



NOVA SCOTIA
BARRISTERS' SOCIETY

Nova Scotia Barristers' Society
CODE OF PROFESSIONAL CONDUCT

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PREFACE

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PREFACE

One of the hallmarks of civilized society is the Rule of Law. Its importance is manifested in every legal activity in which citizens engage, from the sale of real property to the prosecution of murder to international trade. As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to the robust legal system in Canada. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the Justice system and the profession.

The Code sets out statements of principle followed by exemplary subrules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the subrules and commentaries. The Code assists in defining ethical practice and in identifying what is questionable ethically. Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational. The Code in its entirety should be considered a reliable and instructive guide for lawyers that establishes only the minimum standards of professional conduct expected of members of the profession. Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a subrule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Society, senior practitioners or the courts for guidance.

A breach of the provisions of the Code may or may not be sanctionable. The decision to address a lawyer's conduct through disciplinary action based on a breach of the Code will be made on a case-by-case basis after an assessment of all relevant information. The rules, subrules and commentaries are intended to encapsulate the ethical standard for the practice of law in Canada. A failure to meet this standard may result in a finding that the lawyer has engaged in conduct unbecoming or professional misconduct.

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The Code of Conduct was drafted as a national code for Canadian lawyers. It is recognized, however, that regional differences will exist in respect of certain applications of the ethical standards. Lawyers who practise outside their home jurisdiction should find the Code useful in identifying these differences.

The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected. This calls for a framework based on ethical principles that, at the highest level, are immutable, and a profession that dedicates itself to practise according to the standards of competence, honesty and loyalty. The Society intends and hopes that this Code will be of assistance in achieving these goals.

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DEFINITIONS

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DEFINITIONS

In this Code, unless the context indicates otherwise,

“**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;

“**client**” is a person who:

- (a) consults the lawyer and on whose behalf a lawyer renders or agrees to render legal services; or
- (b) having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal services.

In the case of an individual who consults the lawyer in a representative capacity, the client is the corporation, partnership, organization, or legal entity that the individual is representing;

For greater clarity, a client does not include a near-client, affiliated entity, director, shareholder, employee or family member unless there is objective evidence to demonstrate that they had a reasonable expectation that a lawyer-client relationship would be established.

Commentary

A lawyer-client relationship may be established without formality.
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“**conflict of interest**” or “**conflicting interest**” arises when there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another client, a former client or a third person;

Commentary

A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.

“**consent**” means fully informed and voluntary consent after disclosure

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(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

“disclosure” means full and fair disclosure of all information relevant to a person’s decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

“interprovincial law firm” means a law firm that carries on the practice of law in more than one province or territory of Canada;

“law firm” includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the *Legal Aid Act*;

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

“lawyer” means a member of the Society and includes an Articled Clerk enrolled in the Society’s Bar Admission Course;

“Society” means the Nova Scotia Barristers’ Society;

“tribunal” includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures.

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CHAPTER 1 – STANDARDS OF THE LEGAL PROFESSION

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1.01 INTEGRITY

1.01 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

1.01 (2) A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

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Commentary

Collectively, lawyers are encouraged to enhance the profession through activities such as:

- (a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;
- (b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;
- (c) filling elected and volunteer positions with the Society;
- (d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and
- (e) acting as directors, officers and members of non-profit or charitable organizations.

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CHAPTER 2 – RELATIONSHIP TO CLIENTS

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2.01 COMPETENCE

Definitions

2.01 (1) In this rule

“Competent lawyer” means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:

- (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
- (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
 - (i) legal research;
 - (ii) analysis;
 - (iii) application of the law to the relevant facts;
 - (iv) writing and drafting;
 - (v) negotiation;
 - (vi) alternative dispute resolution;
 - (vii) advocacy; and
 - (viii) problem solving;
- (d) communicating at all relevant stages of a matter in a timely and effective manner;
- (e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;
- (f) applying intellectual capacity, judgment and deliberation to all functions;
- (g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;
- (h) recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

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- (i) managing one's practice effectively;
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
- (k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

2.01 (2) A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

- (a) the complexity and specialized nature of the matter;
- (b) the lawyer's general experience;
- (c) the lawyer's training and experience in the field;
- (d) the preparation and study the lawyer is able to give the matter; and
- (e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is

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an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

A lawyer should be wary of bold and over-confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

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The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

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2.02 QUALITY OF SERVICE

Quality of Service

2.02 (1) A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

Commentary

This rule should be read and applied in conjunction with Rule 2.01 regarding competence.

A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

Examples of expected practices

The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (a) keeping a client reasonably informed;
- (b) answering reasonable requests from a client for information;
- (c) responding to a client's telephone calls;
- (d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

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- (e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
- (f) answering, within a reasonable time, any communication that requires a reply;
- (g) ensuring that work is done in a timely manner so that its value to the client is maintained;
- (h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- (i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
- (j) informing a client of a proposal of settlement, and explaining the proposal properly;
- (k) providing a client with complete and accurate relevant information about a matter;
- (l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;
- (m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;
- (n) being civil.

A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

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Honesty and Candour

2.02 (2) When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

Commentary

A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer.

A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

When the Client is an Organization

2.02 (3) Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

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In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (Rule 2.04).

Encouraging Compromise or Settlement

2.02 (4) A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal or Regulatory Proceedings

2.02 (5) A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

- (a) to initiate or proceed with a criminal or quasi-criminal charge; or
- (b) to make a complaint to a regulatory authority.

Commentary

It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.

It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to use, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

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Inducement for Withdrawal of Criminal or Regulatory Proceedings

2.02 (6) A lawyer must not:

- (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
- (b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or
- (c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

"Regulatory authority" includes professional and other regulatory bodies.

A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority. In such circumstances, a lawyer must find a balance between the duty of loyalty to their client and their duty to the administration of justice.

A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or regulatory authority.

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When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Dishonesty, Fraud by Client

2.02 (7) When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

A bona fide test case is not necessarily precluded by this subrule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law

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and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Dishonesty, Fraud when Client an Organization

2.02 (8) A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, must do the following, in addition to his or her obligations under subrule (7):

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with Rule 2.07.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (Rule 2.03).

This subrule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that

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constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 2.07. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization’s and the public’s interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization’s responsibilities to its constituents and to the public.

Clients with Diminished Capacity

2.02(9) When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client’s ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client’s ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is

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whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under Rule 2.03(1) (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

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2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Society, or
- (d) otherwise permitted by this rule.

Commentary

A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter. (See Rule 2.04 Conflicts.)

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Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:

- (a) retained by a person about a particular matter; or
- (b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

Sole practitioners who practise in association with other lawyers in cost-sharing, space-sharing or other arrangements should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if the lawyers institute systems and procedures that are designed to insulate their respective practices. The issue may be heightened if a lawyer in the association represents a client on the other side of a dispute with the client of another lawyer in the association. Apart from conflict of interest issues such a situation may raise, the risk of such disclosure may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients' affairs or business.

In some situations, the authority of the client to disclose may be inferred. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent

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their disclosing or using any information that the lawyer is bound to keep in confidence.

The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

A lawyer may have an obligation to disclose information under Rules 4.05 (2) and (3) and 4.06 (3). If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

Use of Confidential Information

2.03 (2) A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

Commentary

The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

Future Harm / Public Safety Exception

2.03(3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

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Commentary

Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this subrule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:

- (a) the likelihood that the potential injury will occur and its imminence;
- (b) the apparent absence of any other feasible way to prevent the potential injury; and
- (c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

How and when disclosure should be made under this subrule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

If confidential information is disclosed under Rule 2.03(3), the lawyer should prepare a written note as soon as possible, which should include:

- (a) the date and time of the communication in which the disclosure is made;
- (b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and

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(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

2.03 (4) If it is alleged that a lawyer or the lawyer's associates or employees:

- (a) have committed a criminal offence involving a client's affairs;
- (b) are civilly liable with respect to a matter involving a client's affairs;
- (c) have committed acts of professional negligence; or
- (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.

2.03 (5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.

2.03 (6) A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

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2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not advise or represent more than one side of a dispute.

2.04 (2) A lawyer must not act or continue to act in a matter when there is, or is likely to be, a conflicting interest, unless, after disclosure, the client consents.

Commentary

As defined in these rules, a conflict of interest or a conflicting interest arises when there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another client, a former client or a third person. A substantial risk is one that is significant, and while not certain or probable is more than a mere possibility.

A lawyer should be aware that he or she might owe duties to a third person, even though no formal lawyer-client relationship exists. The lawyer might, for instance, receive confidential information from a person, giving rise to a duty of confidentiality. Duties to third persons might also arise when a lawyer acts in non-lawyer capacity, for example as a corporate director or officer, or as an executor of an estate.

A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists, not only from the outset, but also throughout the duration of a retainer, because new circumstances or information may establish or reveal a conflict of interest.

A lawyer's disclosure should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflicting interest could have an adverse effect on the client's interests. This would include the lawyer's relations to the parties and interest in or connection with the matter, if any.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved

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in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, such as when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A lawyer should not act for a client if the lawyer's duty to the client and the personal interests of the lawyer, a law partner or an associate are in conflict. Conflicting interests include, but are not limited to, the financial interest of a lawyer, a law partner or an associate of a lawyer including a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, an associate a family member or a law partner, had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture the financial interests that do not compromise a lawyer's duty to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client. A lawyer acting for a friend or family member may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

A lawyer's close personal relationship including a sexual relationship with a client may also conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. A primary risk is that the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

This rule is also intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits vulnerability. The lawyer must not take advantage of that vulnerability. The solicitor-client relationship frequently creates an imbalance of power in favour of the lawyer where a client exhibits dependence upon the lawyer. A lawyer owes the utmost duty of good faith to the client. The relationship between a lawyer and client is a fiduciary relationship of the very highest character and all dealings between a lawyer and client that are beneficial to the lawyer will be closely scrutinized with the utmost strictness. Where lawyers exercise undue influence over clients to take unfair advantage

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of clients, discipline is appropriate. In all matters, a member is advised to keep clients' interests paramount in the course of the member's representation.

Sole practitioners who practise in association with other lawyers in cost-sharing or other arrangements should consider whether a conflict would exist if two lawyers in an association represent clients in opposite sides of a dispute. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts and other organizations. A dual role may result in a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider Rule 6.03 (Outside Interests and Practice of Law).

While subrule (2) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced.

Acting Against Current Clients

2.04 (3) To follow at a later date.

Concurrent Representation

2.04 (4) A law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

- (a) disclosure of the advantages and disadvantages of the firm so acting has been made to each client;
- (b) each client consents after having received advice from a lawyer independent of the firm;

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- (c) it is in the best interests of the clients that the firm so acts;
- (d) each client is represented by a different lawyer at the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) the law firm withdraws from the representation of all clients if a dispute that cannot be resolved develops between the clients.

Commentary

Concurrent representation, as distinguished from joint retainers as discussed below, permits law firms to act for a number of clients in a matter, for example, competing bids in a corporate acquisition, in which the clients' interests are immediately divergent and may conflict, but the clients are not in a dispute. A law firm may agree to act in such circumstances provided the requirements of the rule are met. In particular, the clients are to be fully apprised of and understand the risks associated with the arrangement.

In some situations, although all the clients would consent, the law firm should not accept a concurrent retainer. For example, in a matter in which one of the clients was less sophisticated or more vulnerable than the other, acting under this rule would be undesirable because the less sophisticated and more vulnerable client may later regret his or her consent and perceive the situation as having been one in which the law firm gave preferential and better services to the other client.

Acting Against Former Clients

2.04 (5) Unless the client consents, a lawyer must not act against a former client or against persons who were involved in or associated with a former client in a matter in which the lawyer represented the former client:

- (a) in the same matter,
- (b) in any related matter, or
- (c) except as provided by subrule (6), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information.

Commentary

It is not improper for a lawyer to act against a former client in a fresh and independent

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matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter. Generally this Rule would prohibit a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer.

2.04 (6) If a lawyer has acted for a former client and obtained confidential information relevant to a new matter, a partner or associate of the lawyer may act in the new matter against the former client if:

- (a) the former client consents to the lawyer's partner or associate acting; or
- (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:
 - (i) the adequacy of assurances that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter has occurred;
 - (ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;
 - (iii) the extent of prejudice to any party;
 - (iv) the good faith of the parties;
 - (v) the availability of suitable alternative counsel; and
 - (vi) issues affecting the public interest.

Commentary

The guidelines at the end of the Commentary to subrule (26) regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

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Joint Retainers

2.04 (7) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer must advise each of 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 client 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 rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (7). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
 - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;
 - (ii) the other spouse or partner had died; or
 - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new

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instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (9).

2.04 (8) If 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 must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (9) When a lawyer has advised the clients as provided under subrule (7) and 2.04(8) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned 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.

2.04 (10) Except as provided by subrule (11), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

- (a) refer the clients to other lawyers; or
- (b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:
 - (i) no legal advice is required; and
 - (ii) the clients are sophisticated.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any

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legal disability and who wish to submit the dispute to the lawyer.

If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (11) Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflicting interest, or when the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Acting for Borrower and Lender

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) “**lending client**” means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (7) to (11), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

- (a) the lender is a lending client;

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- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- (c) 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; or
- (d) the lender and borrower are not at “arm’s length” as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must 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.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or “flip”, where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client’s consent is deemed to exist upon the lawyer’s receipt of written instructions from the lending client to act and the lawyer is not required to:

- (a) provide the advice described in subrule (7) to the lending client before accepting the retainer;
- (b) provide the advice described in subrule (8); or
- (c) obtain the consent of the lending client as required by subrule (9), including confirming the lending client’s consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (15) and (16) are 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

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the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Conflicts from Transfer Between Law Firms

Application of Rule

2.04 (17) In this rule:

- (a) “**client**”, in this subrule, bears the same meaning as in the Definitions chapter, and also includes anyone to whom a lawyer owes a duty of confidentiality, even if no solicitor-client relationship exists between them;
- (b) “**confidential information**” means information obtained from a client that is not generally known to the public; and
- (c) “**matter**” means a case or client file, but does not include general “know-how” and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

2.04 (18) This rule applies when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

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- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client (“former client”);
- (b) the interests of those clients in that matter conflict; and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

2.04 (19) Subrules (20) to (22) do not apply to a lawyer employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Commentary

The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

Lawyers and support staff — This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer’s firm and confidences of clients of other law firms in which the person has worked.

Government employees and in-house counsel — The definition of “law firm” includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law firms with multiple offices — This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

Law Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses relevant confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

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- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:
 - (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;
 - (ii) the extent of prejudice to any party;
 - (iii) the good faith of the parties;
 - (iv) the availability of suitable alternative counsel; and
 - (v) issues affecting the public interest.

Commentary

The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

2.04 (21) For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

2.04 (22) If the transferring lawyer actually possesses relevant information respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm:

- (a) the lawyer must execute an affidavit or solemn declaration to that effect, and
- (b) the new law firm must
 - (i) notify its client and the former client or, if the former client is represented in the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under this rule, and

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- (ii) deliver to the persons notified under subclause (i) a copy of any affidavit or solemn declaration executed under clause (a).

Transferring Lawyer Disqualification

2.04 (23) Unless the former client consents, a transferring lawyer referred to in subrule (20) or (22) must not:

- (a) participate in any manner in the new law firm's representation of its client in the matter; or
- (b) disclose any confidential information respecting the former client.

2.04 (24) Unless the former client consents, members of the new law firm must not discuss with a transferring lawyer referred to in subrule (20) or (22) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (17) to (26) may apply to a tribunal of competent jurisdiction for a determination of any aspect of those subrules.

Due Diligence

2.04 (26) A lawyer must exercise due diligence to ensure that each lawyer and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained complies with subrules (17) to (26), including not disclosing confidential information of clients of the firm or any other law firm in which the person has worked.

Commentary
MATTERS TO CONSIDER
When a law firm ("new law firm") considers hiring a lawyer or an articulated law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need

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to identify, first, all cases in which:

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;
- (b) the interests of the clients of the two law firms conflict; and
- (c) the transferring lawyer actually possesses relevant information.

The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm (“former client”) that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

- (a) the new law firm obtains the former client’s consent to its continued representation of its client in that matter; or
- (b) the new law firm complies with subrule (20)(b) and, in determining whether continued representation is in the interests of justice, both clients’ interests are the paramount consideration.

If the new law firm seeks the former client’s consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of

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the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (25) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of subrule (20)(b). Ideally, this process should be completed before the transferring person is hired.

B. If no conflict exists

Although the notice required by subrule (22) need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.

A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (25) for a determination of that issue.

C. If the new law firm is not sure whether a conflict exists

There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former

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client's confidential information will occur to any member of the new law firm:

- (a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and
- (b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (20)(b), particularly clause (v). Only when the entire firm must be disqualified under subrule (20) will it be necessary

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to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised
 - (a) that the screened lawyer is now with the new law firm, which represents the current client, and
 - (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support

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staff working on the matter.

11. The screened lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

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Doing Business with a Client

Definitions

2.04 (27) In subrules (27) to (41),

“independent legal advice” means a retainer in which:

- (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, or
 - (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,
- (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 another 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 a proposed investment from a business point of view;

“independent legal representation” means a retainer in which

- (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, and
- (b) the retained lawyer will act as the client’s lawyer in relation to the matter;

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Commentary

If 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.

“**related persons**” means related persons as defined in the *Income Tax Act* (Canada).

2.04 (28) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

This provision applies to any transaction with a client, including:

- (a) lending or borrowing money;
- (b) buying or selling property;
- (c) accepting a gift, including a testamentary gift;
- (d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;
- (e) recommending an investment; and
- (f) entering into a common business venture.

Commentary

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer’s own interest and the lawyer’s duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (29) Subject to subrule (30), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting

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any retainer, the lawyer must

- (a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;
- (b) recommend and require that the client receive independent legal advice and
- (c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (32).

2.04 (30) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (31) A lawyer must not borrow money from a client unless

- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
- (b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

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Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (32) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

- (a) provide the client with a written certificate that the client has received independent legal advice, and
- (b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (33) Subject to subrule (31), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (34) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

- (a) disclose and explain the nature of the conflicting interest to the client;
- (b) require that the client receive independent legal representation; and
- (c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (35) Except as provided by subrule (36), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a

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borrower or lender.

2.04 (36) A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;
- (b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or
- (c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:
 - (i) the lawyer has complied with this rule (Conflicts), in particular, subrules (27) to (36) (Doing Business with a Client); and
 - (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

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Testamentary Instruments and Gifts

2.04 (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.

2.04 (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.

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

Judicial Interim Release

2.04 (40) A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (41) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

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2.05 PRESERVATION OF CLIENT'S PROPERTY

Preservation of Clients' Property

In this rule, “**property**” includes a client’s money, securities as defined in the *Securities Act*, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client’s correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

2.05 (1) A lawyer must:

- (a) care for a client’s property as a careful and prudent owner would when dealing with like property; and
- (b) observe all relevant rules and law about the preservation of a client’s property entrusted to a lawyer.

Commentary

The duties concerning safekeeping, preserving, and accounting for clients’ monies and other property are set out in the regulations of the Society.

These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client’s confidential information. A lawyer should keep the client’s papers and other property out of sight as well as out of reach of those not entitled to see them.

Subject to any rights of lien, the lawyer should promptly return a client’s property to the client on request or at the conclusion of the lawyer’s retainer.

If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 2.07 (Withdrawal from Representation).

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Notification of Receipt of Property

2.05 (2) A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Clients' Property

2.05 (3) A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

2.05 (4) A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

2.05 (5) A lawyer must account promptly for clients' property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

2.05 (6) If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the *Income Tax Act (Canada)*, the *Charter* and the *Criminal Code*.

A lawyer is never required to take or keep possession of property relevant to a crime or offence. If a lawyer comes into possession of property relevant to a crime, either from a client or another person, the lawyer must act in keeping with the lawyer's duty of loyalty and confidentiality to the client and the lawyer's duty to the administration of justice, which requires, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. Generally, a lawyer in such circumstances should, as soon as reasonably possible:

- (a) turn over the property to the prosecution, either directly or anonymously;
- (b) deposit the property with the trial judge in the relevant proceeding;

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- (c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or
- (d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.

When a lawyer discloses or delivers to the Crown or law enforcement authorities property relevant to a crime or offence, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the property.

If a lawyer delivers the property to the court under paragraph (c), he or she should do so in accordance with the protocol established for such purposes, which permits the lawyer to deliver the property to the court without formal application or investigation, ensures that the property is available to both the Crown and defence counsel for testing and examination upon motion to the court, and ensures that the fact that property was received from the defence counsel will not be the subject of comment or argument at trial.

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2.06 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

2.06 (1) A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

What is a fair and reasonable fee depends on such factors as:

- (a) the time and effort required and spent;
- (b) the difficulty of the matter and the importance of the matter to the client;
- (c) whether special skill or service has been required and provided;
- (d) the results obtained;
- (e) fees authorized by statute or regulation;
- (f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
- (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;
- (h) any relevant agreement between the lawyer and the client;
- (i) the experience and ability of the lawyer;
- (j) any estimate or range of fees given by the lawyer; and
- (k) the client's prior consent to the fee.

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on

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which fees will be determined.

A lawyer should be ready to explain the basis of the fees and disbursement charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

Contingent Fees and Contingent Fee Agreements

2.06 (2) Subject to subrule (1), a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

Commentary

In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which may require judicial approval under the governing legislation. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee, in all of the circumstances, is fair and reasonable.

Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in Rule 2.07, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in Rule 2.07 (7) (Obligatory Withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

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Statement of Account

2.06 (3) In a statement of an account delivered to a client, a lawyer must clearly and separately detail the amounts charged as fees and disbursements.

Commentary

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.

Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. While an agreement that the lawyer will be entitled to costs is not uncommon, it does not affect the lawyer's obligation to disclose the costs to the client.

Joint Retainer

2.06 (4) If a lawyer acts for two or more clients in the same matter, the lawyer must divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

2.06 (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.

2.06 (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.

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2.06 (7) A lawyer must not:

- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or
- (b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

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.

Exception for Interjurisdictional Law Firms

2.06 (8) Subrule (7) does not apply to;

- (a) sharing of fees, cash flows or profits by lawyers who are:
 - (i) members of an interprovincial law firm; or
 - (ii) members of a law partnership of Canadian and non-Canadian lawyers who otherwise comply with this rule.

Commentary

An affiliation is different from an interprovincial law partnership or a partnership between Canadian lawyers ¹ and foreign lawyers. An affiliation is subject to rule 2.06

¹ This issue is currently specific to Ontario.

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(7). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

2.06 (9) If a lawyer and client agree that the lawyer will act only if the lawyer's retainer is paid in advance, the lawyer must confirm that agreement in writing with the client and specify a payment date.

2.06 (10) A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

Commentary

The rule is not intended to be an exhaustive statement of the considerations that apply to payment of a lawyer's account from trust. The handling of trust money is generally governed by the rules of the Law Society.

Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

2.06 (11) If the amount of fees or disbursements charged by a lawyer is reduced on a review or assessment, the lawyer must repay the monies to the client as soon as is practicable.

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2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.07 (1) A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See subrule (8) – Manner of Withdrawal.

Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer

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will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.

Optional Withdrawal

2.07 (2) If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

2.07 (3) If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Commentary

When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

Withdrawal from Criminal Proceedings

2.07 (4) If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

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- (a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;
- (b) accounts to the client for any monies received on account of fees and disbursements;
- (c) notifies Crown counsel in writing that the lawyer is no longer acting;
- (d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and
- (e) complies with the applicable rules of court.

Commentary

A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

2.07 (5) If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.

2.07 (6) If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary

If circumstances arise that, in the opinion of the lawyer, require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

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Obligatory Withdrawal

2.07 (7) A lawyer must withdraw if:

- (a) discharged by a client;
- (b) a client persists in instructing the lawyer to act contrary to professional ethics; or
- (c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

2.07 (8) When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

2.07 (9) On discharge or withdrawal, a lawyer must:

- (a) notify the client in writing, stating:
 - (i) the fact that the lawyer has withdrawn;
 - (ii) the reasons, if any, for the withdrawal; and
 - (iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;
- (b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;
- (c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;
- (d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;
- (e) promptly render an account for outstanding fees and disbursements;
- (f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and
- (g) comply with the applicable rules of court.

Commentary
If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

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If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter.

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

Duty of Successor Lawyer

2.07 (10) Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But, if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

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CHAPTER 3 – MARKETING OF LEGAL SERVICES

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3.01 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

3.01 (1) A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective client by any means. ²

Commentary

A lawyer may assist in making legal services available by participating in Legal Aid and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.

Right to Decline Representation - A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.06, without charge.

² For the purposes of this Rule "offering legal services" includes advertising, making public appearances, being interviewed, circulating literature or directly or indirectly initiating contacts with a party with the aim of attracting work.

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Restrictions

3.01 (2) In offering legal services, a lawyer must not use means that:

- (a) are false or misleading;
- (b) amount to coercion, duress, or harassment;
- (c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or
- (d) otherwise bring the profession or the administration of justice into disrepute.

Commentary

A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

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3.02 MARKETING

Marketing of Professional Services

3.02 (1) A lawyer may market professional services, provided that the marketing is:

- (a) demonstrably true, accurate and verifiable;
- (b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;
- (c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary

Examples of marketing that may contravene this rule include:

- (a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
- (b) suggesting qualitative superiority to other lawyers;
- (c) raising expectations unjustifiably;
- (d) suggesting or implying the lawyer is aggressive;
- (e) disparaging or demeaning other persons, groups, organizations or institutions;
- (f) taking advantage of a vulnerable person or group; and
- (g) using testimonials or endorsements that contain emotional appeals.

Advertising of Fees

3.02 (2) A lawyer may advertise fees charged for their services provided that:

- (a) the advertising is reasonably precise as to the services offered for each fee quoted;
- (b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and
- (c) the lawyer strictly adheres to the advertised fee in every applicable case.

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3.03 ADVERTISING NATURE OF PRACTICE

3.03 (1) The marketing of legal services by a practising lawyer or law firm shall not use the words “specialist”, “specializing”, “expert”, “expertise” or synonyms thereof.

Commentary

Lawyers’ advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client’s particular legal matter.

If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in Nova Scotia and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer’s or law firm’s proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

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CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

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4.01 THE LAWYER AS ADVOCATE

Advocacy

4.01 (1) When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be

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accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Duty as Defence Counsel - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

4.01 (2) When acting as an advocate, a lawyer must not:

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

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- (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
- (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;
- (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;
- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
- (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;
- (h) make suggestions to a witness recklessly or knowing them to be false;
- (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
- (j) improperly dissuade a witness from giving evidence or advise a witness to be absent;
- (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
- (l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation
- (m) needlessly abuse, hector or harass a witness;

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- (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;
- (o) needlessly inconvenience a witness; or
- (p) appear before a court or tribunal while under the influence of alcohol or a drug.

Commentary

In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, when the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. If the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 2.02(5) and (6) and accompanying commentary.

When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

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Duty as Prosecutor

4.01 (3) When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.³

Commentary

When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Disclosure of Error or Omission

4.01 (4) A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

³ In reviewing matters involving the exercise of prosecutorial discretion by a Crown prosecutor, the Executive Director and the members of the Complaints Investigation Committee will be guided by the following from the Supreme Court of Canada decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65:

50. There is a clear distinction between prosecutorial discretion and professional conduct. It is only the latter that can be regulated by the Law Society. The Law Society has the jurisdiction to investigate any alleged breach of its ethical standards, even those committed by the Crown prosecutors in connection with their prosecutorial discretion.

51. Review by the Law Society for bad faith or improper purpose by a prosecutor does not constitute a review of the exercise of prosecutorial discretion *per se*, since an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General. As stated by McIntyre J. in his concurrence in *Nelles*, *supra*, at p. 211: "public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities". We agree with the observation of MacKenzie J. that "conduct amounting to bad faith or dishonesty is beyond the pale of prosecutorial discretion" (para. 55).

The duties in this Code generally apply, *mutatis mutandis*, to lawyers acting as prosecutors who are not full-time or part-time Crown Attorneys. This will include a lawyer who has conduct of proceedings in the name of an on behalf of any complainant in any proceeding against an accused who may be convicted of any offence or charge and as a result face fine, punishment or any other penalty including reprimand or suspension or dismissal from any employment, activity or organization.

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Commentary

If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to rule 2.07 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

4.01 (5) A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary

Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.

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Undertakings

4.01 (6) A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary

A lawyer should also be guided by the provisions of Rule 6.02(11) Undertakings and Trust Conditions.

Agreement on Guilty Plea

4.01 (7) Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

4.01 (8) A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

- (a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;
- (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
- (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
- (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

Commentary

The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

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4.02 THE LAWYER AS WITNESS

Submission of Evidence

4.02 (1) A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

Appeals

4.02 (2) A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

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4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.02 (6)-(8), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

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4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

4.04 (1) A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.

Communication with Witnesses Giving Evidence

4.04 (2) A lawyer who has called a witness has a duty not to communicate with that witness about the matter including the witness' evidence in the matter, without leave of the court or tribunal, from the time when the witness is called until the witness concludes his or her testimony under examination, cross-examination or re-examination and is dismissed.

Commentary

The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel.

The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

While any testimony-related discussion is generally prohibited during breaks, there are two qualifications to the rule as it relates to examinations for discovery. First, if the examination for discovery of a witness is adjourned for longer than one week, it is permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer's intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.

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This rule is not intended to prevent discussions or consultations that are necessary to fulfill undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in this rule.

This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

This rule applies with necessary modifications to examinations out of court.

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4.05 RELATIONS WITH JURORS

Communications before Trial

4.05 (1) When acting as an advocate before the trial of a case, a lawyer must not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary

A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

4.05 (2) Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate must disclose to them any information of which the lawyer is aware that a juror or prospective juror:

- (a) has or may have an interest, direct or indirect, in the outcome of the case;
- (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or
- (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness

4.05 (3) A lawyer must promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

Communication During Trial

4.05 (4) Except as permitted by law, a lawyer acting as an advocate must not communicate with or cause another to communicate with any member of the jury during a trial of a case.

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4.05 (5) A lawyer who is not connected with a case before the court must not communicate with or cause another to communicate with any member of the jury about the case.

4.05 (6) A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary
The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

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4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it.

Criticizing Tribunals - Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and

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public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

4.06 (2) A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

4.06 (3) A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

Commentary

If possible, the lawyer should suggest solutions to the anticipated problem such as:

- (a) further security, or
- (b) reserving judgment.

If possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

If client information is involved in those situations, the lawyer should be guided by the provisions of Rule 2.03 (Confidentiality).

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4.07 LAWYERS AND MEDIATORS

Role of Mediator

4.07 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

- (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and
- (b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary

In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails.

Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 (Conflicts) and its commentaries and the common law authorities.

If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so.

If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

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CHAPTER 5 - RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

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5.01 SUPERVISION

Direct Supervision Required

5.01 (1) A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

Commentary

A lawyer may permit a non-lawyer to act only under the supervision of a lawyer. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non-lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

A lawyer who practises alone or operates a branch or part-time office should ensure that

- (a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and
- (b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

A lawyer in private practice may permit a non-lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client. A lawyer in a community legal clinic funded by a provincial legal aid plan may do so, so long as the lawyer maintains direct supervision of the client's case in accordance with the supervision requirements of the legal aid plan and assumes full professional responsibility for the work.

Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer generally turns on the distinction between any special knowledge of the non-lawyer and the professional and legal

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judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Application

5.01 (2) In this rule, a non-lawyer does not include an articulated clerk.

Delegation

5.01 (3) A lawyer must not permit a non-lawyer to:

- (a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;
- (b) give legal advice;
- (c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;
- (d) act finally without reference to the lawyer in matters involving professional legal judgment;
- (e) be held out as a lawyer;
- (f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;
- (g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;
- (h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

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- (i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;
- (j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;
- (k) sign correspondence containing a legal opinion;
- (l) sign correspondence, unless
 - (i) it is of a routine administrative nature,
 - (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,
 - (iii) the fact the person is a non-lawyer is disclosed, and
 - (iv) the capacity in which the person signs the correspondence is indicated;
- (m) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction;
- (n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or
- (o) issue statements of account.

Commentary

A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision.

A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment.

In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

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Suspended or Disbarred Lawyers

5.01 (4) Without the express approval of the Society, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred and struck off the Rolls, suspended, undertaken not to practise or who has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted.

Electronic Registration of Documents

5.01 (5) A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not

- (a) permit others, including a non-lawyer employee, to use such access; or
- (b) disclose his or her password or access phrase or number to others.

5.01 (6) When a non-lawyer employed by a lawyer has a personalized encrypted electronic access to any system for the electronic submission or registration of documents, the lawyer must ensure that the non-lawyer does not

- (a) permit others to use such access; or
- (b) disclose his or her password or access phrase or number to others.

Commentary

The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

In a real estate practice, when it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has such access, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the system.

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5.02 STUDENTS

Recruitment and Engagement Procedures

5.02 (1) A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or other students.

Duties of Principal

5.02 (2) A lawyer acting as a principal to an articled clerk must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Commentary
A principal or supervising lawyer is responsible for the actions of articled clerks acting under his or her direction.

Duties of Articled Clerk

5.02 (3) An articled clerk must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

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5.03 EQUALITY, HARASSMENT AND DISCRIMINATION

5.03 (1) The principles of human rights laws and related case law apply to the interpretation of this rule.

5.03 (2) A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.⁴

5.03 (3) A lawyer must not sexually harass any person.

5.03 (4) A lawyer must not engage in any other form of harassment of any person.

5.03 (5) A lawyer must not discriminate against any person.⁵

Commentary
A lawyer has a responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

⁴ For the purpose of this Rule, the human rights legislation means any human rights legislation in force and effect in the jurisdiction at the time.

⁵ This Rule does not preclude any program, activity or ameliorative program that has as its object the amelioration of conditions or disadvantages for individuals or groups including those who are disadvantaged because of a characteristic or perceived characteristic such as age, race, colour, religion, creed, sex, sexual orientation, disability, an irrational fear of contracting an illness or disease, ethnic, national or aboriginal origin, family status, marital status, source of income, political belief or affiliation, or an individual's association with another individual or class of individuals having characteristics referred to above.

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CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

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6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

6.01 (1) A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

6.01 (2) A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

Commentary

In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report Misconduct

6.01 (3) Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

- (a) the misappropriation or misapplication of trust monies;
- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;

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- (d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;
- (e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
- (f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups, such as the Lawyers' Assistance Program and the Risk and Practice Management Program, in their commitment to the provision of confidential counselling. Therefore, lawyers providing peer support for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer providing peer support to another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

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Encouraging Client to Report Dishonest Conduct

6.01 (4) A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

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6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

6.02 (1) A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

6.02 (2) A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

6.02 (3) A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

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Communications

6.02 (4) A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

6.02 (5) A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

6.02 (6) Subject to subrule (7), if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

- (a) approach, communicate or deal with the person on the matter; or
- (b) attempt to negotiate or compromise the matter directly with the person.

6.02 (7) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a lawyer with respect to that matter.

Commentary

Subrule (6) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by closing his or her eyes to the obvious.

Subrule (7) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second

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opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

6.02(8) A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

- (a) who has the authority to bind the organization;
- (b) who supervises, directs or regularly consults with the organization's lawyer; or
- (c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

Commentary

This subrule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of Rule 2.04 (Conflicts), and particularly subrules 2.04(7) through (11). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

6.02 (9) When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

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- (a) urge the unrepresented person to obtain independent legal representation;
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
- (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Inadvertent Communications

6.02 (10) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.

Commentary

Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

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Undertakings and Trust Conditions

6.02 (11) A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

Commentary

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as “on behalf of my client” or “on behalf of the vendor” does not relieve the lawyer giving the undertaking of personal responsibility.

Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one’s compliance with the original trust conditions.

If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

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Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these Rules.

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6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

6.03 (1) A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary

A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.

When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

6.03 (2) A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

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6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.04 (1) A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary

The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

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6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.05 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with the media, but there are other cases in which the lawyer should contact the media to properly serve the client.

Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

Lawyers are often called upon to comment publicly on the effectiveness of existing

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statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

6.05 (2) A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

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6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.06 A lawyer must assist in preventing the unauthorized practice of law.

Commentary

Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust monies and the maintenance of compensation funds.

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6.07 RETIRED JUDGES RETURNING TO PRACTICE

6.07 A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the Society approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

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6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

- (a) promptly inform the client of the error or omission without admitting legal liability;
- (b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and
- (c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Notice of Claim

6.08 (2) A lawyer must give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary

The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

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Co-operation

6.08 (3) When a claim of professional negligence is made against a lawyer, he or she must assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

Responding to Client's Claim

6.08 (4) If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer must expeditiously deal with the claim and must not take unfair advantage that would defeat or impair the client's claim.

6.08 (5) If liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance. [See also Rule 6.01(2)]