Income Tax Act (Canada)*
- the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer

In addition, no law statements will be required for transfers involving a government body including a municipality or for transfers of easements.

Where a lawyer determines that one of these limited defined circumstances applies, the lawyer **must also** comply with the remaining provisions of rule 2.04.

CONCLUSION

In conclusion, the joint retainer rule and the *two-lawyer* rule most significantly impact the practice of real estate law. Real estate practitioners will need to address these issues prior to accepting a retainer and will need to establish procedures and practices to ensure compliance with these rules. Attached as “Appendix A” are suggested tips for dealing with the joint retainer rule and independent legal advice under the *Rules*.



*Legal information and support
designed for you*

Please note that this information is not a substitute for the member's own research, analysis and judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.

APPENDIX A

DEALING WITH THE JOINT RETAINER RULE WHERE THE CLIENT'S CONSENT IS REQUIRED

SUBRULES 2.04(6)-(10): PRACTICE TIPS

The "joint retainer rule" [subrules 2.04 (6) to (10)] imposes duties on a lawyer *both* prior to accepting a joint retainer *and* during the course of the joint retainer. A joint retainer is one in which the lawyer accepts employment from more than one client in a matter or transaction. The following are some practice tips to assist you in dealing with the rule:

PRIOR TO ACCEPTING A RETAINER

CONSIDER

- Who are your clients?
- Is this a matter or transaction in which you are considering accepting employment from more than one client?

If yes, advise each client that

- you have been asked to act for both or all of them
- 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
- if a conflict develops that cannot be resolved, you cannot continue to act for both or all of them and you may have to withdraw completely

OBTAIN THE CONSENT OF EACH CLIENT BY

- having the client execute a written consent, or
- obtaining the client's oral consent and sending a letter to the client recording his or her consent separately

YOU SHOULD RECOMMEND THAT THE CLIENT OBTAIN INDEPENDENT LEGAL ADVICE ABOUT THE JOINT RETAINER IF

- the client is more vulnerable or less sophisticated than the other or others, or
- there are any other reasons why the client should obtain such advice

IF YOU HAVE A CONTINUING RELATIONSHIP WITH ANY OF THE CLIENTS FOR WHOM YOU ACT REGULARLY, YOU SHALL

- advise the other client or clients of the continuing relationship and recommend that the other client or clients obtain independent legal advice about the joint retainer

CONSIDER OBTAINING THE AGREEMENT OF ALL CLIENTS THAT IF A CONTENTIOUS ISSUE ARISES YOU MAY CONTINUE TO ADVISE ONE OF THEM ABOUT THE CONTENTIOUS MATTER AND SHALL REFER THE OTHER OR OTHERS TO ANOTHER LAWYER.

YOU SHOULD AVOID ACTING FOR MORE THAN ONE CLIENT, EVEN THOUGH ALL PARTIES CONCERNED MAY CONSENT IF

- it is likely that an issue contentious between the clients will arise or their interests, rights or obligations will diverge as the matter progresses

DURING THE RETAINER

WHERE CLIENTS HAVE CONSENTED TO A JOINT RETAINER AND A CONTENTIOUS ISSUE BETWEEN THEM OR SOME OF THEM ARISES, YOU SHALL

- not advise any of them on the contentious issue unless the clients have previously agreed that you may continue to advise one of them about the contentious matter
 - where there is no such agreement, you shall refer the clients to other lawyers, unless legal advice is not required *and* the clients are sophisticated, in which case, the clients may settle the contentious issue by direct negotiation and without your participation
- where the parties have previously agreed that you may continue to advise one of them about the contentious matter, refer the other client or clients to another lawyer

INDEPENDENT LEGAL ADVICE - RULE 1.02 DEFINITIONS
GIVING INDEPENDENT LEGAL ADVICE PURSUANT
TO THE RULES OF PROFESSIONAL CONDUCT: PRACTICE TIPS

PRIOR TO ACCEPTING THE RETAINER

CONSIDER WHETHER YOU CAN GIVE INDEPENDENT LEGAL ADVICE

Do you have a conflicting interest with respect to the client's transaction, that

- would be likely to affect adversely your judgment on behalf of, or loyalty to, the client or prospective client, or
- you might be prompted to prefer to the interests of the client or the prospective client?

IF YES, YOU CANNOT GIVE INDEPENDENT LEGAL ADVICE

IF NO, CONSIDER WHETHER THE CLIENT'S TRANSACTION INVOLVES DOING BUSINESS WITH

- another lawyer
- a corporation or other entity in which the other lawyer has an interest and the corporation is not a corporation or other entity whose securities are publicly traded, or
- a client of the other lawyer?

IF YES, YOU MUST ADVISE THE CLIENT THAT HE OR SHE HAS THE RIGHT TO INDEPENDENT LEGAL REPRESENTATION, WHICH MEANS

- a retainer where the retained lawyer has no conflicting interest with respect to the client's transaction and ***will act as the client's lawyer in relation to the matter***

IF THE CLIENT WAIVES HIS OR HER RIGHT TO INDEPENDENT LEGAL REPRESENTATION

- you must obtain the client's express waiver of the right to independent legal representation
- the client must elect to receive no legal representation or to receive legal representation from the other lawyer
- it would be prudent to confirm the client's instructions in writing

DURING THE RETAINER

YOU MAY NOW PROCEED TO PROVIDE THE CLIENT WITH INDEPENDENT LEGAL ADVICE. YOU SHALL

- explain the legal aspects of the transaction to the client
- satisfy yourself that the client appears to understand the advice given, and
- inform the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view

PLEASE NOTE THAT WHERE A CLIENT ELECTS TO WAIVE INDEPENDENT LEGAL REPRESENTATION AND TO RELY ON INDEPENDENT LEGAL ADVICE ONLY, THE RETAINED LAWYER HAS A RESPONSIBILITY THAT SHOULD NOT BE LIGHTLY ASSUMED OR PERFUNCTORILY DISCHARGED.