



NOVA SCOTIA BARRISTERS' SOCIETY

A NEW CODE OF PROFESSIONAL CONDUCT FOR NOVA SCOTIA LAWYERS

ON JANUARY 1, 2012, the *Nova Scotia Barristers' Society Code of Professional Conduct* (the 'Code') came into effect, replacing *Legal Ethics and Professional Conduct: A Handbook for Lawyers* (aka 'the Handbook').

The new *Code* is based on the Federation of Law Societies' *Model Code of Conduct for Canada*, which is in various stages of adoption across the country.

With the increase in mobility of lawyers across Canada, the need for greater consistency in our rules of ethics and professional responsibility became obvious both to regulators, members and to the public. With consistent ethical rules comes greater consistency in education, rule interpretation, decision-making and national precedents. Lawyers and the public can have confidence that a lawyer practicing ethically in Manitoba is similarly practicing ethically in Nova Scotia.

During the lengthy consultation process between the Society and its members and stakeholders respecting adoption of the new Code, there were a number of frequently asked questions:

- Will the new *Code* change the way I am supposed to practice law ethically?
- Will it make it harder for me to stay out of trouble with the Bar Society?
- Will it become a truly national *Code*, and if not, why bother?
- Will it preserve some of the 'unique' ethical practices in Nova Scotia?
- Will we retain responsibility for maintaining our own rules of ethics, or does this become a national function?

The key messages developed around these questions should alleviate lawyers' anxiety about a new *Code of Professional Conduct*.

1. The new *Code* represents **very little** substantive change to our rules of ethics: If you practised law ethically in 2011, you will still be practising law ethically after January 1, 2012.
2. The old *Handbook* and the new *Code* share the same two goals: to clearly set out the black letter law in terms of ethical rules, and to provide helpful and informative best practice guidance in the Commentaries to the rules. With the added guidance found in the new *Code*, lawyers should find it **easier** to know and adhere to the rules.
3. The new *Code* is on its way to becoming a truly national code of conduct and a number of provinces, such as PEI, Manitoba, Alberta and British Columbia have or are about to adopt the *Model Code*, with minor provincial variations. The other jurisdictions plan to follow suit.
4. Each province retains the legislative responsibility for developing and maintaining its own code of conduct. The Federation of law Societies will now work with each province to track jurisdictional amendments, make recommendations for change nationally, and support the process of adoption of the *Model Code* across Canada. The NSBS *Code* has retained certain 'colloquial' ethical quirks, and has done away with others in the spirit of having a national code (see below).

What has changed?

The new *Code* looks very different than our current 24-rule *Handbook*, but in substance it is not. The new *Code* has six main rules, centered on relationships; e.g., in Rule 2, all rules relating to relationships with clients are grouped together. This includes competence, quality of service, confidentiality and conflict of interest. By grouping the rules around six key relationships, lawyers can more easily consider all the rules that logically or intuitively relate to a particular ethical situation. The six new rules are:

Chapter 1 – Standards of the Legal Profession (integrity)

Chapter 2 – Relationship to Clients (competence, quality of service, confidentiality, conflicts, preservation of client's property, fees and disbursements, withdrawal)

Chapter 3 – Marketing of Legal Services (making legal services available, marketing, advertising)

Chapter 4 – Relationship to the Administration of Justice (the lawyer as advocate, the lawyer as witness, interviewing witnesses, communication with witnesses giving evidence, the lawyer and the administration of justice, lawyers and mediators)

Chapter 5 – Relationship to Students, Employees and Others (supervision, students, equality, harassment and discrimination)

Chapter 6 – Relationship to the Society and Other Lawyers (responsibility to the Society and the profession generally, responsibility to lawyers and others, outside interests and the practice of law, the lawyer in public office, public appearance and public statements, preventing unauthorized practice, retired judges returning to practice, errors and omissions)

Aside from some minor housekeeping amendments, such as to the definition of 'lawyer', below are the highlights of the only substantive changes to our current rules of ethics brought about by adoption of the new *code*:

Rule 2.02(6) – This directly addresses the circumstances when a lawyer may or may not offer an inducement to an accused or any other person in exchange for withdrawal of criminal or regulatory proceedings.

Rule 2.02(8) – This rule provides clearer guidance to lawyers when acting for an organization where the lawyer discovers evidence of dishonesty or fraud.

Rule 2.02(9) – A very helpful new rule providing guidance to lawyers when dealing with clients with diminished capacity.

Rule 2.03(3) – This rule deals with the duty of confidentiality, and when disclosure of otherwise confidential information by a lawyer may be required or permissible. In terms of future harm, the rule still requires that a lawyer have reasonable grounds to believe there is an imminent risk of death or serious bodily harm, but the rule now notes that serious physical harm may in some cases include serious psychological harm.

Rule 2.04(38) – This rule strikes an appropriate balance with regard to restrictions on lawyers preparing or causing to have prepared wills in which they receive testamentary gifts, other than from family members.

Rule 2.05(6) – A detailed and helpful Commentary has been added to this rule respecting client property, specifically dealing with lawyers coming into possession of property relevant to a crime.

Rule 2.06 – This sets out current requirements with regard to charging for fees and disbursements, and includes the provision that 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*.

Rule 2.04(31) – With regard to borrowing and lending, and **Rules 3.01 and 3.02** with regard to marketing and advertising, these are now captured in the *Code* as opposed to the Regulations – the rules themselves have not changed substantially.

Rule 2.07(4) – This rule describes the special duties on lawyers when withdrawing from representing clients in criminal matters.

Rule 4.06(3) – This is an important new rule establishing duties on lawyers where there are reasonable grounds to believe that a dangerous situation is likely to develop at a court facility.

Resources

For more information about the new *Code*, see the “Current Issues in Legal Ethics” columns in [InForum](#) and the feature article in the October 2011 edition of the [Society Record](#). Council has determined that all practising lawyers and articulated clerks, and those wishing to change to practising status in future, must complete a mandatory online *Code* assessment. Current members and clerks must complete the assessment **by April 30, 2012**. The fully searchable *Code of Professional Conduct* is available online in the [Regulation](#) section of the Society’s website.

Please contact Elaine Cumming, Professional Responsibility Counsel, at ecumming@nsbs.org for more information.