



NOVA SCOTIA BARRISTERS' SOCIETY

# LEGAL ETHICS HANDBOOK

*Approved by Council January 21, 2011*

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### Foreword

This publication marks the first time that the Nova Scotia Barristers' Society has made a comprehensive statement on legal ethics and professional conduct. Until now such comments as have been made were in the form of rulings by the Society's Discipline Committees or isolated one-issue pronouncements by the Society's Legal Ethics Committees. The burden of formulation, revision and promulgation of legal ethics *en bloc* has been carried by the Canadian Bar Association.

The CBA has given the profession inestimable service with the small blue book we all know affectionately as the "Code". Its pages are well worn by members of the Society's Discipline Committees whose work, it seems, is never done. It is, or should be, at the right or left hand of all our active members. It is a touchstone. It might be argued that the Code is the CBA's most significant contribution to the legal profession in Canada.

It is now time for the Nova Scotia Barristers' Society, the governing body of the legal profession in this province, to shoulder part of the burden. It does so by the publication of this *Handbook*. As will be seen, much of the form and even more of the content of the CBA's Code of Professional Conduct is incorporated. But there are some changes which we consider better reflect practice and the thinking of lawyers in Nova Scotia. It is too much to expect of a national professional organization to craft a code of ethics for adoption throughout this broad and diverse land. In the Society's collective view, it is wiser, now, to use the CBA work as a model and to mold it for use in Nova Scotia.

There is another aspect. The legal profession, as indeed other professions, is under public scrutiny as never before. This is perhaps as it should be. We have, after all, a public trust of considerable magnitude. In furtherance of our obligations under this trust we should have a more direct hand in the formulation of ethics and behavioural standards which are to prevail here. Anything less is an abdication of our responsibility.

This is not to suggest that the CBA should feel that its work in legal ethics and professional responsibility is concluded. It and it alone is the surveyor of the national scene and remains best able to continue its work as the maker of the model, leaving it to the provinces and territories to make the final adjustments.

There can be no foolproof guardian of moral fitness at the gates of our law schools or upon admission as practising barristers. What we can do is raise the level of ethical consciousness in our legal institutions and amongst our members. Dalhousie Law School is doing its part with the introduction in the fall of 1988 of a mandatory third year course in professional responsibility. We shall endeavour to do ours. The publication of this *Handbook* is but an example. We hope it, like the Code, will be a touchstone.

It is not intended that this be a compendium which is determinative of all ethical and behavioural questions that arise daily in the practice of law. It is but a collection of ethical and professional precepts considered to be appropriate for use in Nova Scotia at the time of publication from which careful extrapolation may be made to assist in the resolving of questions which are not expressly covered. The *Handbook* will be supplemented, from time to time, by rulings of the Society's Legal Ethics Committee and regulations of the Society itself.

In the preparation of this *Handbook*, a recent Canadian text on professional legal conduct by Professor Beverley G. Smith was used. Entitled "Professional Conduct for Canadian Lawyers" and published by Butterworths Canada Ltd., the text is recommended as excellent supplementary reading.

Practice in Nova Scotia, on the eve of publication of this *Handbook*, is facing rapid change, technological and otherwise, characterized by growing law firms with expensive overheads. There is stiff competition for work. There



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are "marketing" committees and soon, inevitably, marketing consultants to devise strategies to attract work. There are recruiting strategies to attract students and associates to do the work. It is commonly said that the practice of law is now a business. There is talk of national and even international law firms. This will no doubt intensify as we approach the 21st century.

These changes must not come at the expense of our ethics and standards.

Frederick B. Wickwire, Q.C., Chairman  
Legal Ethics Handbook Committee  
February, 1990



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### Interpretation

This *Handbook* contains the rules for ethical and professional conduct deemed appropriate for lawyers in Nova Scotia. They are drawn, in the main, from the Code of Professional Conduct of the Canadian Bar Association adopted by that organization's Council in August, 1974 and revised in August, 1987. They were adopted by the Council of the Nova Scotia Barristers' Society, after what was thought to be ample opportunity for consideration and debate.

The rules are expressed as duties thereby avoiding, wherever possible, the use of the words "shall" or "must" and "should" and the differences in nuance represented by these words which occasionally give the reader difficulty and which occasionally produce inconsistency.

There are 25 chapters although the subject does not always lend itself readily to such a division. Each chapter begins with a Rule, then Guiding Principles and lastly Commentary. The essence of the chapter is expressed in the Rule but the Rule itself is not determinative. Duties are found not only in the Rule but frequently in the Guiding Principles and occasionally in the Commentary.

This *Handbook* is not a code in the sense of a criminal code: a lawyer may behave unethically and unprofessionally even if there is nothing in the *Handbook* which deals specifically with such behaviour. Therefore, the reader, whether a practitioner or a member of a discipline committee, should not conclude that because the issue at hand is not precisely embraced in the material, there is not a breach. On the other hand, a technical breach of a Rule contained in this *Handbook*, may not, in the particular circumstances or setting, amount to professional misconduct. Sensible, intelligent and just extrapolation is called for. The document is not to be construed narrowly.

The *Handbook* will be supplemented, when deemed necessary, by regulations of the Society and rulings of the Society's legal ethics and other committees that are duly constituted to do so.

A few terms frequently used in the *Handbook* require definition. They are as follows:

- "associate" means, except where otherwise stated, a partner or associate in the practice of law and includes one who shares an office or office expenses or both;
- "client" means a person on whose behalf a lawyer renders or undertakes to render professional services;
- "Code" means the Code of Professional Conduct adopted by Council of the Canadian Bar Association in August, 1987;
- "court" includes a conventional court of law and, generally, any tribunal whether judicial, quasi-judicial or administrative, including a municipal council;
- "Complaints Investigation Committee" means the Complaints Investigation Committee appointed pursuant to the *Legal Profession Act*;
- "Hearing Committee" means the Hearing Committee appointed pursuant to the *Legal Profession Act*;
- "hearing panel" means a quorum of the Hearing Committee empanelled to hear a charge;
- "law" includes rules of court;
- "lawyer" means an individual who is duly authorized to practise law in the Province of Nova Scotia;
- "member" includes those over whom the Society has jurisdiction pursuant to s. 28 of the *Legal Profession Act*;
- "person" includes a corporation or other legal entity, including the Crown in the right of Canada or a province and a government of a state or any political subdivision thereof and also includes an association, partnership or other organization;



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- "profession" means the legal profession which includes all lawyers collectively and their institutions and governing bodies, of which the Society is one;
- "rules of court" includes the Civil Procedure Rules and such other rules of practice governing the process and procedure before courts and tribunals in Nova Scotia;
- "Society" means Nova Scotia Barristers' Society.

It will be noted that the term "lawyer" as defined above extends not only to a lawyer engaged in private practice but also to a lawyer who is employed by a government, an agency, a corporation (as corporate counsel or otherwise) or any other organization. An employer-employee relationship of this kind may give rise to special problems in the area of conflict of interest, but in all matters involving integrity and generally in all professional matters, where the requirement or demands of the employer conflict with the standards set out in this *Handbook*, the latter must prevail.



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### Abbreviations

Short-form references to Canons, Codes, Rulings and particular writings are as follows:

- AB Law Society of Alberta, *Alberta Code of Professional Conduct*. (Calgary: The Law Society of Alberta, 1995).
- ABA-MC *Model Code of Professional Responsibility*, as amended August 1980. (Chicago: American Bar Association, 1982).
- ABA-MR *Model Rules of Professional Conduct*. (Chicago: American Bar Association, Center for Professional Responsibility, 1994).
- Lund *Book II: Professional Ethics*(New York: International Bar Association, 1970).
- NB Law Society of New Brunswick, *Rules of Professional Conduct* (Fredericton: The Law Society of New Brunswick, 1986).
- N.S.B.S.-D Nova Scotia Barristers' Society Discipline Committee (as it was called pursuant to the former *Barristers and Solicitors Act*, R.S.N.S. 1989, c. 30) Formal Hearing Decisions.
- N.S.B.S. Reg. The Nova Scotia Barristers' Society Regulations', enacted by the Barristers' Society pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28.
- N.S.L.N. *Nova Scotia Law News*
- ON Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1987).
- PQ *Code of Ethics of Advocates*, R.R.Q. 1981, c. B-1, r. 1, as am. O.C. 1381-91, 9 October 1991, G.O.Q. 1991.II.4052; O.C. 538-93, 7 April 1993, G.O.Q. 1993.II.2436; O.C. 1691-93, 1 December 1993, G.O.Q. 1993.II.6880.
- SK Law Society of Saskatchewan, *Code of Professional Conduct* (Regina: The Law Society of Saskatchewan, 1991).



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## The Underlying Principle



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### Chapter 1 – Integrity

#### Rule

A lawyer has a duty to discharge with integrity<sup>1</sup>

- (a) every duty the lawyer owes to
  - (i) a client,
  - (ii) another lawyer,
  - (iii) a court,
  - (iv) the profession, or
  - (v) the general public; and
- (b) every duty the lawyer has to uphold justice and the administration of justice.<sup>2</sup>

#### Guiding Principles

Integrity underlies each Rule of this *Handbook*. Every person who practices law must therefore have integrity.

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#### Commentary

##### The consequences of lack of integrity

1.1 If a client is in doubt about his or her lawyer's trustworthiness, the essential element of the lawyer-client relationship is missing. If personal integrity is lacking, a lawyer's value to the client and ultimately the lawyer's reputation inside and outside the legal profession will be destroyed, competence notwithstanding.<sup>3</sup>

##### Conduct outside the practice of law

1.2 Dishonourable or questionable conduct of a lawyer in either private life or professional practice reflects adversely on the lawyer, the integrity of the profession, the legal system and the administration of justice as a whole.<sup>4</sup>

1.3 If the conduct of a lawyer is such that a client's knowledge of it would likely impair the client's trust in the lawyer as a professional adviser, the Complaints Investigation Committee or a hearing panel is justified in considering disciplinary action against the lawyer.<sup>5</sup>

##### Extra-professional activities

1.4 Generally speaking, however, the Complaints Investigation Committee or a hearing panel will not be concerned with purely private or extra-professional activities of a lawyer that do not bring into question the integrity of the legal profession or the lawyer's professional integrity or competence.

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#### Notes

1. O.E.D.: "Integrity ... soundness of moral principle; the character of uncorrupted virtue, esp. in relation to truth and fair dealing, uprightness, honesty, sincerity, candor." See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 4, "... the term 'integrity' perforce includes honesty and trustworthiness...."

2. "The rules of professional conduct enforced in various countries ... uniformly place the main emphasis upon the essential need for integrity and, thereafter, upon the duties owed by a lawyer to his client, to the Court, to other members of the legal profession and to the public at large." Lund, at 18.



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See also Alan D. Hunter, "A View as to the Profile of a Lawyer in Private Practice" (1995), 33 Alta. L.R. 831-32.

For other codes of ethics dealing with this, see also Lund, at 20; ABA-MC EC1-1.

3. "Integrity, probity or uprightness is a prized quality in almost every sphere of life .... The best assurance the client can have ... is the basic integrity of the professional consultant .... Sir Thomas Lund says that ... his reputation is the greatest asset a solicitor can have .... A reputation for integrity is an indivisible whole; it can therefore be lost by actions having little or nothing to do with the profession .... Integrity has many aspects and may be displayed (or not) in a wide variety of situations ... the preservation of confidences, the display of impartiality, the taking of full responsibility are all aspects of integrity. So is the question of competence .... Integrity is the fundamental quality, whose absence vitiates all others." F.A.R. Bennion, *Professional Ethics: The Consultant Professions and Their Code* (London: Charles Knight & Co. Ltd., 1969) at 108-12 *passim* (emphasis added).

"Simply put, consumers of legal services must be confident in knowing that behind every law office door will be found a lawyer whose trustworthiness and integrity can be accepted without question." *Re P.G.M.*, Formal Hearing Panel Decision, N.S.B.S.-D27, March 21, 1988, at 7.

4. Illustrations of conduct as drawn from Lund, A1-A24, at 20-24 and Nova Scotia disciplinary records, that may infringe the Rule (and often other provisions of this Handbook) include

- (a) committing any personally disgraceful or morally reprehensible offence that reflects upon the lawyer's integrity (whereof a conviction by a competent court would be *prima facie* evidence);
- (b) committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty, e.g. by knowingly making a false tax return or falsifying a document, even without fraudulent intent, and whether or not prosecuted therefor;
- (c) making untrue representations or concealing material facts from a client with dishonest or improper motives;
- (d) taking improper advantage of the youth, inexperience, lack of education or sophistication, ill health, or unbusinesslike habits of a client;
- (e) misappropriating or dealing dishonestly with the client's monies;
- (f) receiving monies from or on behalf of a client expressly for a specific purpose and failing, without the client's consent, to pay them over for that purpose;
- (g) knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally toward the lawyer's client;
- (h) failing to be absolutely frank and candid in all dealings with the Court, fellow lawyers and other parties to proceedings, subject always to not betraying the client's cause, abandoning the client's legal rights or disclosing the client's confidences;
- (i) failing, when dealing with a person not legally represented, to disclose material facts, e.g., the existence of a mortgage on a property being sold, or supplying false information, whether the lawyer



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is professionally representing a client or is concerned personally;

- (j) failure to honour the lawyer's word when pledged even though, under technical rules, the absence of writing might afford a legal defence.

See also SK Ch.I: Com. 3.

Other examples are specifically dealt with in subsequent Chapters. For illustrative cases in the same area see 44 *Halsbury's Laws* (4th) at 223-25 and M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957) at 204-214.

Based on case law, Smith, *supra*, note 1, at 245-246, has summarized the types of offences by lawyers whose private activities have lead to disciplinary action by law societies and courts as follows:

Conduct in a lawyer's private life which brings the lawyer's integrity into question also brings disrepute upon the profession. (*Re Cwinn and Law Society of Upper Canada* (1980), 28 O.R. (2d) 61, 108 D.L.R. (3d) 381; leave to appeal to the Supreme Court of Canada refused 28 O.R. (2d) 61n).

When a lawyer commits fraud and forgery in order to support an extravagant lifestyle, that lawyer breaches the special duty owed to the Bar and to the Court as one of its sworn officers. (*R. v. Morrison* (1975), 13 N.S.R. (2d) 98 (C.A.)).

When a lawyer uses a client's confidential disclosures to engage in dishonourable conduct in private life, the necessary lawyer-client trust may be destroyed. Such conduct will be actionable if the client also suffers injury from these private activities. (*Szarfer v. Chodos* (1986), 27 D.L.R. (4th) 388 (Ont. H.C.); appeal dismissed 66 O.R. (2d) 350 (C.A.)).

5. "The public looks for a hallmark bestowed by a trusted professional body, and evidenced by entry on a register or members' list." Bennion, *supra*, note 3, at 36. "Membership of a ... professional body is generally treated as an indication of good character in itself ..." *Id.*, at 111.



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## Duties to the Client



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### Chapter 2 – Competence

#### Rule

A lawyer has a duty to be competent to perform all legal services undertaken on behalf of a client.<sup>1</sup>

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#### Guiding Principles

A competent lawyer has relevant knowledge, skills and attributes and applies them in a manner appropriate to each matter undertaken on behalf of a client, and within the reasonable parameters of the lawyer's experience and the nature and terms of the lawyer's engagement.<sup>2</sup> Consequently, being competent requires the following:

- i. knowing general legal principles and procedures, and substantive law and procedure for the areas of law in which the lawyer practices;<sup>3</sup>
  - ii. investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client as to appropriate courses of action;
  - iii. implementing the chosen course of action through the application of appropriate skills<sup>4</sup> including:
    - (a) legal research;
    - (b) analysis;
    - (c) application of the law to the relevant facts;
    - (d) writing and drafting;
    - (e) negotiation;
    - (f) advocacy;
    - (g) problem solving
  - iv. establishing and maintaining an appropriate lawyer-client relationship, including managing client expectations;<sup>5</sup>
  - v. communicating in a timely and effective manner at all stages of the matter;<sup>6</sup>
  - vi. performing all functions conscientiously, diligently, and in a timely and cost effective manner;<sup>7</sup>
  - vii. complying in letter and in spirit with the *Legal Ethics Handbook*;
  - viii. recognizing limitations in one's ability or capacity to handle a matter, or some aspect of it, and taking steps accordingly to ensure the client is appropriately served;
  - ix. managing one's practice effectively;<sup>8</sup>
  - x. pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
  - xi. otherwise adapting to changing professional requirements, standards, techniques, and practices.
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### Commentary

#### The client's expectations

**2.1** As a lawyer holds himself or herself out as being knowledgeable, skilled and capable in the practice of law, the client is entitled to assume that the lawyer is competent.<sup>9</sup>

#### Referral to lawyers and other professionals

**2.2** A lawyer has a duty to recognize his or her lack of competence for a particular task and the disservice that would be done to the client by undertaking that task in such circumstances. If consulted in such circumstances, the lawyer has a duty to either decline to act; to obtain the client's instructions to retain, consult or collaborate with another lawyer who is competent in that field; or, with knowledge and assent of the client, to become educated in that field. In circumstances where another lawyer is retained to assist with the file, it is essential that the other lawyer respect the duties of confidentiality owed to the client.

**2.3** The lawyer also has a duty to recognize that in order to be competent for a particular task, the lawyer sometimes needs advice from or should collaborate with an expert in a scientific, accounting or other non-legal field. In such situations the lawyer should seek the client's instructions to consult an expert. Non-legal experts should also be advised of the duty of confidentiality owed to a client.

#### Application of the Rule

**2.4** This Rule does not prescribe a standard of perfection. A mistake, although it might be actionable for damages in negligence, does not necessarily constitute a failure to maintain the standard set by this Rule; conversely, conduct, while not actionable, may constitute a violation of this Rule. Evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such violation of the Rule regardless of liability in tort or contract. Where both negligence and incompetence are established, while damages may be awarded for the former, the latter can result in the additional sanction of disciplinary action.<sup>10</sup>

A lawyer will continue to develop and hone his or her skills throughout practice, and should strive to attain the upper range of the competence continuum in those areas in which the lawyer regularly practises.

The duty of competence extends to practice and firm management. Practice management comprises the knowledge, skills and attributes which a lawyer applies to the organization of his or her work, and to resources which contribute to producing the legal services required by the client. Firm management relates to the organizational structure or environment in which a lawyer works, and may include production of correct, efficient and timely legal services by the lawyer and staff members; and development of adequate organizational systems and communications. The lawyer must ensure there are in place sufficient resources and administrative support to support the practice and the work undertaken by the lawyer, and those resources must remain current with the technology required to proficiently carry out the lawyer's area(s) of practice.<sup>11</sup>

**2.5** The lawyer who is not competent does the client a disservice, brings discredit to the profession and may bring the legal system and the administration of justice into disrepute.<sup>12</sup>

**2.6** When it becomes apparent or may reasonably be foreseen that the lawyer will be unable to provide competent services for any reason, the lawyer should take appropriate steps to discontinue acting.<sup>13</sup>

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### Notes

1. For codes of ethics with this rule, see ON R.2; AB C.2; B.C. C.3; ABA-MC EC1-2 and CBA, C II.



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"A practising lawyer, by the very fact that he practices, holds himself out as having the knowledge, skill and judgment of a lawyer. He knows that a client consults him for that reason, and by undertaking work for the client he impliedly undertakes to have and apply the knowledge, skill and judgment necessary for the work. If he does not have it and does not intend to get it, he is in automatic and immediate breach of an ethical duty to the client." (W.H. Hurlburt, "Incompetent Service and Professional Responsibility" (1980) 18 Alta. L. Rev. 145 at 149.)

"Competence in the context of these duties of course means more than formal qualification to practise law, and involves more than an understanding of legal principles. Clients are entitled to expect that a lawyer who undertakes a particular matter on their behalf is either competent to handle the matter or is able to become competent without undue delay, risk or expense to the client. The rules of professional conduct make it clear that lawyers who proceed on any other basis are not being honest with their clients, and that this raises ethical considerations to be distinguished from the standard of care that a court would apply for purposes of determining negligence." (Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Carswell, 2001) at 24-1.)

"There is, then, on principle and on the authority of the Code and its approval by governing bodies, an ethical duty of competence and diligence, and a standard of competence based upon the expectation of lawyers generally." (Hurlburt, *supra* at 150.)

See SK C.2 for a competence profile for newly called lawyers.

See Regulation 9.1.3(b) of the *Legal Profession Act*, S.N.S. 2004, c.28 for a list of factors constituting professional incompetence.

2. "Competence is ... a measure of both capacity to perform and performance itself. The lawyer must be able to carry out lawyering functions with a requisite degree of knowledge and skill; and he or she must also be willing to perform such functions honestly, and completely, and on time." (Leon E. Trakman, ed., *Professional Competence and the Law*, Dalhousie Continuing Education Series, no. 21 (Halifax: Dalhousie University Faculty of Law, 1981) at 3.)

"Believe in yourself and the honourable character of your work: master the facts and have a thorough understanding of the legal principles: prepare every case with the greatest care: make sure that nothing is omitted: try to learn as much about your opponent's case as possible if you will be relying upon a legal authority, have the text in full available to the Court." (Lund at 35.)

See also Beverley G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 2002) at c.2 for standards of competence.

3. See [www.nsbs.ns.ca/cpd.htm](http://www.nsbs.ns.ca/cpd.htm) for information on Continuing Professional Development. Continuing Professional Development provides ongoing legal education for its members.

4. "The conduct of any trial, in any forum, from a small claims action to a full jury trial, is a formidable challenge and requires the highest order of legal skills. Consider all that is required in order to be successful in trial work." (Lee Stuesser, *An Advocacy Primer*, 3d ed. (Toronto: Carswell, 2005) at 1.)

5. "Ensure that the expectations of the client are met. If the client has a realistic understanding of what's going to be involved, what has to be done, the possible results, and what it will likely cost, then you have the basis for a good relationship. You should put as much importance on managing the relationship as you do on providing the service." (John R. Merrick, "Cultivating the Client Relationship" (2003) 21:5 Society Record 8 at 8.)



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6. "Just as in litigation or any other aspect of the law, frequent and full reporting to the client cannot be overemphasized. Send the client copies of everything that goes out of [your] office ..." (Joseph A. Macdonald, "Keeping Your Client Happy: Avoiding Claims" in *Company Law* (Halifax: Continuing Legal Education Society of Nova Scotia, 1992) at 11.)

7. "My suggestion to you is that you should aim for a higher level of customer satisfaction and that means a higher level of client service. It means not mere competence, but competence plus. You should aim for a level of service where your clients do not grudgingly concede that you did nothing wrong, but rather enthusiastically recommend you to their associates as a lawyer who does things correctly, promptly, at a fair price and who reports both comprehensively and comprehensibly to his or her clients." (Macdonald, *supra* note 6 at 2 [emphasis in original].)

See Practice Management Guidelines: Time Management and File Management, online: The Law Society of Upper Canada <<http://mrc.lsuc.on.ca/jsp/pmg/executiveSummary.jsp>>.

Also see C.3, Commentary 3.10, 3.11 of this Handbook on sound professional judgement.

8. See 30 Best Practices: Strategies for Law Firm Management, online: Canadian Bar Association <<http://www.cba.org/cba/PracticeLink/pdf/clientcare.pdf>>.

Also see Practice Management Guidelines, online: The Law Society of Upper Canada <<http://mrc.lsuc.on.ca/jsp/pmg/executiveSummary.jsp>>.

9. "The solicitor-client relationship is not that sort of relationship which is governed by the maxim *caveat emptor* or "buyer beware". The average client assesses a lawyer on the basis of his formal professional qualifications. Although no lawyer can be expert in all areas of the law, most clients cannot differentiate among lawyers on the basis of specific areas of expertise and competence. This places an added responsibility on the lawyer to take care he does not accept a retainer for services he is not competent to perform ..." (*Lockhart v. MacDonald* (1979), 38 N.S.R. (2d) 671 (S.C. (T.D.)) at para. 73, per Richard J., rev'd (1980), 42 N.S.R. (2d) 29, 118 D.L.R. (3d) 397 (S.C. (T.D.))

"The public is entitled to expect that self governing legal profession will take reasonable measures to ensure that all lawyers who practise law will possess the minimum skill sets reasonably required of the circumstances. Repeated examples of specific skills - in this instance the skills of conscientious, diligent, and efficient service to the client - will support a finding of incompetence." (*Nova Scotia Barristers' Society v. Richey* (8 April 2002), Halifax (Hearing Subcommittee of the Nova Scotia Barristers' Society), online: Professional Responsibility Today <[http://nsbs.ns.ca/discipline\\_digest/richey.pdf](http://nsbs.ns.ca/discipline_digest/richey.pdf)> at p. 5.)

10. "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor." *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 208, (1986), 75 N.S.R. (2d) 109, 31 D.L.R. (4th) 481, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, per Le Dain J.)

"Incompetence in this instance is determinable by its consistent pattern ... it is in the predictability and consistency of the pattern of such acts by the member that the finding of incompetence is based." (*Nova Scotia Barristers' Society v. Richey*, *supra* note 9 at p. 5.)

11. See Jonathon Vogt, ed., *Managing Your Law Firm* (Vancouver: Continuing Legal Education Society of British Columbia, 1996).



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See CBA PracticeLink on Technology, online: Canadian Bar Association  
<<http://www.cba.org/cba/PracticeLink/TAYP/>>.

Also see Law Society of New Brunswick, Code of Professional Conduct for Guidelines on Ethics and the New Technology.

**12.** For an instance of "inordinate and inexcusable delay", see *Tiesmaki v. Wilson* (1972), 23 D.L.R. (3d) 179 (S.C. (A.D.)) at 183 per Johnson, J.A.

**13.** See Professional Development and Competency — Withdrawal of Services, online: Law Society of Upper Canada <[http://www.lsuc.on.ca/services/pdf/withdrawal\\_ser.pdf](http://www.lsuc.on.ca/services/pdf/withdrawal_ser.pdf)>.

See this Handbook, C.11 on Withdrawal. Also see AB C.2, R.2.



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### Chapter 3 – Quality of Service

#### Rule

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.<sup>1</sup>

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#### Guiding Principles

The lawyer has a duty to make every effort to provide courteous, thorough and prompt service to the client. The quality of service required of a lawyer is service which is competent, conscientious, diligent, efficient and civil.<sup>2</sup> This chapter should be read and applied in conjunction with Chapter 2 of this Handbook, Competence.

#### Commentary

##### Communication

**3.1** The lawyer has a duty to communicate effectively with the client.<sup>3</sup>

##### Timeliness

**3.2** The lawyer should ensure that matters are attended to within a reasonable time frame.<sup>4</sup> 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

**3.3** The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice.<sup>5</sup> 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 in circumstances when unable to keep such an appointment;
- 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;
- f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;<sup>6</sup>
- g) answering within a reasonable time any communication that requires a reply;
- h) ensuring that work is done promptly so that its value to the client is maintained;
- i) providing the best quality of work possible, and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- j) maintaining office staff, facilities and law office equipment adequate to the lawyer's practice;<sup>7</sup>
- k) informing a client of a proposal or settlement, and explaining the proposal properly;
- l) providing a client with all relevant information about a matter, and never withholding information from a client or misleading the client about the position of a matter in order to cover up neglect or a mistake;
- m) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report where one might reasonably be expected;<sup>8</sup>
- n) being civil.<sup>9</sup>



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### Application of the Rule

**3.4** This Rule does not prescribe a standard of perfection.<sup>10</sup> A mistake, although it might be actionable for damages in negligence, does not necessarily constitute a failure to maintain the standard set by this Rule; conversely, conduct, while not actionable, may constitute a violation of this Rule. Evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such violation of the Rule regardless of liability in tort or contract. Where both negligence and incompetence are established, while damages may be awarded for the former, the latter can result in the additional sanction of disciplinary action. [combines current commentaries 3.2 and 3.3]

**3.5** A lawyer who fails to serve a client in a conscientious, diligent and efficient manner does the client a disservice, brings discredit to the profession, and may bring the legal system and the administration of justice into disrepute. As well as damaging the lawyer's own reputation and practice, the failure of a lawyer to serve a client in a conscientious, diligent, efficient and civil manner may also damage the lawyer's associates and dependents.

**3.6** Deadlines should be met 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 reasonably expected by the client.<sup>11</sup>

### Firmness and Candour

**3.7** Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the Rule. In communicating with a 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 the client advice which will not please the client. This may legitimately require firm and animated discussion with the client.<sup>12</sup>

### Professionalism

**3.8** Professionalism is a characteristic of quality of service. Professionalism comprises attitudes and values such as dedication to the client's welfare, good work habits, an understanding of client relations, a general determination to practise ethically and a high regard for the interests of society generally. An important aspect of professionalism is attention to quality of service.<sup>13</sup>

### Sound professional judgment

**3.9** A lawyer must be mindful of maintaining a balanced workload which will allow the lawyer to provide an appropriate level of service to each client. A lawyer must be able to identify problems created by an excessive workload and take the steps necessary to correct the situation.

**3.10** A lawyer must be able to assess whether the nature of a matter will justify the legal costs of bringing it to conclusion. A lawyer may be aware at the outset of a matter, or may become aware during the course of a matter, that the costs of performing the requested services completely and competently will be disproportionately high as compared to the anticipated outcome. This fact must be brought immediately to the client's attention.

**3.11** A lawyer should balance the obligation to be thorough with the obligation to be economical. In some instances, a lawyer may have to decline a retainer where it is reasonably apparent that the lawyer will not be able to render competent service commensurate with the client's expectations as a result of the lawyer being unable or unwilling to make the appropriate commitment to the file.<sup>14</sup> It is also unacceptable to curtail the scope of services in an effort to minimize legal fees or other expenses when to do so would compromise the lawyer's quality of service.

### Limited Retainers

**3.12** A lawyer may accept a limited retainer, but in doing so, the lawyer must be honest and candid with the client



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about the nature, extent and scope of the work which the lawyer can provide within the means provided by the client. In such circumstances where a lawyer can only provide limited service, the lawyer should ensure that the client fully understands the limitations of the service to be provided and the risks of the retainer. Discussions with the client concerning limited service should be confirmed in writing. Where a lawyer is providing limited service, the lawyer should be careful to avoid placing him or herself in a position where it appears that the lawyer is providing full service to the client.<sup>15</sup>

Nothing prevents a lawyer from continuing to represent clients on a *pro bono* basis as long as the clients have been clearly advised by the lawyer of the nature and limits of the engagement.

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### Notes

1. "As far as I'm aware, it's no crime to offer such extraordinary legal service that clients become addicted to it.....Only one ingredient will, and it's not on any restricted list. It is, simply, "legendary client service." (Gerald A. Riskin, "Legendary Service For Your Clients," online: <<http://www.edge.ai/lawyer-attorney-1058806.html>>.)

The Supreme Court of Canada has held that a solicitor, like other professionals, can be concurrently liable in contract and in tort for negligently performing the services for which he or she was retained. The basis of this tortious liability arises from the relationship of sufficient proximity and is not confined to professional advice, but applies to any act or omission in the performance of those services. (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, (1986), 75 N.S.R. 109 (2d), 31 D.L.R. (4th) 481, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187.)

2. See Task Force on Professional Civility: 2002 Report, online: Nova Scotia Barristers' Society <<http://www.nsbs.ns.ca/publications/civ.pdf>>.

On quality of service generally, see Beverley G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 2002), c. 1, para. 14 *et seq.* See also AB C.2, Commentary G.1(a).

3. " You must tap into a profound understanding of how clients think. This can only be done if you are close to the clients you serve. This requires you to look, listen and get involved." (Milton W. Zwicker, "Pampering Your Clients" (1986) 27 Law Off. Econ. & Mgt. 421 at 428.)

"One thing that is important to every client is effective communication.... Even assuming the client's grasp of [E]nglish is as good as yours, are you communicating effectively; bluntly are you speaking [E]nglish or are you talking like a lawyer? ... Use the words everybody else does and use less of them, ... Above all, make sure your client understands the essential points about his or her legal position." (Joseph A.F. Macdonald, "Keeping Your Client Happy: Avoiding Claims" in *Company Law* (Halifax: Continuing Legal Education Society of Nova Scotia, 1992) at 6.)

See 30 Best Practices: Strategies for Law Firm Management, online: Canadian Bar Association <<http://www.cba.org/cba/PracticeLink/pdf/clientcare.pdf>>.

Also see "Lawyer Client Communications & Quality of Service," online: The Law Society of Upper Canada <[http://mrc.lsuc.on.ca/pdf/pmg/advisory\\_clientcom\\_quality.pdf](http://mrc.lsuc.on.ca/pdf/pmg/advisory_clientcom_quality.pdf)>.

4. See Practice Management Guidelines: Time Management, online: The Law Society of Upper Canada, <<http://mrc.lsuc.on.ca/jsp/pmg/timeManagement.jsp>>.



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For a denunciation of dilatory practices of solicitors, see *Allen v. McAlpine*, [1968] 2 W.L.R. 366, [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (C.A.).

"A client has a right to honest explanations for delay on the part of his solicitor, and it is clear that the Benchers ... concluded that the solicitor had not given an honest explanation for the delay but on the contrary had deceived his client as to the reason for such delay." *Sandberg v. F.*, [1945] 4 D.L.R. 446 at 447, per Farris C.J.S.C. (Visitorial Tribunal of the Law Society of British Columbia.)

See Smith, *supra* note 2 at c.6, para. 61 where the case of *Tiesmaki v. Wilson* (1971), 23 D.L.R. (3d) 179 (Alta. C.A.) is discussed in the context of failure by the lawyer to prosecute an action in a timely manner.

5. Robert Michael Greene, ed., *The Quality Pursuit: Assuring Standards in the Practice of Law* (Chicago: American Bar Association, 1989).

6. See *Managing the Lawyer/Client Relationship*, online: Lawyers' Professional Indemnity Company <[http://www.practicepro.ca/practice/lawyer\\_client/index.html](http://www.practicepro.ca/practice/lawyer_client/index.html)> for engagement and non engagement checklists.

7. See Nova Scotia Barristers' Society Guidelines on Lawyers and Technology. Also see CBA PracticeLink on Technology, online: Canadian Bar Association <<http://www.cba.org/cba/PracticeLink/TAYP/>>.

8. In some areas of law and in appropriate circumstances, a 'disengagement' or end of retainer letter is a useful practice:

"Once your retainer is completed, provide your client with a final reporting letter that gives a comprehensive review of the major events or accomplishments and a full description of the result." (John R. Merrick, "Cultivating the Client Relationship" (2003) 21: 5 Society Record 8 at 10.)

Also see "Closing Files" in 30 Best Practices: Strategies for Law Firm Management, online: Canadian Bar Association <<http://www.cba.org/cba/PracticeLink/pdf/clientcare.pdf>>.

9. "Be courteous and civil, and require the same from those under your supervision." ("Civility, and the Practise of Law in Nova Scotia" (2003) 21:2 Society Record 9 at 9.)

10. "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor." (*Central Trust Co. v. Rafuse*, *supra* note 1 at 236, per Le Dain J.)

"We must no longer think of quality assurance only as a means of maintaining a threshold standard adequate to avoid professional malpractice. We must instead reflect on what quality assurance means in the modern practice of law and how lawyers can be trained to meet the modern standard." (Greene, *supra* note 5 at 3.)

11. "McIntyre, J. of the Supreme Court of Canada has said, "One of the worst faults of the Bar is delay. It is, I think, the greatest single cause of injustice and failure in the courts. It is not merely a cliché to say that "justice delayed is justice denied!" (Leon E. Trakman, ed., *Professional Competence and the Law*, Dalhousie Continuing Legal Education Series, no. 21 (Halifax: Dalhousie University Faculty of Law, 1981) at 63.)

See Practice Management Guidelines: Time Management, online: The Law Society of Upper Canada <<http://mrc.lsuc.on.ca/jsp/pmg/timeManagement.jsp>>.



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12. See C.4 of this Handbook on Honesty and Candour when Advising Clients.

"We probably know our services better than our client, so we can help them identify their preferences with relative ease. Having noted the client's preferences, this now becomes the performance criteria from which we should be evaluated. No need to cringe. If the client identifies preferences or expectations which are outside the scope (or interest) of our abilities, it is incumbent upon us to make this understood." (Susan Van Dyke, "Create a Winning Client Retention Strategy in 5 Steps", online: Canadian Bar Association <<http://www.cba.org/cba/PracticeLink/CS/retention.aspx>>.)

"The best advice is to actively manage client expectations about your services, their timing, the results to be obtained, and the costs for obtaining them." (Michelle Mann, "How to Irritate a Client" (2004) 13:7 National 36 at 41.)

13. See AB C.2, Commentary G.1(a) on professionalism.

14. See Practice Management Guidelines: Client Service and Communication, online: The Law Society Society of Upper Canada <<http://mrc.lsuc.on.ca/jsp/pmg/clientService.jsp>>.

15. A lawyer must therefore carefully assess in each case in which a client desires abbreviated or partial services whether, under the circumstances, it is possible to render those services in a competent manner. For example, it may not be permissible to prepare documents which, when viewed objectively, are incomplete or insufficient to protect a client's interests. If a client is not willing to pay the costs of an adequately detailed document, the lawyer may have a duty to withdraw or provide complete services for less than an amount that fairly compensates the lawyer.

"The advantage to unbundled legal services is that the client pays a lower fee by obtaining only the limited services he or she wants. The trade-off is the service the client could have had but does not receive. As long as the client is genuinely fully informed about the nature of the arrangement and understands clearly what is given up, it should be possible to provide such services effectively and ethically. Indeed, it can be seen as consistent with the duty to provide services "in an efficient and convenient manner". A clear retainer letter is wise in any case; for unbundled legal services it is essential." (*The Future of the Legal Profession: The Challenge of Change*, online: Canadian Bar Association <<http://www.cba.org/CBA/NEWS/pdf/future.pdf>> at 76.)

See AB C.2, Commentary G.1(v) for an elaboration and examples of limited service.



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### Chapter 4 –Honesty and Candour When Advising Clients

**Rule** A lawyer has a duty to be both honest and candid when advising a client.<sup>1</sup>

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#### **Guiding Principles**

A lawyer has a duty to a client who seeks legal advice to give the client a competent opinion that is

- (a) open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results; and
- (b) based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise.<sup>2</sup>

#### **Commentary**

##### **Client's understanding of true position**

**4.1** Whenever it becomes apparent that the client has misunderstood or misconceived what is really involved in the matter brought to the lawyer, the lawyer has a duty to explain as well as advise, so that the client is informed of the true position and fairly advised about the real issues or questions involved.<sup>3</sup>

##### **Basis of opinion**

**4.2** A lawyer has a duty to clearly indicate the facts, circumstances and assumptions upon which the lawyer's opinion is based.

**4.3** Unless the client instructs otherwise, the lawyer has a duty to investigate the matter in sufficient detail to be able to express an opinion rather than merely make conjectural comments with many qualifications.

##### **Bold and over-confident assurances**

**4.4** A lawyer has a duty not to make bold or over-confident assurances to a client, especially when the lawyer's engagement may depend upon the way in which the lawyer advises the client.<sup>4</sup>

##### **Second opinion**

**4.5** If a client so desires, the lawyer has a duty to assist in obtaining a second opinion.

##### **Compromise and settlement**

**4.6** A lawyer has a duty

- (a) to advise and encourage the client to compromise or settle a dispute whenever possible on a reasonable basis; and
- (b) to discourage the client from commencing or continuing useless legal proceedings.<sup>5</sup>

##### **Dishonesty or fraud by client**

**4.7** When advising the client the lawyer has a duty never to knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct and never to instruct the client on how to violate the law and avoid punishment.

**4.8** The lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with the client who have an interest in the client's matter or its outcome and against engaging in unethical conduct on the client's instructions.<sup>6</sup>

##### **Test cases**

**4.9** A bona fide test case is not necessarily precluded by Commentary 4.7. As long as no injury to the person or



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violence is involved, the lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and this can most effectively be done by means of a technical breach giving rise to a test case. In all such situations the lawyer has a duty to ensure that the client appreciates the consequences of bringing a test case.<sup>7</sup>

### Threatening criminal proceedings

**4.10** Apart altogether from the substantive law on the subject, a lawyer has a duty not to

- (a) advise, threaten or bring a criminal or quasi-criminal proceeding in order to secure some civil advantage for the client; or
- (b) advise, seek or procure the withdrawal of a prosecution in consideration of the payment of money or transfer of property to or for the benefit of the client.<sup>8</sup>

### Advice on non-legal matters

**4.11** In addition to opinions on legal questions, the lawyer may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question or in the course the client should choose.

**4.12** 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.

**4.13** However, the lawyer who advises on such matters has a duty, where and to the extent necessary, to point out the lawyer's lack of experience or other qualification in the particular field and to clearly distinguish legal advice from such other advice.<sup>9</sup>

### Errors and omissions

**4.14** Upon discovering that a lawyer has made an error or omission in a matter in which the lawyer was engaged that is or may be damaging to the client and cannot readily be rectified, the lawyer has a duty to inform the client promptly of the situation but without admitting liability. When so informing the client, the lawyer must be careful not to prejudice any right of indemnity that either the client or the lawyer may have under any insurance, client protection or indemnity plan or otherwise.

**4.15** At the same time the lawyer has a duty to recommend to the client that the client obtain legal advice elsewhere about any rights the client may have which arise from such error or omission and also whether it is proper for the lawyer who made the error or omission to continue to act in the matter for the client.

**4.16** The lawyer also has a duty to give prompt notice of any potential claim to the lawyer's insurer and any other indemnitor so that any protection from that source will not be prejudiced and, unless the client objects, has a duty to assist and cooperate with the insurer or other indemnitor to the extent necessary to enable any claim that is made to be dealt with promptly.

**4.17** If the lawyer is not so indemnified, or to the extent that the indemnity may not fully cover the claim, the lawyer has a duty to expeditiously deal with any claim that may be made and must not, under any circumstances, take unfair advantage that might defeat or impair the client's claim. In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim the lawyer has a duty to arrange for payment of the balance.<sup>10</sup>

### Giving independent advice

**4.18** Where a lawyer is asked to provide independent advice or independent representation to another lawyer's client in a situation where a conflict exists, the provision of such advice or representation is an undertaking to be taken seriously and not to be lightly assumed or perfunctorily discharged.



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**4.19** In such cases, the lawyer's duties to the party for whom the independent advice or representation is required are the same as in any other lawyer-client relationship.

### **Dealings with unrepresented persons<sup>11</sup>**

**4.20** The lawyer should not undertake to advise an unrepresented person, but should urge such a person to obtain independent legal advice and, if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that the lawyer is protecting such person's interests. If the unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in the Rule relating to impartiality and conflict of interest between clients. The lawyer may have an obligation to a person whom the lawyer does not represent, whether or not such person is represented by a lawyer.

### **Dishonesty or fraud by client organization**

**4.21** A lawyer, acting for an organization, who learns that the organization, or an employee or agent on behalf of the organization, is engaging in or contemplating dishonesty, fraud or illegal conduct, should take appropriate action. This may include

- (a) following a procedure prescribed by the organization;
- (b) explaining the nature of the activity to
  - (i) the employees or agents involved, and
  - (ii) the person with whom the lawyer normally deals advising of the reasons why the lawyer recommends the activity should not be pursued, and outlining the consequences to the organization, the employees or agents, and to the lawyer which could result from the activity; and
- (c) if the issue is not resolved after the lawyer takes the action suggested in (a) and (b), then, depending upon the circumstances, it may be appropriate for the lawyer to
  - (i) provide in writing the same advice which was given orally,
  - (ii) advise as to the steps to be taken by the lawyer if this conduct is not stopped or suitably abated,
  - (iii) inform the person's immediate superior, describing the nature of conduct, its potential consequences, and the action already taken by the lawyer, and
  - (iv) provide advice in writing to a senior member of management, and thereafter, if necessary, to the chair and an outside member of the Board of Directors, or the Minister in case of a lawyer working in government, and include with such advice the information and correspondence already provided.

**4.22** If a lawyer, after taking reasonable action to discourage such activity receives instructions that would involve breaching the duties in this Handbook, dishonesty, fraud or illegal conduct, the lawyer is under a duty to withdraw from the representation of the organization in the particular matter.<sup>12</sup>

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### **Notes**

1. For codes of ethics dealing with this, see Lund, A10. Also see M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957) at 78-79 and B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989) at 46.

2. "He [a lawyer] has an obligation before giving advice to fully acquaint himself with the facts of the case and an obligation to give candid and honest advice ..." *Maple Leaf Enterprises Ltd. v. Mackay* (1980), 42 N.S.R. (2d) 60 at 65, per Hallett J. (T.D.).



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"The lawyer should not remain silent when it is plain that the client is rushing into an unwise, not to say disastrous adventure." *Neushul v. Mellish & Harkavy* (1967), 111 Sol. J. 399, per Lord Danckwerts (C.A.).

3. For cases illustrating the extent to which a lawyer should investigate and verify facts and premises before advising see, e.g., those collected in *Digest*, at 135-139.

Legal Ethics Ruling 1992-3: "It is unethical for a lawyer to bind or commit the lawyer's client when the lawyer knows that the lawyer does not have the authority to do so."

4. See K. Eaton, "Practising Ethics" (1966), 9 *Can. B.J.* 349.

5. For a code of ethics dealing with this, see Lund, B2.

See Orkin, *supra*, note 1, at 95-97; see Smith, *supra*, note 1, at 102-110.

"The lawyer has a duty to discourage a client from commencing useless litigation; but the lawyer is not the judge of his client's case and if there is a reasonable prospect of success, the lawyer is justified in proceeding to trial. To avoid needless expense, it is the lawyer's duty to investigate and evaluate the proofs or evidence upon which the client relies *before* the institution of proceedings. Similarly, when possible, the lawyer must encourage the client to compromise or settle the dispute." NB C-3 (emphasis added).

"... it [the litigation process] operates to bring about a voluntary settlement of a large proportion of disputes .... This fact of voluntary settlement is an essential feature of the judicial system." W. Jackett, *The Federal Court of Canada: A Manual of Practice* (Ottawa: Information Canada, 1971), at 41-42.

For Nova Scotia decisions dealing with a solicitor's authority to accept a settlement on behalf of the client, see *(Canada Attorney General) v. Veinotte* (1987) 81 N.S.R. (2d) 356 (S.C.T.D.); *Begg v. East Hants (Municipality)* (1986), 85 N.S.R. (2d) 304 (C.A.); *Pineo v. Pineo* (1981), 45 N.S.R. (2d) 576 (S.C.T.D.); *Landry v. Landry* (1981), 48 N.S.R. (2d) 136 (S.C.T.D.); *Co-operative Fire and Casualty Co. v. Shipley* (1982), 53 N.S.R. (2d) 235, 109 A.P.R. 235, 29 C.P.C. 172 (S.C. (T.D.)). See also *Maillet v. Haliburton & Comeau* (1983), 55 N.S.R. (2d) 311 (S.C.T.D.) [lawyer not negligent in recommending settlement when uncertain about the outcome of an appeal].

See *Handbook*, Commentary 10.21, below, on responsibilities regarding alternate dispute resolution.

6. For a code of ethics dealing with this, see Lund, A15.

Any complicity such as abetting, counselling or being an accessory to a crime or fraud is obviously precluded.

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." ABA-MR 1.2(d).

"... that the arms which [the lawyer] wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interest of his clients *per fas*, but not *per nefas*." Cockburn L.C.J. in a speech in 1864 quoted S. Rogers, "The Ethics of Advocacy" (1899), 15 L.Q.R. 259 at 270-71.



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Applied to a solicitor in a "very clear case where the solicitor has been guilty of misconduct" and is "floundering in a quagmire of ignorance and moral obliquity" (he having, pending trial of an action and in anticipation of an adverse outcome, advised his client to dispose of its property and, after verdict, taking an assignment of part of that property). *Centre Star Mining Co. v. Rossland Miners Union* (1905), 11 B.C.R. 194, 1 W.L.R. 244 (C.A.).

See also L. Kocontes, "Client Confidentiality and the Crooked Client: Why Silence is not Golden." 6 *Georgetown J. Legal Ethics* (1992-93), 283-318.

7. For example, to challenge the constitutionality of, the jurisdiction for or the applicability of a shop-closing by-law or a licensing measure, or to determine the rights of a class or group having some common interest.

8. See also "Criminal Law May Not be Used to Collect Civil Debts" (1968), 2:4 *Gazette* 36; K. Eaton, "Threats of Criminal Prosecution" (Dec. 1977), 4:3 *N.S.L.N.* 1. See also *Rex v. LeRoux* (1928), 3 D.L.R. 688 (Ont. C.A.).

See also Legal Ethics Ruling 1994-6 (1): "It is unethical for a lawyer to seek to obtain an improper advantage or benefit over another lawyer or that lawyer's client by threatening disciplinary action."

"The purpose of the rule is to prevent the criminal law from being used as a lever to enforce the payment of a civil claim. The rule is concerned with professional conduct, and it is designed to ensure that the members of the profession will not act in a way which is contrary to the best interest of the public, or of the legal profession, or in a way which tends to harm the standing of the legal profession in public estimation." *Wilson v. Law Society of British Columbia* (1986), 33 D.L.R. (4th) 572, 9 B.C.L.R. (2d) 260 (C.A.) See also *Pearlman v. Law Society of Manitoba Judicial Committee* (1989), 62 D.L.R. (4th) 681, [1990] 1 W.W.R. 178 (C.A.); affd 84 D.L.R. (4th) 105, [1991] 2 S.C.R. 869.

9. The lawyer's advice is usually largely based on the lawyer's conception of relevant legal doctrine and its bearing on the particular factual situation at hand. Anticipated reactions of courts, probative value of evidence, the desires and resources of clients, and alternative courses of action are likely to have been considered and referred to. The lawyer may indicate a preference and argue persuasively, or pose available alternatives in neutral terms. The lawyer makes the law and legal processes meaningful to clients; the lawyer explains legal doctrines and practices and their implications; the lawyer interprets both doctrines and impact. Often legal and non-legal issues are intertwined. Much turns on whether the client wants a servant, a critic, a sounding board, a neutral evaluator of ideas, reassurance, authority to strengthen his or her hand .... The real problem may be one, not of role conflict, but of role definition. The lawyer may spot problems of which the client is unaware and call them to his attention. (Summarized from Q. Johnstone and D. Hopson, *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* (Indianapolis: Bobbs-Merrill, 1967), at 78-81).

10. See T. Bastedo, "A Note on Lawyers' Malpractice" (1970), 7 *Osgoode Hall L.J.* 311.

11. For a code of ethics dealing with this, see Lund, A20.

12. In private practice, withdrawal is understood to mean ceasing to act in a particular matter and does not necessarily preclude a lawyer's continuing to act in other matters for the same client. Similarly, a lawyer employed by a client may "withdraw" from a given matter by refusing to implement the client's instructions in that matter, while continuing to advise the client in other respects.

In the case of a profound and fundamental disagreement between lawyer and client or a pervasive institutional policy of illegality, withdrawal may also entail resignation. In most cases, however, a preferable approach is to



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seek alternative instructions from other levels of authority in the organization, have the matter referred to outside counsel, or take similar action that falls short of resignation.

Cf. *Handbook*, Chapter 11, "Withdrawal," below, which addresses the lawyer's duties with respect to withdrawal, primarily in the private practice context.



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### Chapter 5 – Confidentiality

#### Rule

A lawyer has a duty to hold in strict confidence all information concerning the business and affairs of a client where the information is acquired by the lawyer as a result of the professional relationship with the client except where disclosure is

- (a) expressly or impliedly authorized by the client;
- (b) required by law;<sup>1</sup> or
- (c) permitted or required by this *Handbook*.

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#### Guiding Principles

In a lawyer-client relationship

- (a) the lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them; and
- (b) the client must feel completely secure and entitled to presume that, unless there is an agreement or understanding with the lawyer to the contrary, all material disclosed to and matters discussed with the lawyer will be kept secret and confidential.<sup>2</sup>

#### Commentary

##### Distinction from evidentiary lawyer-client privilege

**5.1** This ethical rule must be distinguished from the evidentiary rule of lawyer-client privilege with respect to oral or written communications passing between the client and the lawyer. The ethical rule is broader and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.<sup>3</sup>

##### Non-disclosure of lawyer-client relationship

**5.2** As a general rule, a lawyer has a duty not to disclose that he or she has been consulted or retained by a person unless the nature of the matter requires the lawyer to do so.

##### Continuing duty of secrecy

**5.3** The lawyer owes a duty of secrecy to every client without exception, regardless of whether the client is a continuing or casual client. This 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.<sup>4</sup>

**5.4** The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information acquired by the lawyer as a result of the professional relationship for the benefit of the lawyer or a third person, or to the disadvantage of the client.<sup>5</sup>

**5.5** The lawyer who engages in literary works such as an autobiography, memoirs and the like has a duty not to disclose confidential information in any such work.

**5.6** Except as permitted by this Handbook, a lawyer has a duty

- (a) not to disclose to one client confidential information concerning or received from another client; and
- (b) to decline employment that might require such disclosure.<sup>6</sup>



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### Gossip

**5.7** A lawyer has a duty to

- (a) avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs;
- (b) shun any gossip about a client's affairs even if the client is not named or otherwise identified; and
- (c) not repeat any gossip or information about the client's business or affairs that may be overheard by or recounted to the lawyer.

**5.8** Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client and also result in the respect of the listener for the lawyers concerned and the legal profession generally being lessened.<sup>7</sup>

**5.9** Although this Rule may not apply to facts which are public knowledge, a lawyer has a duty not to participate in or comment upon speculation concerning the client's affairs or business.

### When disclosure permitted

**5.10** Confidential information may be divulged with the express authority of the client concerned and, in some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Unless the client directs the lawyer to the contrary, the lawyer may disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and clerks. A lawyer, therefore, has a duty to impress upon associates, students and employees of the lawyer's office the importance of non-disclosure, both during their employment and afterwards, and to take reasonable care to prevent them from disclosing or using any information that the lawyer is bound to keep in confidence.<sup>8</sup>

**5.11** Disclosure may be justified in order to establish or collect a fee but only to the extent necessary for such purposes.<sup>9</sup>

**5.12** Where 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, conduct unbecoming a lawyer, incapacity or professional incompetence,

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

**5.13** A lawyer should exercise restraint in determining when and to whom to disclose confidential information in order to defend against allegations, and the extent to which such disclosure is necessary under the circumstances, considering that any disclosure must be commensurate and proportional to the nature and source of the complaint. In making this determination, the lawyer should consider to whom the allegations were made.

In most cases it will be appropriate for a member to immediately notify a client if the member discloses confidential information in order to defend herself or himself against allegations made by a third party.

**5.14** A lawyer has a duty to disclose information necessary to prevent a crime where

- (a) the lawyer has reasonable grounds for believing that the crime is likely to be committed; and



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(b) the anticipated crime involves violence.<sup>10</sup>

**5.15** However, a lawyer has a duty, when disclosure is required by law or by order of a court of competent jurisdiction, not to divulge more information respecting a client than is specifically required and to assert the client's privilege.<sup>11</sup>

### Duty of former public officer

**5.16** A lawyer formerly in the service of any government or public agency who has possession of information about a person, has a duty not to represent any client, other than the lawyer's former public employer, whose interests are adverse to the person about whom the lawyer possesses information in circumstances in which the information could be used to the material disadvantage of such person.

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### Notes

1. For codes of ethics dealing with this, see ABA-MR 1.6; Lund, B8.

"... [F]or practical purposes any information received by a lawyer in his professional capacity concerning his client's affairs is prima facie confidential unless it is already notorious or was received for the purpose of being used publicly or otherwise disclosed in the conduct of the client's affairs." *Ott v. Fleishman*, [1983] 5 W.W.R. 721 at 723, 46 B.C.L.R. 321 at 323, 22 B.L.R. 57 at 60, per McEachern C.J.S.C. (S.C.).

2. "... [I]t is absolutely necessary that a man, in order to prosecute his rights or defend himself ... should have recourse to the assistance of professional lawyers, and ... equally necessary ... that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent)..." *Anderson v. Bank of British Columbia* (1876), 2 Ch.D. 644 at 649, 45 L.J. Ch. 449 at 451, per Jessell M.R.

"To force a client to choose between legal representation without effective communication and legal representation with all secrets revealed publicly is to deprive the client in some cases of the right to counsel." G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), at 3-2.

3. See M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 83-86.

Cf. E. Tollefson, "Privileged Communications in Canada (Common Law Provinces)" (1967), *Proceedings of 4th Int. Comp. Law Symp.* 32 at 36-41.

See *Canadian Broadcasting Corporation v. Amherst (Town)*, [1994 CanLII 4012](#), 133 N.S.R. (2d) 277, 48 A.C.W.S. (3d) 1034, 380 A.P.R. 277, 22 C.R.R. (2d) 129 (C.A.); *Coopers & Lybrand v. Tinmouth, N.S.S.C.*, S.H. 81772, 17 August 1994, *Tidman J.*, S368/2 (as yet unreported) [solicitor-client privilege still attaches when the lawyer is in-house counsel]; *Nova Scotia Securities Commission v. W* (1996), 152 N.S.R. (2d) 1(N.S.S.C.). Cf. *Hartford Accident and Indemnity Co. v. Maritime Life Assurance Co.*, [1996 CanLII 5208](#), 160 N.S.R. (2d) 161, 69 A.C.W.S. (3d) 826, 473 A.P.R. 161, 9 C.P.C. (4th) 102 (S.C.).

4. For a code of ethics dealing with this, see Lund, B8.



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"... [A] fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege ... Because the solicitor owes to his client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived." *Bell v. Smith*, [1968] S.C.R. 664 at 671 per Spence J.

To waive, the client must know of his or her rights and show a clear intention to forgo them. *Kulchar v. Marsh & Beukert*, [1950] 1 W.W.R. 272 (Sask. K.B.).

For an illustration of limits upon the ability to waive see *R. v. Robillard* (1986), 14 O.A.C. 314 (C.A.); *affg* (1985), 23 C.C.C. (3d) 474 (Ont. H.C.).

"When a lawyer ceases to represent a client, the rule of confidentiality ... makes it unethical for the lawyer, without permission of the client, to turn the client's file over to or to supply any information whatsoever about the client to any person, including another lawyer, except to persons in the lawyer's firm or office and to the extent mentioned ..." Legal Ethics Ruling 1992-10.

5. "The highest and clearest duty of a fiduciary is to act to advance the beneficiary's interest and avoid acting to his detriment." *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 at 676, per Callaghan A.C.J.H.C. (H.C.J.).

Misuse by a lawyer for his own benefit of his client's confidential information may render the lawyer liable to account: *McMaster v. Byrne* (1952), 3 D.L.R. 337 (P.C.); *Bailey v. Ornheim* (1962), 40 W.W.R. (N.S.) 129 (B.C.S.C.); *Lockhart v. MacDonald* (1980), 42 N.S.R. (2d) 29 (S.C.A.D.).

6. "Joint Retainer. When two parties employ the same solicitor, the rule is that communications passing between either of them and the solicitor, in his joint capacity, must be disclosed in favour of the other - e.g., a proposition made by one, to be communicated to the other; or instructions given to the solicitor in the presence of the other; though it is otherwise as to communications made to the solicitor in his exclusive capacity." (Quotation from *Phipson on Evidence* (10th ed.) cited and approved by Atkins J. in *Chersinoff v. Allstate Insurance Co.* (1968), 69 D.L.R. (2d) 653 at 661, 65 W.W.R. 449 at 457, [1969] I.L.R. 1-217 at 308 (B.C.S.C.).

As to the duties of lawyers instructed by insurers in the defence of the insured in motor accident cases, see *Groom v. Crocker et al.*, [1938] 2 All E.R. 394, [1939] 1 K.B. 194, 108 L.J.K.B. 296, 158 L.T. 477, 54 T.L.R. 861, 82 Sol. J. 374.

7. See K. Eaton, "Practising Ethics" (1967), 10 Can. B.J. 528.

8. "When a solicitor files an affidavit on behalf of his client ... it should be assumed until the contrary is proved, or at least until the solicitor's authority to do so is disputed by the client, that the solicitor has the client's authority to make the disclosure." *Kennedy v. Diversified Mining Interests (Can.) Ltd.*, [1949] 1 D.L.R. 59 at 61, [1948] O.W.N. 798 at 800, per Lebel J. (H.C.).

Cf. T.P. Donovan and M.J. Belliveau, "Disclosure of Discovery Information and the Principle of Implied Undertaking in Nova Scotia" (June 1992), 18:3 N.S.L.N. 81; cf. *Reichman v. Toronto Life Publishing Co.* (1988), 28 C.P.C. (2d) 11 (Ont. H.C.).

9. "It is not unethical for a lawyer to forward accounts to a third party auditor without the informed consent of the insured provided: a) it would be proper for the lawyer to provide the information to the insurer itself, and b) the insurer confirms to the lawyer in writing that: 1) the auditor's services are required in order to facilitate the provision of legal services in the litigation; 2) the arrangements in place with the auditor protect the confidentiality



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of the information the lawyer provides; and 3) the insurer will notify the lawyer if conditions 1 or 2 above ceases to be true." Legal Ethics Ruling 2000-1.

There is no duty or privilege where a client conspires with or deceives his lawyer. *R. v. Cox* (1884), 14 Q.B.D. 153 (C.C.R.).

Cf. Orkin, *supra*, note 3, at 86 as to the exceptions of crime, fraud and national emergency.

NB C-5 says, "Another exception [where disclosure of confidential information is permitted] is when the national interest makes disclosure imperative."

**10.** To oust privilege the communication must have been made to execute or further a crime or fraud - it must be prospective as distinguished from retrospective. *R. v. Bennett* (1963), 41 C.R. 227 (B.C.S.C.) and cases there cited. See B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 24-26 for exceptions.

For a code of ethics dealing with this, see Lund, A15.

**11. Cf. M. Freedman, "Solicitor-Client Privilege Under the Income Tax Act" (1969), 12 Can. B.J. 93.**



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### Chapter 6 – Impartiality and Conflict of Interest Between Clients

#### Rule

A lawyer has a duty not to:

- (a) advise or represent both sides of a dispute<sup>1</sup>; or
  - (b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.
- 

#### Guiding Principles

##### What is a conflicting interest?

1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client.<sup>2</sup> Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.<sup>3</sup>

##### What is informed consent?

2. For the purposes of Rule (b), a lawyer has the client's informed consent to act in such a matter where the client or prospective client, preferably in writing, has consented to the lawyer so acting after the lawyer, preferably in writing, has advised the client or prospective client

- (a) that the lawyer intends to act in the matter not only for that client or prospective client but also for one or more other clients or prospective clients;
- (b) that no information received from one client respecting the matter may be treated as confidential with respect to any of the others;
- (c) that if a dispute develops in the matter that cannot be resolved, the lawyer cannot continue to act for any of the clients and has a duty to withdraw from the matter;
- (d) whether or not the lawyer has a continuing relationship with one of the clients and acts regularly for that client; and
- (e) that the client or prospective client obtain independent legal advice where the lawyer has a continuing relationship with one or more of those for whom the lawyer intends to act.<sup>4</sup>

3. A lawyer, however, has a duty not to act for more than one client where, despite the fact that all parties concerned have given informed consent, it is reasonably obvious that an issue contentious between them may arise or that their interests, rights or obligations will diverge as the matter progresses.<sup>5</sup>

##### Treatment of contentious issues

4. If, however, after the clients involved have given informed consent, an issue contentious between them or some of them arises, the lawyer, although not precluded from advising them on other non-contentious issues, is in breach of the Rule if the lawyer attempts to advise them on the contentious issue. In such circumstances the lawyer has a duty to refer the clients to other lawyers.



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5. However, if the issue is one that involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, they may be permitted to settle the issue by direct negotiation in which the lawyer does not participate. Alternatively, the lawyer may refer one client to another lawyer and continue to advise the other if it was agreed at the outset that this course would be followed in the event of a conflict arising.

### Effect on arbitrations

6. Nothing in this Rule prohibits a lawyer from arbitrating, mediating, negotiating or settling a matter among two or more persons or attempting to do so, as long as

- (a) the persons are *sui juris*;
- (b) the persons consent, preferably in writing, to the submission of the dispute to the lawyer as arbitrator, mediator or negotiator;<sup>6</sup>
- (c) the lawyer, before beginning to act, advises each of the persons that the lawyer is not acting as that person's legal adviser in the matter;
- (d) neither the lawyer nor any associate of the lawyer has ever acted for any of the clients or advised any of the clients in or with respect to the matter; and
- (e) where the lawyer has had, prior to beginning to act, any contact with any of the clients with respect to any other matter, the lawyer discloses this fact to all of the other clients.

7. A lawyer has a duty not to act for a party in respect of a dispute while the lawyer arbitrates, mediates, negotiates or settles the dispute, and every associate of the lawyer has a duty not to act for any party to the dispute or advise any party with respect to the dispute. Nothing in this paragraph prevents a lawyer who has previously acted as mediator or arbitrator in a dispute from subsequently acting for any of the parties to such a dispute in any matter completely unrelated to the dispute provided that there is compliance with all other duties in this *Handbook*.

### Subsequent matters

8. A lawyer or any associate of the lawyer who has acted for a person in a matter has a duty not to act against that person in the same or a related matter.<sup>7</sup>

9. Nothing in this paragraph prohibits a lawyer from acting against a person in a fresh and independent matter wholly unrelated to any matter in which the lawyer previously represented that person.

### Acting for organizations<sup>8</sup>

10. A lawyer acting for an organization in circumstances described in Guiding Principle 11 has a duty to make it clear to any person with whom the lawyer is dealing, such as a director, officer, employee, shareholder or member of that organization or related organization (the "individual"), that

- (a) the organization is the lawyer's client;
  - (b) the individual is not the lawyer's client; and
- the lawyer may be obliged to provide to the organization any information acquired by the lawyer and the information may be used or disclosed by the organization.

11. The duty in Guiding Principle 10 arises when

- (a) the lawyer perceives that the individual believes, or
- (b) a reasonably informed member of the public could reasonably believe that the lawyer owes a duty to the individual not to pass information about the affairs of the individual to the organization.



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**12.** Where a lawyer ought to have provided, but did not provide the clarification described in Guiding Principle 10 and the individual discloses information about the individual's affairs to the lawyer, the lawyer shall not disclose the information to the organization and shall not act for either the organization or the individual in a matter to which the information pertains if there is an issue contentious between them, if their interests, rights or obligations diverge, or if it is reasonably obvious that an issue contentious between them may arise or that their interests, rights or obligations will diverge as the matter progresses.

**13.** If the lawyer discloses information to the organization, the lawyer has a duty to tell the individual that the information has been disclosed to the organization if the circumstances described in Guiding Principle 12 exist or subsequently arise, unless telling the individual would provide an opportunity to conceal actions that are contrary to law.

### **Commentary Reasons for Rule <sup>9</sup>**

**6.1** The reason for the Rule respecting impartiality and conflict of interest between clients is self-evident: a client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from compromising influences.

**6.2** The Rule requires informed consent to enable the client to make an informed decision about whether to have the lawyer act despite the existence or possibility of a conflicting interest.

### **Examples of conflicts**

**6.3** In practice, there are many situations where even though no actual dispute exists between the parties, their interests are in latent conflict. Common examples in a conveyancing practice are vendor and purchaser or mortgagor and mortgagee. In all such transactions it is preferable that each party be separately represented but the lawyer may act in such transactions only if the Rule and the duties contained in this chapter are strictly observed.

### **The client's perspective**

**6.4** 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, obligations or influences, this factor, in practice, may not always be decisive. Instead it may be only one of several factors that the client weighs when considering whether or not to give informed consent.

**6.5** Other factors might include, for example, the availability of another lawyer of comparable expertise and experience or the extra expense, delay and inconvenience in engaging another lawyer and the latter's unfamiliarity with the client and the client's affairs.

**6.6** The client's interests may be better served by not engaging another lawyer. Such may be the case when the client and another party to a commercial transaction are continuing clients of the same firm but are regularly represented by different lawyers in that firm. This situation does not eliminate the need for informed consent.

**6.7** There are also many situations where more than one person may wish to retain the lawyer to handle a transaction and, although their interests appear to coincide, in fact a potential conflict of interest exists. Examples are co-purchasers of real property and persons forming a partnership or corporation. Such cases will be governed by the requirement of this Rule for informed consent.

### **Burden of Proof**

**6.8** In disciplinary proceedings arising from a breach of this Rule, the lawyer has the burden of showing his or her good faith, that adequate disclosure was made to the parties for whom the lawyer was acting and that the client's informed consent was obtained.



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### Acting for organizations

**6.9** What a reasonably informed member of the public could reasonably believe is a question of fact. Relevant factors for determining when the duty referred to in Guiding Principle 10 arises include

- (a) the organizational context such as
  - (i) legislation, policies, procedures and practices of the organization,
  - (ii) physical indicators such as proximity of offices, security systems, filing systems, sharing of secretarial support,
  - (iii) visible indicators such as job titles, letterhead, organizational charts;
- (b) prior statements and actions by the lawyer or the individual such as whether the lawyer routinely performs legal services for individuals in the organization in their individual capacity;
- (c) the individual context such as
  - (i) the experience, rank, or position of the individual in the organization or related organizations,
  - (ii) statements by the lawyer or the individual at the time of the disclosure of information.

**6.10** For the purposes of Guiding Principles 10 to 13

- (a) "organization" includes a body corporate, sole proprietorship, partnership, joint venture, society or unincorporated association, union, employers group, and a government;
- (b) a lawyer working in a division, department or agency of an organization is considered to be working for the organization as a whole except as explicitly provided by the organization.

**6.11** As an internal matter, an organization may provide specific instructions or follow practices governing the performance of a lawyer's obligations to the organization. These instructions or practices may include a direction to accept instructions from and report to a particular individual or a group of individuals within the organization; to keep certain information confidential from other individuals or groups within the organization; or to act for more than one component of the organization in circumstances that would constitute a multiple representation if the organization as a whole were not the client. A lawyer is entitled to act in accordance with such instructions or practices.

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### Notes

1. See J. DeP. Wright, "The Duty of an Advocate" (1983), 17 *Gazette* 327.

It has been recognized, however, that there are not always two lawyers available for a transaction, particularly in rural areas. See *McCauley v. McVey*, [1980] 1 S.C.R. 165.

Whether a solicitor / client relationship has been established depends on the facts of the case; it cannot be commenced by the subjective view of one party. See *Campbell v. Lienux* (1996) 153 N.S.R. (2d) 241 (S.C.); *affd* (1997), 154 N.S.R. (2d) 159 (C.A.).

Nova Scotia decisions dealing with conflicts of interest include the following: *Grand Anse Contracting Ltd. v. MacKinnon* (1993), 121 N.S.R. (2d) 423 (S.C.); *Avco Financial Services Realty Ltd. v. Tracey* (1979), 59 N.S.R. (2d) 333 (S.C.T.D.); *Begg v. Smith*, S.C.T.D., S.H. 33579, 25 April 1983, Grant J., S169/7 (as yet unreported); *Higgins v. Naugler* (1995), 142 N.S.R. (2d) 104 (N.S.S.C.).

2. For codes of ethics dealing with this, see Lund, B7. Also see M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 98-101; B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 27-31.

See also D.B. Perschbacher and R.R. Perschbacher, "Enter at Your Own Risk: The Initial Consultation & Conflicts of Interest." 3 *Georgetown J. Legal Ethics* (1989-90), 657-688.



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See, for example, *R. v. Silvini* (1991), 5 O.R. (3d) 545, 68 C.C.C. (3d) 251 (C.A.) [Lawyer acting on behalf of two separate defendants should have withdrawn when one decided to change pleas and a resulting conflict arose between the two defendants]. Per *Baumgartner v. Baumgartner* (1994), 113 D.L.R. (4th) 579, 92 B.C.L.R. (2d) 141 (S.C.); *vard* 122 D.L.R. (4th) 542, [1995] 5 W.W.R. 289 (C.A.), the test is the reasonably informed person in possession of the facts.

3. "Not specifically mentioned ... is the effect upon the public of permitting Mr. MacLeod to continue to act in this matter. The public would certainly view this as a case where Mr. MacLeod is attacking the provisions of a will drafted by another member of the firm to which he belongs (the public would not be familiar with the niceties of the legal relationship within the group of lawyers practicing together). I am sure the public would find this to be an incongruous situation..." *McCallum v. McCallum Estate and Montena* (1981), 47 N.S.R. (2d) 530 at 537, per McLellan Loc. J. (T.D.).

"A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as it is relevant .... What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has ..." *Spector v. Ageda*, [1971] 3 All E.R. 417 at 430, [1973] Ch. 30 at 48, per Megarry J.

In *Cornell v. Jaeger* (1968), 63 W.W.R. 747 (Man. C.A.) the non-disclosure by a solicitor of his personal interest in a property to the clear detriment of his client was held to amount to fraud.

"It is unethical for a lawyer to represent a client as counsel in a matter in which the lawyer, the lawyer's partner or person with whom the lawyer is associated has at any stage acted as a member of any tribunal dealing with such or any related matter." Legal Ethics Ruling 1992-5.

But see Legal Ethics Ruling 1994-1: "A staff lawyer working for the Nova Scotia Legal Aid Commission is not presumed to be in a conflict of interest by reason only of representing a person in dispute where a party opposite in interest in the dispute is being advised or represented by another staff lawyer working for a different Nova Scotia Legal Aid Commission office."

4. "Notwithstanding that he [the solicitor] had acted for the plaintiff and had been introduced to the defendants by the plaintiff and acted for both the plaintiff and Ridout while they were negotiating the purchase ... he divorced himself from his responsibilities ... and acted for the defendants while they acquired the property ... and, after the writ was issued ... acted for both defendants .... I refer to Bowstead on Agency 11th ed. 1951, pp. 101-2. 'It is the duty of a solicitor - ... (8) not to act for the opponent of his client, of or a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage.' *This is a principle of ethical standards which admits to no fine distinctions but should be applied in its broadest sense*, and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter." *Sinclair v. Ridout*, [1955] O.R. 167 at 182-83, [1955] 4 D.L.R. 468 at 483, per McRuer C.J.H.C. (H.C.) (emphasis added).

See W. Knepper, "Conflicts of Interest in Defending Insurance Cases", [1970] *Defence L.J.* 515 and S. Stieber, "Conflict of Interest Involving the Insurer, the Defence Lawyer and the Insured; the Common Law" (1987), 55 *Assurances* 330 at 339.

See also *Garofoli v. Kohm* (1989), 77 C.B.R. (N.S.) 84 (Man. Q.B.).

5. For a code of ethics dealing with this, see Lund, B7.



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Common "multiple client" situations where there is real danger of divergence of interest arising between clients include the defending of co-accused, the representation of co-plaintiffs in tort cases or of insureds and their insurers, the representation of classes or groups such as beneficiaries under a will or trust and construction lien and bankruptcy claimants. See for examples, Orkin, *supra*, note 1, at 100.

[Leave to appeal granted] " ... by reason of the same solicitor appearing for Robert and DePatie, and it being apparent that there was a conflict of interest between Robert and DePatie, each one blaming the other for the injuries of the children, he should not have acted for Mrs. DePatie after having acted for Robert." *R. v. DePatie*, [1971] 1 O.R. 698 at 699, 2 C.C.C. (2d) 339 at 340, per Gale C.J.O. (C.A.).

6. For codes of ethics dealing with this, see ABA-MR 2.2.

7. For a code of ethics dealing with this, see Lund, D8.

"The solicitor acting for the defendant ... drew the mortgage and advised the said defendant on the effect thereof. Later the same solicitor acting for the mortgagee bank brought action against his former client based on a claim arising out of and related to that mortgage. Solicitors should not so conduct themselves even with the knowledge and consent of all parties." *La Banque Provinciale v. Adjutor Levesque Roofing* (1968), 68 D.L.R. (2d) 340 at 345, per Limerick J.A. (N.B.C.A.).

"The appellant for many years had been the respondent's solicitor, and a quarrel ... brought about a rupture .... It was then ... that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action ... thus stirring up a litigation against the respondent." *Sheppard v. Frind*, [1941] S.C.R. 531 at 535, [1941] 4 D.L.R. 497 at 500, per Taschereau J.

"[Quoting from Bowstead on Agency] 'It is the duty of a solicitor ... not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage. An injunction will be granted to restrain a solicitor from communicating to the opponent of a former client confidential communications made to him, or documents or facts coming to his knowledge, as the solicitor of the former client; and when there is a chance of his using any such communications or knowledge to the detriment of the former client, from acting as solicitor for the opponent. In the application of this principle it is quite immaterial whether the solicitor was discharged by his former client, or ceased to act for him voluntarily....' This is a principle of ethical standards that admits of no fine distinctions but should be applied in its broadest sense, and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved in litigation over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter." *Sinclair v. Ridout*, [1965] O.R. 167 (H.C.), per McRuer C.J.H.C.

Decisions in several recent cases have focused upon the appearance of professional impropriety created in situations in which a solicitor acting against a former client might have received confidential information from that former client: *Canada Southern Railway Co. v. Kingsmill, Jennings* (1978), 8 C.P.C. 117, 4 B.L.R. 257 (Ont. H.C.); *Szebelledy v. Constitution Ins. Co. of Canada* (1985), 11 C.C.L.I. 140 (Ont. Dist. Ct.); *Fisher v. Fisher* (1986), 73 N.S.R. (2d) 181 (T.D.); *revd* (1986), 76 N.S.R. (2d) 326. But see *Aldrich v. Struk* (1986), 26 D.L.R. (4th) 352, 1 B.C.L.R. (2d) 71, [1986] 3 W.W.R. 341 (S.C.). See also *G.(D.L.) v. Wood* (1995), 125 D.L.R. (4th) 712 (N.S.C.A.); *Bay Roberts Shopping Centre Ltd. v. Dalfen's Ltd.* (1989), 78 Nfld. & P.E.I.R. 128 (Nfld. T.D.); *Barry v. Law Society (New Brunswick)* (1989), 100 N.B.R. (2d) 245 (Q.B.) ["...a party's right to counsel of their choice is an important right which would only be set aside if there was a clear indication that there would be prejudice to another party by their continuing."]; *Farm-Rite Equipment Ltd. (Receiver of) v. Robinson Alamo Sales Ltd.* (1989), 78 Sask. R. 161 (C.A.); *Brar v. Brar*, [1990] 3 W.W.R. 495 (Sask. Q.B.); *Princess Auto & Machinery Ltd. v. Winnipeg (City)* (1991), 73 Man. R. (2d) 311 (C.A.); *McCallum v. McCallum Estate* (1981), 47 N.S.R. (2d) 530; *G.*



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(*D.L.*) v. *Wood* (1995), 125 D.L.R. (4th) 712 (N.S.C.A.) ["... the court ought to be concerned not only with the actual possibility of a conflict of duty, but with the appearance of such a possibility... once it is shown that the previous relationship is sufficiently related to the retainer from which it is sought to remove the solicitor there is an inference that confidential information was imparted which could be relevant. Further, the burden on the solicitor to satisfy the court that the relevant information was not imparted is a difficult burden to discharge."]; *Widrig v. Cox Downie* (1992), 114 N.S.R. (2d) 320 (T.D.); *Manville Canada Inc. v. Ladner Downs* (1992), 88 D.L.R. (4th) 208 (B.C.S.C.).

"Counsel, having taken on a new brief for a new client, is obliged by the ethics of our profession to utilize all his skill and training together with all his knowledge accumulated from whatever source for the benefit of his client. Any information which has come to his knowledge through his contacts in the community or through his previous experience in his professional office, he must place at the disposal of his client. To do otherwise would be to make his services conditional and limited. The profession would obviously lose any credibility if the present client were not assured that their solicitor's complete store of skill and knowledge was not at their disposal." *Lasch v. Annapolis (County)* (1992), 118 N.S.R. (2d) 418 (Co. Ct.).

"A client cannot be expected to remember all of the information imparted to the solicitor, nor appreciate what may be 'confidential' in the sense of being relevant to the second matter. Where the two matters are not obviously 'sufficiently related,' the client may have an obligation to provide more specific information about the first retainer to establish the connection between the two matters. Where, however, ... the solicitor is involved in another stage of the same matter, such specific pleading is not a requirement. The matters are, clearly, 'sufficiently related' and the burden is squarely on the lawyer and cannot be discharged by a bald denial that information has been revealed." *Montreal Trust Co. of Canada v. Basinview Village Ltd. et al.* (1995), 142 N.S.R. (2d) 337 at para [22].

However, there is authority for the proposition that if the client delays in bringing action for disqualification, courts will allow the representation to go ahead: *ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH* (1994), 20 O.R. (3d) 36 (Gen. Div.); *Ramsbottom v. Morning* (1991), 48 C.P.C. (2d) 177 (Ont. Gen. Div.); *South Calgary Properties Ltd. v. J.T. Miller Construction Ltd.* (1995), 29 Alta. L.R. (3d) 393 ["Here there were delays in this suit, and numerous unsuccessful motions by the defendants to dismiss this suit, and delay in bringing the motion to disqualify. All three convince us that the prejudice and injustice of disqualifying would be far greater than any harm done by leaving the law firm in place."].

See also *Bezzeg v. Bezzeg* (1994), 153 N.B.R. (2d) 212, 33 C.P.C. (3d) 94 (Q.B.) [There is a conflict of interest when two lawyers in what appear to be one firm act for different sides of a dispute, regardless of whether the lawyers are members of a firm or not].

Nova Scotia court decisions which have dealt with the propriety of acting against a former client include the following: *Michaluk v. National Bank of Canada* (1995) 144 N.S.R. (2d) 32 (S.C.); *Hoque v. Montreal Trust Co. of Canada* (1995) 138 N.S.R. (2d) 97 (S.C.); *Card v. Card*, [1997 CanLII 2211](#), 161 N.S.R. (2d) 227, 74 A.C.W.S. (3d) 693, 477 A.P.R. 227 (S.C.); *Bedford Village Properties Ltd. v. Carnaghan*, S.C.T.D., 1 June 1991, Roscoe J., S312/18 (as yet unreported); *Re Robinson*, S.C.T.D., S.H. 81225, 7 May 1992, Nathanson J., S328/20 (as yet unreported); *U.S.W.A. v. King* (1993) 127 N.S.R. (2d) 161, 110 D.L.R. (4th) 150 (S.C.T.D.); *Mercator Enterprises Ltd. v. Mainland Investments Ltd.*, S.C.T.D., S.H. 16736, 29 May 1978, Jones J., S81/17 (as yet unreported).

See also P. Kryworuk, "Acting Against Former Clients - A Matter of Dollars and Common Sense" (1984), 45 C.P.C. 1.

See also Legal Ethics Ruling 1994-2: "It is unethical for a lawyer to represent a client as counsel in respect of the foreclosure of a mortgage where the lawyer, the lawyer's partner or anyone with whom the lawyer is associated has represented both the mortgagor and the mortgagee in respect of that mortgage."



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**8.**For clarification on the role of in-house counsel, which may be governed by Guiding Principles 10 to 13, see Commentaries 6.9 to 6.11; G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), Chapter 20, "The Corporate Counsel" and Chapter 21, "Government Lawyers"; and Smith, *supra*, note 1, Chapter 10, "The Lawyer as In-House Counsel.."

**9.**"The underlying premise ... is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith." *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 at 602, 133 D.L.R. (3d) 647, per Wilson J.A.

See also Don Murray's article in *The Nova Scotia Law News*, "A Conflict of Interest Refresher", Volume 25, No. 2, July 2000.



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### Chapter 6A – Conflicts Arising as a Result of Transfer Between Law Firms

#### Definitions

1. In this Chapter:

**"client"** includes anyone to whom a member owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

**"confidential information"** means information obtained from a client which is not generally known to the public;

**"law firm"** includes one or more members practising:

- a. in a sole proprietorship,
- b. in a partnership,
- c. in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners,
- d. as a professional law corporation,
- e. in a government, a Crown corporation or any other public body, and
- f. in a corporation or other body;

**"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;

**"member"** means a member of this Society, and includes an articled clerk.

#### Application of Rule

2. This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that:

- a. the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client"),
- b. the interests of those clients in that matter conflict, and
- c. the transferring member actually possesses relevant information respecting that matter.<sup>2</sup>

3. Subrules (4) to (7) do not apply to a member 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.

#### Firm Disqualification

4. Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless:

- a. the former client consents to the new law firm's continued representation of its client, or
- b. the new law firm establishes that:



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- i. it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including:
  - a. the adequacy of the measures taken under ii,
  - b. the extent of prejudice to any party,
  - c. the good faith of the parties,
  - d. the availability of alternative suitable counsel, and
  - e. issues affecting the national or public interest, and
- ii. it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

### Transferring lawyer disqualification

5. Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client:

- a. the member should execute an affidavit or solemn declaration to that effect, and
- b. the new law firm shall:
  - i. notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and
  - ii. deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

6. A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents:

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

7. No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4) or (5) the new law firm's representation of its client or the former law firm's representation of their former client in that matter.

### Due diligence

8. A member shall exercise due diligence in ensuring that each member and employee of the member's law firm, and each other person whose services the member has retained:

- a. complies with this Rule, and
- b. does not disclose:
  - i. confidences of clients of the firm, and
  - ii. confidences of clients of another law firm in which the person has worked.

### Commentary

#### 6A.1 Application of this Rule

##### *a. Lawyers and support staff*

This Rule is intended to regulate members of the Society and articled clerks who transfer between law firms. It also imposes a general duty on members 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 member's firm, and



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- confidences of clients of other law firms in which the person has worked.

### *b. Government employees and in-house counsel*

The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members 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.

Subrule 3, for greater certainty exempts from the Rule lawyers in the Legal Services Division of the Nova Scotia Department of Justice in respect of internal transfers and assignments between departments, boards and agencies where the lawyer continues to be a member of the Division.

### *c. Law firms with multiple offices*

The 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 interprovincial law firm and a legal aid program with many community law offices. The more autonomous that each such 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.

### *d. Practising in association*

The definition of "law firm" includes one or more members practising in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners. This recognizes the risk that lawyers practising in association, like partners in a law firm, will share client confidences while discussing their files with one another.

## **6A.2 Matters to consider when interviewing a potential transferee<sup>3</sup>**

When a law firm considers hiring a lawyer or articled clerk ("transferring member") from another law firm, the transferring member and the new law firm need to determine, before transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm which the transferring member is leaving, and with respect to clients of a firm in which the transferring member worked at some earlier time.

During the interview process, the transferring member and the new law firm need to identify, firstly, all cases in which:

- i. the new firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client,
- ii. the interests of these clients in that matter conflict, and  
the transferring member actually possesses relevant information respecting that matter.

When these three elements exist, the transferring member is personally disqualified from representing the new client, unless the former client consents.

Second, they must determine whether, with respect to each such case, the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client.

If this element exists, then the transferring member is disqualified unless the former client consents, and the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the public interest.



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In this Rule "confidential" information refers to information obtained from a client which is not generally known to the public. It 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.

In determining whether the transferring member possesses confidential information, both the transferring member and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

### **6A.3 Matters to consider before hiring a potential transferee**

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

#### *a. Where a conflict does exist*

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

- i. the new law firm obtains the former client's consent to its continued representation of its client in that matter, or
- ii. the new law firm complies with subrule (4)(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 the former client's confidential information will occur. The former client's consent must be obtained before the transferring member is hired.

The circumstances enumerated in subrule (4)(b)(i) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (B) to (D) are self-explanatory, clause (E) addresses governmental concerns respecting issues of national security, Cabinet confidences and obligations incumbent on Attorneys-General and their agents in the administration of justice.

#### *b. Where no conflict exists*

If the new law firm concludes that the transferring member actually possesses relevant information respecting a former client, but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client, then:

- a. the transferring member should execute an affidavit or solemn declaration to that effect, and
- b. the new law firm must notify its client and the former client/former law firm "of the relevant circumstances and its intended action under the Rule", and deliver to them a copy of any affidavit or solemn declaration executed by the transferring member.



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Although the Rule does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

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

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

A transferring member who possesses no such confidential information, by executing an affidavit or solemn declaration and delivering it to the former client, puts the former client on notice.

### **6A.4 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 to any member of the new law firm of the former client's confidential information will occur:

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

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

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 argue 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.

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.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client which, if disclosed to a member of the new "law firm", may prejudice the former client, the interests of the new client (ie. Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory



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screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (E).

### Guidelines

1. The screened member should have no involvement in the new law firm's representation of its client.
  2. The screened member 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 prior representation with the screened member.
  4. The current client matter should be discussed only within the limited group which 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 member any documents relating to the current representation.
  7. The measures taken by the new law firm to screen the transferring member 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. Affidavits should be provided by the appropriate firm members, 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 member, that member, should be advised:
    - a. that the screened member 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 member should not participate in the fees generated by the current client matter.
  11. The screened member's office or work station should be located away from the offices of work stations or those working on the matter.
  12. The screened member should use associates and support staff different from those working on the current client matter.
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### Notes

1. The decision of the Supreme Court of Canada in *Martin v. Gray* (1991), 77 D.L.R. (4th) 249 has led to the development by the Federation of Law Societies of Canada of a Rule dealing with conflicts arising from transfers of lawyers between law firms. All 13 governing bodies of the legal profession in Canada have agreed to adopt this Rule in their respective jurisdictions. On April 21, 1995, Council adopted the Rule as Chapter 6A of the *Handbook*. In the case of conflicts with any other provisions in the *Handbook*, those other provisions are to be modified as necessary to comply with the spirit of Chapter 6A.



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For a good review of the issues raised by *Martin v. Gray*, see J.W.E. Mingo, "*Martin v. Gray*: More Questions than Answers" (Oct. 1991) 17:6 *N.S.L.N.* 213.

2. See also Legal Ethics Ruling 1994-7: Duty to Inform Clients when a Lawyer Leaves a Law Firm:

- (1) When a lawyer departs from a law firm to practise alone or to join another firm, there is a duty upon the departing lawyer and the law firm to inform all clients for whom the departing lawyer is the responsible lawyer in an ongoing legal matter of the clients' right to choose who will continue to represent them.
- (2) The duty does not arise where the departing lawyer and the law firm, acting reasonably, both conclude that the circumstances make it obvious that a client will continue as a client of the law firm notwithstanding the departure of the lawyer.
- (3) In circumstances where this Ruling requires a notification to clients, the clients for whom the departing lawyer is the responsible lawyer in a legal matter must receive a letter informing them of this choice as soon as practicable after the date of the departure is determined.
- (4) It is preferable that this letter be sent jointly by the departing lawyer and the firm. However, in the absence of joint announcement, letters in substantially the form set out in this Ruling may be sent by either the departing lawyer or the law firm.
- (5) The right of the client to be informed and to choose his or her solicitor cannot be curtailed by any contractual or other arrangement.
- (6) With respect to communication other than that required by this Ruling, lawyers should be mindful of the common law restrictions upon uses of proprietary information, and interference with contractual and professional relations between the firm and its clients.

See P.R. Taskier and A.H. Casper, "Vicarious Disqualification of Co-Counsel Because of Taint" (1987-88), 1 *Georgetown J. Legal Ethics* 155-194; M.P. Moser, "Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm" (1989-90), 3 *Georgetown J. Legal Ethics* 399-418; M.W. Bennett, "You Can Take It With You When You Go: The Ethics of Lawyer Departure and Solicitation of Firm Clients" (1996) 10 *Georgetown J. Legal Ethics* 395-421.

3. See also *Rakusen v. Ellis, Munday & Clark*, [1912] 1 Ch. 831; *Muurmans Valkenburg B.V. v. Lemmon* (1987), 23 C.P.C. (2d) 269 (Ont. S.C.); *Brown v. Hodsell et al.* (1986), 7 C.P.C. (2d) 267 (Ont. H.C.); *Morton v. Asper* (1987), 45 D.L.R. (4th) 375, [1988] 1 W.W.R. 47 (Q.B.), affd 45 D.L.R. (4th) 374, [1988] 2 W.W.R. 317 (C.A.); *Bank of Nova Scotia v. Imperial Developments*, [1989] 3 W.W.R. 21, 58 Man. R. (2d) 100 (Q.B.); *Johnson v. Law Society of Prince Edward Island* (1990), 86 Nfld. & P.E.I.R. 352, 46 C.P.C. (2d) 140 (P.E.I.S.C.); *Dalfen's v. Bay Roberts Shopping Centre Ltd.* (1989), 78 Nfld. & P.E.I.R. 128 (Nfld. S.C.); *York Investments Ltd. v. Winnipeg (City)* (1990), 65 Man. R. (2d) 274 (sub nom. *Princess Auto & Machinery Ltd. v. Winnipeg (City)*) (Q.B.), revd 3 W.A.C. 311, 73 Man. R. (2d) 11 (C.A.); *Choukalos Woodburn McKensie Maranda Ltd. v. Smith, Lyons, Torrance, Stevenson & Mayer* (1994), 97 B.C.L.R. (2d) 122, [1995] 1 W.W.R. 3 (S.C.).

However, see also *Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419 (Ont. Gen. Div.) where it was held that the erection of a Chinese wall was undertaken too late and the firm was disqualified from acting.

"There is a broad presumption that a solicitor, as an officer of the court, may be normally expected to retain *in pectore* any confidential information which he has come by in his earlier employment. That presumption, however, must be examined in the light of, and weighed against, the facts of the instant case. If these facts, on their face, negative any suggestion or reasonable probability of any mischief whatever, then no injunction will issue. On the other hand, the court has a duty to balance the expected high standards of professional integrity against the realities of life. Where, in the opinion of the court, there exists, or may exist, or may be reasonably anticipated to



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exist a danger of a breach of confidentiality, then an injunction will issue. Strict proof of the likelihood of breach is not the standard; the standard is the perceived, or reasonably anticipated 'danger' of such a breach." *Canada v. Consortium Designers Inc.* (1988), 72 Nfld. & P.E.I.R. 255 at 257 (P.E.I.S.C., T.D.), per McQuaid, J.

4. Cf. discussion of ABA Formal Opinion 96-400, "Job Negotiations with an Adverse Firm or Party" in E.K. Thorp and K.A. Weber, "Recent Opinions from the American Bar Association Standing Committee on Ethics and Professional Responsibility" (1995-96), 9 *Georgetown J. Legal Ethics* 1009, at 1051-1058. See also ABA-MR 1.9-1.12.



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### Chapter 7 – Conflict of Interest Between Lawyer and Client

#### Rule

- (a)** A lawyer has a duty not to act for a client when the interests of the client and the personal interests of the lawyer or, to his knowledge, the interests of an associate of the lawyer, as defined by the Guiding Principles are in conflict.<sup>1</sup>
- (b)** A lawyer has a duty not to enter into or continue a business transaction with a client if
- (i) the client expects or might reasonably be assumed to expect from the circumstances, including the fact of the lawyer's participation as a business associate, that the lawyer is protecting the client's interests in the business transaction; or
  - (ii) it is reasonably obvious that an issue contentious between them may arise or that their interests will diverge as the matter progresses.
- (c)** A lawyer may enter into a business transaction with a client as long as
- (i) the lawyer does not, by doing so, violate Rule (b);
  - (ii) the transaction is a fair and reasonable one; and
  - (iii) the lawyer has the client's informed consent, preferably in writing, to the transaction.<sup>2</sup>
- (d)** For the purpose of Rule (c), a lawyer has a client's informed consent to enter into a business transaction with the client where the client consents, preferably in writing, to the transaction after the lawyer, preferably in writing, has
- (i) recommended to the client that the client seek independent legal advice respecting the transaction; and
  - (ii) fully disclosed the terms of the transaction to the client in a manner that is reasonably understood by the client.
- (e)** A lawyer has a duty not to acquire property from a client by way of gift or testamentary disposition unless the client is independently represented in the transaction or the client has independent legal advice with respect to the transaction.
- (f)** A lawyer has a duty not to prepare an instrument for a client, giving the lawyer a gift from the client, including a testamentary gift, unless the client has received independent legal advice, except where the client is a family member of the lawyer.
- (g)** A lawyer may prepare a will in which the client names the lawyer as executor or executrix provided that the lawyer has received, except where the client is a family member of the lawyer, the client's informed consent after the lawyer, in writing, has:
- (i) recommended to the client that the client seek independent legal advice respecting the transaction; and
  - (ii) fully disclosed to the client the nature of the benefits which would accrue to the lawyer as a result of the lawyer being so named, in a manner that is reasonably understood by the client.



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(h) A lawyer has a duty not to borrow money from or loan money to a client except where the borrowing or lending does not violate any regulation or ruling of the Society.<sup>3</sup>

(i) A lawyer who has a personal interest in a joint business venture with others may represent or advise the business venture in legal matters between it and third parties, but has a duty not to represent or advise either the joint business venture or the joint venturers in respect of legal matters as between them.

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### Guiding Principles

#### What is an associate?

For the purposes of this Rule, an associate of a lawyer includes

- (b) the lawyer's spouse;
- (c) the lawyer's child;
- (d) a relative of the lawyer or the lawyer's spouse where the relative resides with the lawyer;
- (e) a partner or associate of the lawyer in the practice of law;
- (f) a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity; or
- (g) a corporation of which the lawyer is a director or in which the lawyer or another person with whom the lawyer is associated or in partnership in the practice of law owns or controls directly or indirectly, more than ten per cent of the voting rights attached to all outstanding equity shares of the corporation.<sup>4</sup>

#### What is Independent Legal Advice?

For the purpose of this rule, independent legal advice means a clear explanation of the nature and effect of the transaction that the client intends to undertake by an independent and qualified lawyer knowledgeable about all relevant circumstances and who is not an associate of the referring lawyer, and is therefore able to act solely in the interests of that client.

#### What is a Family Member?

For the purpose of this Chapter, "family member" includes:

- (a) spouse, including common-law partner;
- (b) child;
- (c) sibling, including step-sibling or half sibling;
- (d) parent, including step-parent;
- (e) grandparent;
- (f) grandchild;
- (g) the following relatives of the lawyer's spouse or common-law partner:
  - (i) child of the spouse or common-law partner;
  - (ii) sibling of the spouse, including step-sibling or half sibling;
  - (iii) parent, including step-parent;
  - (iv) grandparent; or
  - (v) grandchild;

where "common-law partner" means an individual who has cohabited with the lawyer in a conjugal relationship for a period of at least two years.

### Commentary

#### A deemed client

7.1 For the purposes of this Rule, a person who is not otherwise a client of a lawyer may be deemed to be a client



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of the lawyer if the person might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the transaction. In those circumstances the lawyer shall consider the person or corporation to be a client and is bound by the same fiduciary obligations that a lawyer has in dealings with a client. The onus is on the lawyer to establish that such a person or corporation was not in fact looking to the lawyer for guidance and advice.

### **Fees do not constitute a conflicting interest**

**7.2** For the purposes of this Rule, the consideration paid, payable or negotiated for the work undertaken by the lawyer for the client shall not be deemed to give rise to a conflicting interest.

### **Inserting retainer in client's will**

**7.3** Without express instructions from the client, preferably in writing, the lawyer has a duty not to insert in the client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

### **Bail**

**7.4** The lawyer has a duty not to stand bail for an accused person for whom the lawyer or an associate of the lawyer is acting, except where there is a family relationship with the accused in which case the person should not be represented by the lawyer but may be represented by an associate.

### **Sexual Relations with Client**

**7.5** Rule 7(a) is intended to prohibit, *inter alia*, 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.<sup>5</sup> 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 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.<sup>6</sup>

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### **Notes**

1. For a code of ethics dealing with this, see Lund, A9, B6.

See on this point *Ferris v. Rusnak* (1983), 50 A.R. 297 (Q.C.). See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 27-31.

Cf. Legal Ethics Ruling 1992-5: "It is unethical for a lawyer to represent a client as counsel in a matter in which the lawyer, the lawyer's partner or person with whom the lawyer is associated has at any stage acted as a member of any tribunal dealing with such or any related matter."

See *Thompson v. Walford*, N.S.S.C. T.D., S.H. 28319, 15 June 1981, Cowan, C.J.T.D., S135/11 (as yet unreported).



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2. See also R. Maltz, "Lawyer-Client Business Transactions: Caveat Counselor" (1989-90), 3 *Georgetown J. Legal Ethics* 291-322.

See also *Re A Solicitor* (1995), 14 B.C.L.R. (3d) 100.

3. For a code of ethics dealing with this, see ABA-MR 1.8.

The practice of loaning money to clients was criticized in *Maillet v. Haliburton* (1983), 55 N.S.R. (2d) 311, 32 C.P.C. 33 (T.D.).

N.S.B.S. Regulation 4.3.1 deals with loans between solicitors and clients.

Cf. M.R. Koval, "Living Expenses, Litigation Expenses, and Lending Money to Clients" (1993-94), 7 *Georgetown J. Legal Ethics* 1117-1138.

4. For a code of ethics dealing with this, see ABA-MR 1.13.

5. See for example: *Szarfer v. Chodos* (1986), 54 O.R. (2d) 663 (H.C.); *affd* (1988), 66 O.R. (2d) 350 (C.A.).

6. S. Bradfield, "Lawyer/Client Sexual Relations" *Legal Ethics Reporter*, Issue No. 4, (November, 1994). See also L. Dubin, "Sex and the Divorce Lawyer: Is the Client off Limits?" (1987-88), 1 *Georgetown J. Legal Ethics* 585-620; Y. Levy, "Attorneys, Clients and Sex: Conflicting Interests in the California Rule" (1991-92), 5 *Georgetown J. Legal Ethics* 649-673. But see also L.F. Mischler, "Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex" (1996) 10 *Georgetown J. Legal Ethics* 209-270.



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### Chapter 8 – Outside Interests and the Practice of Law

#### Rule

The lawyer who engages in another profession, business or occupation concurrently with the practice of law has a duty not to allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.<sup>1</sup>

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#### Guiding Principles

The term "outside interest" covers the widest possible range and includes activities which may overlap or be connected with the practice of law, such as engaging in the mortgage business, family counselling, mediation and arbitration, 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 the lawyer may properly engage in the outside interest and to what extent is subject to any applicable law or regulation or ruling of the Society.<sup>2</sup>

#### Commentary

##### Application of Conflict of Interest Rule

**8.1** A lawyer has a duty not to allow his or her involvement in an outside interest to impair the exercise of the lawyer's independent professional judgment on behalf of a client.<sup>3</sup>

**8.2** Whenever a social, political, economic or other consideration or factor arises from a lawyer's outside interest which might reasonably be said to influence the lawyer's judgment, the Rule, Guiding Principles and Commentary relating to Conflict of Interest Between Lawyer and Client apply.<sup>4</sup>

##### Interference with law practice

**8.3** Where the lawyer's outside interest is not materially related to the legal services being performed for a client, ethical considerations will usually not arise unless the lawyer's conduct brings either the lawyer or the profession into disrepute<sup>5</sup>, or impairs the lawyer's competence as, for example, where the outside interest occupies so much time that the client suffers because of the lawyer's lack of attention or preparation.

##### Outside business, investment, property or occupation

**8.4** The lawyer has a duty to the client, when the lawyer is simultaneously carrying on, managing or being involved in any outside business, investment, property or occupation, to carry on such involvement in such a way that it is clear to the client in which capacity the lawyer is acting in a particular transaction.<sup>6</sup>

**8.5** The lawyer has a duty to the client not to carry on, manage or be involved in any outside business, investment, property or occupation in a way which would give rise to or reasonably appear to constitute a conflict of interest or breach of duty to a client unless the lawyer has made full disclosure of the nature of the lawyer's involvement.

**8.6** When acting or dealing in respect of a transaction involving an outside interest in a business, investment, property or occupation, the lawyer has a duty to disclose any personal interest, declare to all parties in the transaction or to their solicitors whether the lawyer is acting on the lawyer's own behalf or in a professional capacity or otherwise, and adhere throughout the transaction to standards of conduct as high as those that this *Handbook* requires of a lawyer engaged in the practice of law.



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- 8.7** The lawyer who has an outside interest in a business, investment, property or occupation has a duty to
- (a) not be identified as a lawyer when carrying on, managing or being involved in such outside interest; and
  - (b) ensure that monies received in respect of the outside interest are deposited in an account other than the lawyer's trust account, unless such monies are received by the lawyer when acting as a lawyer on behalf of the outside interest.

### Burden of Proof

**8.8** In disciplinary proceedings arising from a breach of this duty, the lawyer has the burden of showing his or her good faith and that adequate disclosure was made to the parties for whom the lawyer was acting.

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### Notes

1. This Rule is closely connected with the Rule relating to conflict of interest between lawyer and client. For codes of ethics dealing with this, see Lund, B3, D1. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), Chapter 11, "The Lawyer's Other Lives" and especially at 227-238.

2. PQ 4.01.01 lists positions which are incompatible with the practice of the profession of advocate.

Cf. M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 188-90.

3. For a discussion of "independent judgment" as it may be impaired by outside interests, see S. Weddington, "A Fresh Approach to Independent Judgment - Canon 6 of the Proposed Code of Professional Responsibility" (1969), 11 *Ariz. L.R.* 31.

4. Cf. *Handbook*, Chapter 7, below.

5. *In Re Weare*, [1893] 2 Q.B. 439, 62 L.J.Q.B. 596, 58 J.P. 6 (*sub nom. Re Solr. Exp. Incorporated Law Soc.*) 69 L.T. 522, 9 T.L.R. 595, 37 Sol. J. 671 (C.A.), the striking off of a solicitor who had knowingly rented his premises for use as a brothel was sustained by the court.

6. Further examples of outside interests that could, unless clearly disclosed and defined, confuse or mislead persons dealing with a lawyer engaging in them include professions such as accountancy and engineering; occupations such as those of merchant, land developer or speculator, building contractor, real estate, insurance or financial agent, broker, financier, property manager, or public relations adviser.



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### Chapter 9 – Protecting Clients' Property

#### Rule

A lawyer has a duty to the client to

- (a) observe all relevant laws and rules respecting the protection and safekeeping of the client's property entrusted to the lawyer; and
- (b) in cases where there are no such laws or rules or the lawyer is in doubt, to take the same care of such property as would a careful and prudent owner when dealing with property of a like description.<sup>1</sup>

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#### Guiding Principles

A lawyer's duties with respect to safekeeping, protection and accounting for a client's money and other property are generally the subject of special rules<sup>2</sup>, but in the absence of such rules, the lawyer has a duty to adhere to the minimum standard set out in Rule (b).

For the purposes of this Rule "property" includes a client's money, securities as defined in the *Securities Act (Nova Scotia)*<sup>3</sup>, original documents such as wills, title deeds, minute books, licenses, 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.<sup>4</sup>

#### Commentary

##### Notice to client

**9.1** A lawyer has a duty to notify the client upon receiving any property owned by or relating to the client unless the lawyer is satisfied that the client knows that the property has come into the lawyer's custody.<sup>5</sup>

##### Separate safekeeping of client's property

**9.2** A lawyer has a duty to clearly label and identify the client's property and place it in safekeeping separate and apart from the lawyer's own property.

##### Record of client's property

**9.3** A lawyer has a duty to maintain adequate records of a client's property in the lawyer's custody so that it may be promptly accounted for or delivered to or to the order of the client upon request.

##### Delivery of property to client

**9.4** A lawyer has a duty to ensure that a client's property is delivered to the right person. Where there is a dispute as to the person entitled to the property, the lawyer may have recourse to the courts.<sup>6</sup>

##### Confidentiality

**9.5** A lawyer has a duty to keep a client's papers and other property out of sight as well as out of reach of those not entitled to see them. This duty is closely related to those concerning confidential information.<sup>7</sup>



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### Prompt return to client

**9.6** Subject to any right of lien, a lawyer has a duty to return a client's property to the client upon request or, where appropriate, at the conclusion of the lawyer's retainer.<sup>8</sup>

### Privilege

**9.7** A lawyer has a duty to claim on behalf of a client any lawful privilege respecting information about the client's affairs, including the client's files and property where a third party seizes or attempts to seize them. To be able to meet this duty, the lawyer must be familiar with the nature of clients' privilege and the relevant constitutional and statutory provisions, such as those in the *Canadian Charter of Rights and Freedoms*, the *Criminal Code* and the *Income Tax Act*.<sup>9</sup>

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### Notes

1. Although the basic duty here declared may parallel the legal duty under the law of bailment, it is reiterated as being a matter of professional responsibility quite apart from the position in law. For codes of ethics dealing with this, see Lund A6, B9, B11; ABA-MR 1.15. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 68-71.

Cf. Hatfield v. Nova Scotia Barristers' Society (1978), 30 N.S.R. (2d) 386 (S.C.A.D.); Deveraux v. Saunders, N.S.S.C. T.D., S.H. 10548, 25 July 1977, Cowan, C.J. (unreported).

2. See *Legal Profession Act*, S.N.S. 2004, c. 28, ss. 29, 30 and Regulation 10.2.1

3. *Securities Act*, R.S.N.S. 1989, c. 418, s. 2(1).

4. See N.S.B.S. Regulation 1.1.1(aa)

5. For a code of ethics dealing with this, see ABA-MR 1.15.

6. For example, by seeking leave to interplead.

For a code of ethics dealing with this, see Lund A7, B10.

7. See *Handbook*, Chapter 5, above.

8. Cf. *Handbook*, Commentary 11.15. As to the proper disposition of papers, which is frequently a perplexing problem, see A. Cordery, *Cordery on Solicitors*, 9th ed. (London: Butterworths, 1995), §[676] at E/405 for a discussion of law and principles. See also Spencer v. Crowe and Nova Scotia Legal Aid Commission (1986), 74 N.S.R. (2d) 9 (T.D.).

The lawyer's arrangements and procedures for the storage and eventual destruction of completed files should reflect the foregoing considerations and particularly the continuing obligation to confidentiality. Further, statutes such as the *Income Tax Act* and the operation of limitations statutes pertinent to the client's position may preclude the destruction of files on particular papers. In Nova Scotia provision is made for the appointment of a receiver or custodian to conserve and/or dispose of clients' property where a lawyer has been suspended or disbarred or becomes unable to continue the practice of law. *Legal Profession Act*, S.N.S. 2004, c. 28, s. 51.



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9. See M.H. Freedman, "Solicitor-Client Privilege under the Income Tax Act" (1969), 12 *Can. B.J.* 93; V. Parsley, "Search and Seizure Checklist: What to do when the Police Arrive to Search a Law Office" (1986/87), 20 *Gazette* 291; J. Fitzpatrick et al., "Solicitor-Client Privilege - Searches of Lawyers' Offices" in *Criminal Law: Current Issues* (Vancouver: CLE Society of B.C., 1986); M. Carstairs, "Solicitor-Client Privilege - Searches of Law Offices" (1989), 47 *Advocate* 191.

See *R. v. Bastidas* (1993), 140 A.R. 294, 10 Alta. L.R. (3d) 214 (Q.B.); *R. v. Ontario (Securities Commission)* (1983), 41 O.R. (2d) 328, 146 D.L.R. (3d) 73 (Div. Ct.); *Cox v. Canada (Attorney General)* (1989), 31 B.C.L.R. (2d) 172, [1989] 3 W.W.R. 68 (S.C.); *Heath v. M.N.R.* (1990), 41 B.C.L.R. (2d) 52, [1990] 2 W.W.R. 718 (S.C.); *R. v. Leibel* (1983), 111 Sask. L.R. 107, [1993] 7 W.W.R. 407 (Q.B.), *affd* [1994] 7 W.W.R. 670 (C.A.); *Morley v. Canada (Revenue)*, [1996 CanLII 5400](#), 155 N.S.R. (2d) 47, 67 A.C.W.S. (3d) 608, 457 A.P.R. 47, 43 C.P.C. (4th) 135, 97 D.T.C. 5264 (S.C. (T.D.)).



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### Chapter 10 – The Lawyer As Advocate

#### Rule

When acting as an advocate, the lawyer has a duty to

- (a) represent the client resolutely, honourably and within the limits of the law;<sup>1</sup> and
  - (b) make every reasonable effort consistent with the legitimate interests of the client to expedite litigation.<sup>2</sup>
- 

#### Guiding Principles

1. The advocate's duty to the client is to
  - (a) ask every question, raise every issue and advance every argument, however distasteful, that the advocate reasonably thinks will help the client's case;<sup>3</sup> and
  - (b) endeavour to obtain for the client the benefit of any and every right, remedy and defence which is authorized by law.
2. Such duties are to be discharged by fair and honourable means, without illegality.<sup>4</sup>

#### Commentary

##### Consent required for abandonment of client's legal rights

**10.1** A lawyer has a duty not to waive or abandon a client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent, preferably in writing.

##### Encouraging settlements

**10.2** A lawyer has a duty to advise and encourage the client to settle a case rather than commence or continue legal proceedings where the case can be settled fairly and reasonably.<sup>5</sup>

##### Alternate Dispute Resolution

**10.2A** The lawyer should consider the appropriateness of alternate dispute resolution (ADR) to the resolution of issues in every case and, if appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.

##### Duties of defence counsel

**10.3** When defending an accused person, the lawyer has a duty to protect the client to the extent possible from being convicted except by a court of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence charged.

**10.4** Accordingly, and notwithstanding the lawyer's private opinion as to credibility or merits, but subject to the Rules and the spirit of this Handbook, the lawyer may properly rely upon all available evidence or defences including technicalities not known to be false or fraudulent.<sup>6</sup>

**10.5** Admissions made by the accused to the 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 or to the form of the indictment or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence which, by reason of the admissions, the lawyer believes to be false.



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**10.6** 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 had not done, the act.

**10.7** Such admissions also impose a limit upon 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 in the circumstances of these admissions.<sup>7</sup>

### **Plea bargaining**

**10.8** It is not improper for a defence lawyer to discuss a guilty plea with the prosecutor and where, following investigation,

- (a) the defence lawyer bona fide concludes and advises the accused client that an acquittal of the offence charged is uncertain or unlikely;
- (b) the defence lawyer bona fide believes that it is in the interests of the client to negotiate a plea with the prosecutor;
- (c) the client admits the necessary factual and mental elements;
- (d) the defence lawyer fully advises the client of the implications and possible consequences of a guilty plea, that the matter of sentence is solely in the discretion of the trial judge and that any bargain made with the Crown does not bind the court; and
- (e) the client so instructs the lawyer, preferably in writing, to agree tentatively with the prosecutor to enter a plea of guilty on behalf of the client to the offence charged or to a lesser or included offence or to another offence appropriate to the admissions and also on a disposition or sentence to be proposed to the Court.<sup>8</sup>

**10.9** A lawyer has a duty, when plea bargaining, not to compromise the public interest or the client's interest.

### **The duty to expedite litigation**

**10.10** Delays in bringing cases to court are sometimes caused by the clogging of the dockets but often by the dilatoriness of the lawyer charged with the prosecution of the case. This reflects badly on the lawyer, the profession and the administration of justice. The party who suffers is the client.<sup>9</sup>

### **Constraints on lawyers giving evidence by affidavit**

**10.11** The lawyer has a duty to respect and comply with the rules of court for affidavits and not to give evidence, in a matter in which the lawyer is involved as counsel, by affidavit except only as to merely formal or uncontroverted matters.<sup>10</sup>

### **Unilateral communications with the court**

**10.12** The lawyer has a duty not to initiate or indulge in unilateral communications with the court concerning the matter currently before the court without the consent of all other counsel involved. Delivering of pre-trial memoranda or other material to the court without contemporaneously delivering it to other counsel is deemed to be a violation of this Rule.<sup>11</sup>

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## **Notes**

1. For codes of ethics dealing with this, see ABA-MR 3.



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The consequences of the failure to respect this duty may result in criminal charges being laid against the lawyer for the wilful attempt to obstruct justice. See *R. v. Swezey* (1987), 63 Nfld. & P.E.I.R. 308 (Nfld. S.C.T.D.); *vard* (1987), 66 Nfld. & P.E.I.R. 29, 39 C.C.C. (3d) 182.

"The concept that counsel is the mouth-piece of his client and that his speech is the speech of the client is as unfortunate as it is inaccurate. He is not the agent or delegate of his client. Within proper bounds, however, counsel must be fearless and independent in the defence of his client's rights .... He must be completely selfless in standing up courageously for his client's rights, and he should never expose himself to the reproach that he has sacrificed his client's interests on the altar of expediency ..." W. Schroeder, "Some Ethical Problems in Criminal Law", [1963] *Spec. Lect. L.S.U.C.* 87 at 102.

See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 145- 146.

2. "Delay" is a complaint that occupies significant time of the Complaints Investigation Committee and hearing panels.

For cases stating the courts' disapproval of delays caused by counsel, see *Bay v. Bay* (1988), 65 Sask. R. 161, 13 R.F.L. (3d) 50 (C.A.); *Benta Contractors Limited v. Masco Construction Limited* (1980), 31 N.B.R. (2d) 389 (C.A.); *Northern Meat Packers Limited and Restigouche Abattoir Limited v. Bank of Montreal* (1984), 52 N.B.R. (2d) 196 (Q.B.); *Valley Field Construction Limited v. Argo Construction Limited* (1978) 13 C.P.C. 225 (Ont. H.C.) and the benchmark decision of *Demarco v. Ungaro* (1979), 21 O.R. (2d) 673, 95 D.L.R. (3d) 385, 8 C.C.L.T. 207 (H.C.).

3. *Rondel v. Worsley*, [1969] 1 A.C. 191 at 227, [1967] 3 All E.R. 993 at 998, per Lord Reid (H.L.).

4. " ... [H]e must be a man of character. The Court must be able to rely on the advocate's word; his word must indeed be his bond .... The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself that he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps offers greater temptations to forsake them...", from a speech by Lord Birkett on advocacy quoted in H.M. Hyde, *Norman Birkett: the Life of Lord Birkett of Ulverston* (London: Hamish Hamilton, 1964) at 551. Courtesy and respect, as used herein, include the duty to be prompt and punctual.

5. For codes of ethics dealing with this, see Lund, B2.

"[A]n important element of public policy is involved. It is in the interest of public policy to discourage suits and encourage settlements..." *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776 at 790, 117 D.L.R. (3d) 383 at 398, per Anderson J. (H.C.J.).

See also M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 95-97; Smith, *supra*, note 1, at 102-110.

6. For codes of ethics dealing with this, see ABA-MR 3.4; Lund, B5.

See *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.), per Finlayson J.

7. See Orkin, *supra*, note 5, at 115-116 and W. Boulton, *A Guide to Conduct and Etiquette At The Bar of England and Wales*, 6th ed. (London: Butterworths, 1975), at 69-72. Also commented on by W. Schroeder, *supra*, note 1, at 94-97. See also Smith, *supra*, note 1, at 173-181.



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See H.I. Subin, "The Criminal Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case" (1987-88), 1 *Georgetown J. Legal Ethics* 125-153. For a contrary point of view, see J.B. Mitchell, "Reasonable Doubts are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's 'Different Mission' " (1987-88), 1 *Georgetown J. Legal Ethics* 339-361. See in response H.I. Subin, "Is This Lie Necessary? Further Reflections on the Right to Present a False Defence" (1987-88), 1 *Georgetown J. Legal Ethics* 689-702.

8. See guidelines laid down in *R. v. Turner*, [1970] 2 All E.R. 281 at 285, [1970] 2 Q.B. 321 at 326, 54 Cr. App. R. 352 at 360 (C.A.); panel discussion "Problems in Ethics and Advocacy", [1969] *Spec. Lect. L.S.U.C.* 299-311; E. Ratushny, "Plea Bargaining and the Public" (1972), 20 *Chitty's L.J.* 238; Smith, id., at 182-186.

See *R. v. Baker* (1988), 85 N.S.R. (2d) 96 (C.A.) [Sentence overturned on appeal because accused had agreed to plead guilty in exchange for the Crown's not seeking imprisonment].

9. For a code of ethics dealing with this, see Lund, *supra*, note 6, B1. Cf. Orkin, *supra*, note 5, at 123-125.

"A client has a right to honest explanations for delay on the part of his solicitor, and it is clear that the Benchers ... concluded that the solicitor has not given an honest explanation for the delay but on the contrary had deceived his client as to the reason for such a delay." *Sandberg v. F.*, [1945] 4 D.L.R. 446 at 447, per Farris C.J.S.C. (Visitorial Tribunal of the Law Society of B.C.).

10. See K. Eaton, "Practicing Ethics: Advocates' Affidavits" (1978), 5:2 *N.S.L.N.* 1.

Recent decisions of the courts have emphasized the constraints on lawyers giving evidence by affidavit. See *Syr v. Minister of Justice* (1984) 34 Sask. R. 20 (Q.B.); *R. v. Ironchild* (1984), 30 Sask. R. 269 (C.A.); *New Brunswick Milk Dealers Assn. v. New Brunswick Marketing Board* (1984), 56 N.B.R. (2d) 413 (Q.B.); *Reading & Bates Construction Co. v. Baker Energy Resources Co. et al.* (1986), 7 F.T.R. 117 (T.D.); *Ewacheski v. Bueneke* (1985), 43 Sask. R. 206 (Q.B.).

11. "In the administration of justice, whether by a recognised [sic] legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased [sic]. To use the language of Mellor, J., in *Reg. v. Allan*, 'It is highly desirable that justice should be administered by persons who cannot be suspected of improper motive.' " *Allinson v. General Medical Council*, [1894] 1 Q.B. 750 at 758-759, per Lord Escher, M.R.



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### Chapter 11 – Withdrawal

#### Rule

A lawyer has a duty to a client not to withdraw services except for good cause and upon notice appropriate in the circumstances.<sup>1</sup>

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#### Guiding Principles

1. Although the client has a right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having once accepted professional employment, the lawyer has a duty to complete the task as ably as possible unless there is justifiable cause for terminating the relationship.<sup>2</sup>
2. The lawyer who withdraws from employment has a duty to minimize expense and avoid prejudice to the client, doing everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer.<sup>3</sup>
3. Where withdrawal is required or permitted by this Rule, the lawyer has a duty to comply with all applicable rules of court.<sup>4</sup>

#### Commentary

##### Obligatory Withdrawal

**11.1** In some circumstances the lawyer is under a duty to withdraw.

Examples of such circumstances are

- (a.) where the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such instructions;
- (b.) where the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass another person or cause injury or damage to another person or another person's property;
- (c.) where it is clear that the lawyer's continued employment will lead to a breach of these Rules such as a breach of the Rules relating to Conflict of Interest;
- (d.) where the lawyer is not competent to handle the matter.

**11.2** In these situations the lawyer has a duty to inform the client that the lawyer must withdraw.<sup>5</sup>

##### Optional Withdrawal

**11.3** As a rule, a lawyer is entitled to withdraw, although not under a positive duty to do so, only where there has been a serious loss of confidence between the lawyer and the client. Such a loss of confidence goes to the very basis of the relationship. The lawyer who is deceived by the client has justifiable cause for withdrawal.

**11.4** The refusal of a client to accept and act upon the lawyer's advice on a significant point might give rise to such a loss of confidence. The lawyer has a duty not to use the threat of withdrawal as a device to force the client into making a hasty decision on a difficult question.<sup>6</sup>



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11.5 The lawyer may also withdraw if unable to obtain instructions from the client.<sup>7</sup>

### Non-payment of fees

11.6 Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees justifies withdrawal by the lawyer unless serious prejudice to the client would result from the withdrawal.<sup>8</sup>

### Notice to client

11.7 No definitive rule can be laid down as to what constitutes reasonable notice prior to withdrawal. Sometimes notice requirements are established by statute or the rules of court.

11.8 In other situations the lawyer has a duty to protect the client's interests as far as possible and not to 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.<sup>9</sup>

### Duty following withdrawal

11.9 Upon discharge or withdrawal the lawyer has a duty to

- (a) deliver in an orderly and expeditious manner to or to the order of the client all papers and property to which the client is entitled;
- (b) give the client all information that may be required about the case or matter;
- (c) account for all funds of the client on hand or previously dealt with and refund any remuneration not earned during the employment;
- (d) promptly render an account for outstanding fees and disbursements; and
- (e) co-operate with the successor lawyer so as to minimize delay, disruption and expense in the transition.<sup>10</sup>

11.10 The obligation to deliver papers and property is subject to the lawyer's right of lien referred to in Commentary 11.13. In the event of conflicting claims to such papers and property, the lawyer has a duty to make every effort to have the claimants settle the dispute.

11.11 Co-operation with the successor lawyer in a matter normally includes providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but the lawyer has a duty not to divulge confidential information without the express consent of the client.

11.12 The lawyer who is acting for several clients in a case or matter and who ceases to act for one or more of them, has a duty to co-operate with the successor lawyer or lawyers to the extent permitted by this Handbook and has a duty to avoid any unseemly rivalry, whether real or apparent.<sup>11</sup>

### Solicitor's lien for unpaid fees

11.13 Where upon the discharge or withdrawal of the lawyer the question of a right of lien for unpaid fees and disbursements arises, the lawyer has a duty to duly regard the effect of its enforcement upon the client's position. Generally speaking, the lawyer has a duty not to enforce the lien if enforcement of the lien would materially prejudice the client's position in any uncompleted matter. A lawyer does not have a right of lien on a client's property entrusted to the lawyer in one matter with respect to unpaid fees or disbursements in another matter.<sup>12</sup>

### Duty as successor lawyer

11.14 Before accepting employment the successor lawyer has a duty to be satisfied that the former lawyer approves of the transfer of the matter or has withdrawn or has been discharged by the client. It is proper for the



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successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any account owed to the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged.

**11.15** 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.<sup>13</sup>

### Dissolution of a law firm

**11.16** Dissolution of a law firm 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 a client usually will prefer to retain the services of the lawyer whom the client understood was in charge of the client's affairs prior to the dissolution.

**11.17** However, the final decision rests in each case with the client and the lawyer who is no longer retained by the client has a duty to act in accordance with the Guiding Principles.<sup>14</sup>

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### Notes

1. For codes of ethics dealing with this, see ABA-MR 1.16; Lund, B4.

For cases see R3B Canadian Abridgement (2d) II.6 "Barristers and Solicitors: Termination of Retainer." See *Kelsie v. S. & A. Realty Ltd.* (1980), 39 N.S.R. (2d) 472 (S.C.A.D.).

See also M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 90-95; B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 41-43, 146-154, 188-192.

2. Even where the rules of practice dealing with change of solicitors are not followed, the client has a fundamental right to discharge his or her counsel, even on the opening day of trial. *Sherman v. Manley* (1978), 19 O.R. (2d) 531, 85 D.L.R. (3d) 575, 6 C.P.C. B6 (C.A.). Contrast with *Bank of Nova Scotia v. Anderson* (1982), 43 N.B.R. (2d) 137 (Q.B.) where the Court dismissed a firm's application for leave to withdraw from a trial, regardless of the fact that the client expressly authorized the withdrawal, where no application was made to withdraw the solicitors' name from the record and the solicitors did not inform the other parties' solicitors of their client's position prior to trial. Once the solicitor is on the record, he is obliged to attend and act for the defendant. If he or she cannot or will not do so, he or she must advise the defendant and get off the record: *Craftsman Floors (Alta.) Ltd. v. Horn* (1981), 20 C.P.C. 81 (Alta. M.C.).

See *R. v. C. (D.D.)* (1996), 110 C.C.C. (3d) 323, [1996] 10 W.W.R. 391, but see also *Re Leask and Cronin* (1985), 18 C.C.C. (3d), [1985] 3 W.W.R. 152 (B.C.S.C.); *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127, 36 C.P.C. (2d) 271 (C.A.).

3. For a code of ethics dealing with this, see ABA-MR 1.16.

4. For cases, see R3B Canadian Abridgement (2d) II.4 "Barristers and Solicitors: Order for Change of Solicitor."

On an application under the Ontario rules for an order that the lawyer has ceased to act, the supporting material must show the particular facts warranting the lawyer's ceasing to act: *Ely v. Rosen*, [1963] 1 O.R. 47 (H.C.). See also *Mackay v. Ross (J.D.) Construction Ltd.* (1987), 78 N.S.R. (2d) 314 (A.D.); *Sherman v. Manley*, *supra*, note 2; *Bank of Nova Scotia v. Anderson*, *supra*, note 2.



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The following is extracted from the Nova Scotia *Civil Procedure Rules*:

44.01(1) A party who sues or defends by a solicitor may change his solicitor without an order, but until notice of the change is filed with the prothonotary and served on every other party, the former solicitor shall, subject to rules 44.05 or 44.06, be considered the solicitor of the party until the conclusion of the proceeding.

44.01(2) The notice of change of solicitor may be signed on behalf of the party by the former solicitor or by the solicitor taking his place.

44.06(1) Where a solicitor, who has acted for a party in a proceeding has ceased so to act and the party has not given notice of change in accordance with rule 44.01, or notice of intention to act in person in accordance with rule 44.04, the solicitor may apply to the court for an order declaring that he has ceased to be the solicitor acting for the party, and the court or Nova Scotia Court of Appeal, as the case may be, may so order, but unless and until the solicitor files the order with the prothonotary and serves a copy of the order on every party, the solicitor shall be considered the solicitor of the party until the conclusion of the proceeding.

In *Leask v. Cronin*, [1985] 3 W.W.R. 152; 18 C.C.C. (3d) 315 (B.C.S.C.), the Supreme Court affirmed that it is a barrister, and not the Court before whom he or she is appearing, who may decide whether the barrister will withdraw from the case. The Court emphasized that counsel must not be questioned as to the reason or reasons for withdrawing, since the solicitor-client relationship precludes the disclosure of reasons.

5. For code of ethics dealing with this, see ABA-MR 1.16; Lund, B7.

"... this case where [N.R.] is held to have sworn affidavits of discovery which were false and where the solicitor ... should not have allowed them to be sworn if he had done his duty which he owed to the Court .... The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case." *Myers v. Elman*, [1940] A.C. 282 at 322, 109 L.J.K.B. 105 at 125, 162 L.T. 113 at 125, 56 T.L.R. 177 at 189, per Lord Wright (H.L.).

For a panel discussion chaired by Gale, C.J.O. on the rights and obligations of lawyers with respect to withdrawal in criminal cases, see "Problems in Ethics and Advocacy," [1969] *Spec. Lect. L.S.U.C.* 279 at 295-299.

6. "No solicitor ... need put up with abuse and accusations such as were alleged to have been made here and would be fully entitled, after them, to withdraw from the case. An accusation of fraud, in fact, would make it improper for the solicitor to continue to act for the client, since it showed that the client had lost confidence in him." *Collison v. Hurst*, [1946] O.W.N. 668 at 671, per Urquhart J. (C.A.).

7. Failure to instruct counsel constitutes repudiation which counsel could accept and terminate the employment. See *Martin v. Insurance Corp. of B.C.* (1979), 13 B.C.L.R. 163, 101 D.L.R. (3d) 70 (S.C.).

8. "An attorney is ordinarily justified in withdrawing if the client fails or refuses to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so." Proposition in *Corpus Juris Secundum* approved and applied in *Johnson v. Toronto*, [1963] 1 O.R. 627 at 628 (H.C.).

9. "If the case is scheduled to be tried on a date which will afford the accused ample time to retain another counsel, a lawyer who has not been paid the fee agreed upon may withdraw .... But if he waits until the eve of the



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trial so that there is no time for another counsel to prepare adequately ... it becomes too late for him to withdraw. He must continue on." From panel discussion, "Problems in Ethics and Advocacy," *supra*, note 5, at 295-296.

**10.** " ... [C]ounsel should be generous in accounting for any moneys which have been received but not yet earned, bearing in mind that a great deal of the time he has spent ... may be of little value to the other counsel who is required to take over." *Ibid.*, at 296.

As to the proper disposition of papers, which is frequently a perplexing problem, see A. Cordery, *Cordery on Solicitors*, 9th ed. (London: Butterworths, 1995), §[676] at E/405 for a discussion of law and principles. See, for example, *Spencer v. Crowe* (1986), 74 N.S.R. (2d) 9 (S.C.T.D.) [whether notes taken by a lawyer about conversations are part of the file to be turned over to the successor lawyer].

**11.** "It is quite apparent ... that the applicant dismissed the ... solicitor without just cause .... The common law right of a solicitor to exercise a lien on documents in his possession where he has been discharged without cause by his client is well recognized, subject, however, to certain exceptions ... where third parties are involved the Court may interfere ... always upon the basis that whereas a solicitor may assert a lien ... he should not be entitled to embarrass other parties interested in the proceedings." *Re Gladstone*, [1972] 2 O.R. 127 at 128; 7 R.F.L. 176; 125 D.L.R. (3d) 43 at 44; per McGillivray J.A. (C.A.).

**12.** See J. Morden, "A Succeeding Solicitor's Duty to Protect the Account of the Former Solicitor" (1971), 5 *Gazette* 257.

Cf. *Capital Placement of Canada v. Wilson* (1989), 95 N.S.R. (2d) 370 (S.C.T.D.).

See Regulation 10.7.1 Preserving of Rights

**13.** The successor lawyer has a duty to protect an outstanding account of the former lawyer and may properly insist that the client give proper security. *Franklin Service Co. v. City of Halifax* (1977), 20 N.S.R. (2d) 306 (T.D.).

**14.** "Subject to any question of lien, the client's papers in possession of the firm belong to the client and cannot be the subject of agreement as against him, but as between themselves solicitors can agree that on dissolution the clients of the old firm and their papers shall either be divided between the dissolving partners, or belong to those continuing the business of the firm ...." Cordery, *supra*, note 10.

For a discussion of guiding principles to be used in relation to the adequacy of security see *Re Neylan* (1986), 8 B.C.L.R. (2d) 314 (S.C.).



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### Chapter 12 – Fees

#### Rule

A lawyer has a duty to

- (a) stipulate, charge or accept only fees that are fully disclosed, fair and reasonable; and
- (b) not appropriate any funds of a client, held in trust or otherwise and under the lawyer's control, for or on account of fees, except with the authority of the client unless the regulations and rulings of the Society otherwise provide<sup>1</sup>

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#### Guiding Principles

For the purposes of this Rule, in determining whether a fee is fair and reasonable the following factors should be considered:

- (a) the time and effort required and spent;
- (b) the difficulty and importance of the matter;
- (c) whether special skill or service has been required and provided;
- (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
- (e) in civil cases, the amount involved or the value of the subject matter;
- (f) in criminal cases, the exposure and risk to the client;
- (g) the results obtained;
- (h) tariffs or scales authorized by the Society or by local governing bodies;
- (i) reasonable office overhead;
- (j) such special circumstances as loss of, or adverse effect on other work, urgency and uncertainty of reward; and
- (k) any reasonable agreement between the lawyer and the client.

If a fee cannot be justified in the light of all pertinent circumstances, including the factors described in these Guiding Principles, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, the fee will be deemed unfair and unreasonable and the circumstances may subject the lawyer to disciplinary proceedings.<sup>2</sup>

#### Commentary

##### Explanation of the basis of the fee

**12.1** A lawyer has a duty to explain to a client the basis of all fees, especially where the client is unsophisticated or uninformed about the proper basis and measurement of fees. The lawyer has a duty to give the client an early



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and fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. When something unusual or unforeseen occurs that may substantially affect the amount of the fee, the lawyer has a duty to forestall misunderstandings or disputes by explaining this to the client.<sup>3</sup>

### Hardship cases

**12.2** It is in keeping with the best traditions of the legal profession to reduce or waive a fee or arrange with a client for delayed payment of a fee in cases of hardship or impecuniosity or where a client or prospective client would otherwise effectively be deprived of legal advice or representation.<sup>4</sup>

### Interest on overdue accounts

**12.3** Save where permitted by law or by regulation or ruling of the Society, a lawyer has a duty not to charge interest on overdue accounts except by prior agreement with the client and then only at a reasonable rate.<sup>5</sup>

### Apportionment and division of fees

**12.4** A lawyer who acts for two or more clients in the same matter has a duty to apportion the fees and disbursements equitably between or among the clients in the absence of any agreement otherwise.

**12.5** A fee is not fair and reasonable within the meaning of the Rule if it is divided with another lawyer who is not an associate or any other person, unless

(a) a client consents, either expressly or impliedly, to the employment of the other lawyer; and

(b) the fee is divided in proportion to the work done and responsibility assumed.<sup>6</sup>

### Hidden fees<sup>7</sup>

**12.6** The fiduciary aspect of the relationship that exists between lawyer and client requires full disclosure of all financial matters between them and prohibits a lawyer from accepting any hidden fees.

**12.7** No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to the professional employment may be taken by a lawyer from anyone other than a client without full disclosure to and consent of the client.

**12.8** Where a lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower or a personal representative, the consent of such other person shall be required. With respect to disbursements, only bona fide specified payments to others and charges customarily made without express permission, such as photocopying, delivery charges, facsimile transmissions, long distance telephone charges, may be included. If a lawyer is financially interested in the party to whom the disbursements are made, such as an investigating, brokerage or copying agency, the lawyer shall expressly disclose this fact to the client.<sup>8</sup>

### Sharing fees with non-lawyers

**12.9** Any arrangement whereby a lawyer, other than by paying a salary or bonus, directly or indirectly shares, splits or divides fees with non-lawyers including law students and clerks who bring or refer business to the lawyer's office is improper and constitutes professional misconduct. Also, a lawyer has a duty not to give any financial or other reward to parties in consideration for referring business.<sup>9</sup>

**12.10** A lawyer has a duty not to enter into a lease or other arrangement whereby a landlord or other person directly or indirectly shares in the fees or revenues generated by the law practice.<sup>10</sup>



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### Contingent fees

**12.11** It is not improper for a lawyer to enter into an arrangement with the client for a contingency fee, provided such fee is fair and reasonable and the lawyer adheres to the rules of court and the regulations and rulings of the Society relating to such an arrangement.<sup>11</sup>

**12.12** - Repealed

### Advance fees and non-refundable retainers

**12.13** For the purposes of Commentaries **12:14 - 12:19**:

(1) a fee is an "unearned fee" until such time as the lawyer performs a legal service for the client<sup>12</sup>, and

(2) a "specific retainer" is money advanced to a lawyer on account of fees for services not yet rendered or money advanced on account of disbursements not yet made with respect to a particular matter.<sup>13</sup>

(3) an "engagement fee" is a payment to the lawyer which confers an immediate benefit on the client and includes payment to a lawyer in consideration of the lawyer's agreement to provide a legal service to the client or to make a legal service available for the benefit of the client at a future date.

**12.14** A lawyer has a duty to hold in trust for the benefit of the client an unearned fee and a specific retainer, in accordance with the regulations of the Society.<sup>14</sup>

**12.15** A lawyer has a duty not to enter into a non-refundable retainer agreement.<sup>15</sup>

**12.16** Subject to Commentary **12.17**, it is permissible for a lawyer to accept an "engagement fee" which need not be deposited into a trust account.

**12.17** An engagement fee confers an immediate benefit on a client and includes payment to a lawyer in consideration of the lawyer's agreement to provide a legal service to the client or to make a legal service available for the benefit of the client at a future date.<sup>16</sup> An engagement fee is subject to the following requirements:

(i) At all times the onus is on the lawyer to establish that the fee is a *bona fide* engagement fee, is for a reasonable amount, and otherwise conforms in all respects to this Chapter.

(ii) Prior to accepting an engagement fee, a lawyer has a duty to enter into a written agreement with the client which:

(a) specifies the amount of the engagement fee;

(b) contains an acknowledgment by the client that the engagement fee shall be earned upon receipt;

(c) details the benefit to be conferred on the client;

(d) specifies the terms of the engagement fee and, if any, the terms of renewal;



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(e) explains that if due to changed circumstances, some or all of the engagement fee becomes an unreasonable fee, then the lawyer shall promptly refund the portion that exceeds a reasonable fee or, with the consent of the client, transfer that portion to the lawyer's trust account;

(f) acknowledges that at any time, the terms of the engagement fee may be subject to taxation, and/or review at the client's request; and

(g) confirms that the client has received a copy of the written agreement.

**12.18** If, in fact, a client did not understand the nature of the engagement fee agreement and intended the payment to be an advanced unearned fee or an advanced specific retainer, the fee will be deemed to be an unearned fee or a specific retainer which must be handled in accordance with Commentary **12.14**.

**12.19** If an engagement fee agreement has elements of both an engagement fee and a specific retainer it will be deemed to be an advanced unearned fee or an advanced specific retainer. <sup>17</sup>

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### Notes

1. For codes of ethics dealing with this, see ABA-MR 1.5; ABA-MC, EC2-16, 2-17; Lund, A8, F4. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 34-39.

Cf. Legal Ethics Ruling 1992-4: "It is not unethical for a lawyer to accept a credit card in payment of an account."

See *Barrett v. Townsend*, N.S.S.C. T.D., S.H. 104680, 21 July 1994, Kelly J., S367/31 (as yet unreported). What constitutes a reasonable fee does not depend on the success of the outcome: *Toulany v. McInnes Cooper & Robertson* (1989), 90 N.S.R. (2d) 256 (S.C.T.D.).

In general, reference the *Legal Profession Act* ss. 65-71 in terms of a lawyer's account and taxation

2. For a code of ethics dealing with this, see ABA-MC, EC2-18.

The proper "factors of fairness" have been many times declared by the courts. For a compilation and discussion see, e.g., *Re Solicitors*, [1972] 3 O.R. 433 at 436, per McBride M. (S.C.), " ... I have not set down these factors in any sense in order of importance. In my view most of these eight factors should be considered in every case ... time expended is not, in most cases, the overriding factor, nor even the most important. On the other hand, there are comparatively few cases where the time factor can be completely ignored."

As to the utility of consensual local "minimum fees tariffs," see *Re Solicitors*, [1970] 1 O.R. 407 (H.C.). "Certainty is a desirable feature of any system of law. But there are some types of conduct desirably the subject-matter of legal rule which cannot be satisfactorily regulated by specific statutory enactment, but are better left to the practice of juries and other tribunals of fact. They depend finally ... on proof of the attainment of some degree. [Followed by a page of illustrations, most related to 'reasonableness.']" *Kneller (Publishing, Printing & Promotions) Ltd. v. D.P.P.*, [1972] 2 All E.R. 898 at 929, [1973] A.C. 435 at 486, 56 Cr. App. Rep. 633 at 686, per Lord Simon L.C. (H.L.).

For an interesting view of reasonable fees / billing practices, see L.G. Lerman, "Gross Profits? Questions About Lawyer Billing Practices" (1993-94), 22 *Hofstra L. Rev.* 645; S.S. Chan, "ABA Formal Opinion 93-979: Double Billing, Padding and Other Forms of Overbilling" (1995-96), 9 *Georgetown J. Legal Ethics* 611.



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See Legal Ethics Ruling 2000-1 in Note 9, Chapter 5 of this Handbook, regarding insurer's instructions to lawyers to submit accounts to a third party auditor.

3. For a code of ethics dealing with this, see Lund, F4; ABA-MC, EC2-19.

"The question of compensation for solicitors has long been the anxious concern of the Court, both in the interests of clients and their solicitors ... [M]uch legislative and judicial activity was directed to the reform and settlement of procedures for fair and reasonable fees ... . [In Ontario] there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable." *Re Solicitors*, [1972] 1 O.R. 694 at 697, per Wright J. (H.C.). "The object of a bill of costs is 'to secure a mode by which the items of which the total bill is made up should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not.'" *Millar v. R.* (1921), 51 O.L.R. 246 at 249, 67 D.L.R. 119 at 121, per Riddell J.A. (A.D.).

Cf. Legal Ethics Ruling 1994-95 respecting Maximum Fee Arrangements: "... it is not unethical for a lawyer and a client to agree to a fee arrangement where the client will be billed by the lawyer on an hourly rate or other mutually predetermined basis to a maximum fee. The maximum fee arrangement may be stated in terms of a fixed amount or a percentage of the amount received by the client in the matter. Such an arrangement is not a contingency fee arrangement..."

Lawyers are under a duty to advise clients if a fee estimate changes. See *Richard v. Shafie* (1991), 104 N.S.R. (2d) 356 (Co. Ct.). It is also advisable to ensure that the fee arrangement be in writing: *Gorin v. Flinn Merrick* (1994), 131 N.S.R. (2d) 55 (S.C.); *MacLean v. Van Duinen* (1994), 131 N.S.R. (2d) 60 (S.C.); *Chandler Moore v. Jacques*, N.S.S.C., S.H. 124840, 18 July 1997, MacAdam, J.

4. See *Twa v. R.*, [1948] 4 D.L.R. 833 at 837 (Ont. H.C.).

For codes of ethics dealing with this, see Lund C3; ABA-MC, EC2-16, 2-25.

"The oath that lawyers take when admitted to the bar compels them to work for greater justice. This does not mean that they work only for justice when they get paid, but perhaps more idealistically, that they work to create a more just society. A prerequisite to the attainment of justice is that all members of society have access to the machinery which dispenses it." Mr. Justice J.C. Major, "Lawyers' Obligation to Provide Legal Services." 33 *Alta. L.R.* (1995), 719 -729 at 721.

"The professional man does not measure out his service in proportion to reward, even if, when he can do so, he measures his honorarium by the extent of the service rendered. His best service is often rendered for no equivalent, or for a trifling equivalent, and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. ..." Roscoe Pound, "What is a Profession? The Rise of the Legal Profession in Antiquity" 19 *Notre Dame Lawyer* (March 1944), 203-206, and 208-11. See also S.G. McD. Grange, "Justice and the System" (1985), 19 *Gazette* 125 ["You cannot tailor the cloth of your labours entirely to your client's purse"].

See K.E. Kelleher, "The Availability Crisis in Legal Services: A Turning Point for the Profession" (1992-93), 6 *Georgetown J. Legal Ethics* 953-976, especially at 953-969; J.W. London, "The Impact of Pro Bono Work on Law Firm Economics" (1995-96) 9 *Georgetown J. Legal Ethics* 925; W. J. Dean, "Six Persuasive Arguments for Pro Bono" (1995-96), 9 *Georgetown J. Legal Ethics* 927; R..J. Tabak, "Integration of Pro Bono into Law Firm Practice" (1995-96) 9 *Georgetown J. Leg. Eth* 931. But see also S. Bretz, "Why Mandatory Pro Bono is a Bad Idea" (1989-90), 3 *Georgetown J. Legal Ethics* 623-642; G. Ballman, Jr., "Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?" (1993-94), 7 *Georgetown J. Legal Ethics* 1139-1170.



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5. Cf. *Solicitors Act*, R.S.O. 1990, c. S.15, s. 33, permitting a solicitor to charge interest on unpaid fees, charges, or disbursements calculated from the expiration of one month after delivery of the bill. The rate of interest "shall be shown on the bill delivered." *Solicitors Act*, R.S.O. 1990, c. S.15, s. 33(4).

6. For codes of ethics dealing with this, see Lund, F6; ABA-MR 1.5(e). The intention is not to interfere with routine agency arrangements for such services as searches or document registration in county towns or provincial capitals, etc.

Cf. J.M. Fischer, "Why Can't Lawyers Split Fees? Why Ask Why, Ask When!" (1992-93), 6 *Georgetown J. Legal Ethics* 1-44.; K. Eaton, "Practising Ethics: Fee Sharing" (May 1979), 5:5 *N.S.L.N.* 20. See also *Knock v. Owen* (1904), 35 S.C.R. 1968.

7. For codes of ethics dealing with hidden fees, see Lund A24; ABA-MC, EC2-21.

8. See particularly *Handbook*, Chapter 7, Rule and Commentary respecting Conflict of Interest between Lawyer and Client for the reasons underlying these proscriptions, and M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 154-155.

The lawyer may not profit from interest on clients' trust monies in the lawyer's hands. In Nova Scotia payment of such interest is to the Law Foundation. *Legal Profession Act*, S.N.S. 2004, c. 28, s. 30.

The general principles and fiduciary duties of the law of agency apply to the lawyer-client relationship, particularly with respect to fidelity, the obligation to account, and against secret profits. See G. Fridman, *The Law of Agency*, 4th ed. (London: Butterworths, 1976), at 31-32, 137-144, and other standard authorities on agency. It would, for example, be improper for a lawyer without express disclosure and consent to take any commission, procuration or other fee or reward from a lender, a stockbroker, a real estate or insurance agent, a trust company, a bailiff or a collection agent in consideration of the introduction by the lawyer of business from which professional work resulted to the lawyer in which the lawyer acted for or the lawyer's fees were paid by the person whose business was so introduced.

As to disbursements: "In any case where there is liability upon the part of the solicitor and there is no dishonesty, the mere fact that the amount has not been paid ought not to preclude recovery. If there should be shewn any dishonesty the case would be very different." *Re Solicitors* (1920), 47 O.L.R. 522 at 525, per Middleton J. (H.C.).

For codes of ethics dealing with this, see Lund, D5; ABA-MC, EC2-8.

9. "It is unethical for a lawyer, directly or indirectly, to compensate a third party for referring business to the lawyer." Legal Ethics Ruling 1992-7.

10. See Legal Ethics Ruling 1992-7, *ibid.*

For a code of ethics dealing with this, see ABA-MC, EC2-20.

11. See B. Arlidge, "Contingent Fees" (1974), 6 *Ottawa L.R.* 374; R. McIsaac, "The Contingent Fee" (1979), 37 *Advocate* 41; L. Minish, "The Contingent Fee: A Re-Examination" (1979), 10 *Man. L.J.* 65; C. Schultz, "When Talk Turns to Contingency Fees" (1988), 121 *C.A. Mag.* 430; S. Jay, "The Dilemmas of Attorney Contingent Fees" (1988-89), 2 *Georgetown J. Legal Ethics* 813-884; B.J. Birrell, "Contingency Fees - A Viable Alternative" (1981), 55 *Australian L.J.* 333; L.E. Busath, "The Contingency Fee: Disciplinary Rule, Ethical Consideration, or Free Competition" (1979), 3 *Utah L. Rev.* 547; R.C.A. White, "Contingency Fees: A Supplement to Legal Aid?" (1978),



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41 *Modern L. Rev.* 286; D. Lowell, "Contingent Fees" (1988-89), 2 *Georgetown J. Legal Ethics* 233; J.F. Grady, "Some Ethical Questions About Percentage Fees" (1975-76), 2 *Litigation* 20; P.H. Corboy, "Contingency Fees: The Individual's Key to the Courthouse Door" (1975-76), 2 *Litigation* 27. For a contrary view, see C. Ruby, "Want to Line a Lawyer's Pocket? Contingency Fees Can Help You" *Toronto Globe & Mail*, June 16, 1992, A-22.

See also *Thomson v. Wishart* (1910), 19 Man. R. 340, 13 W.L.R. 445, 16 C.C.C. 446 (C.A.); *Monteith v. Calladine* (1964), 47 D.L.R. (2d) 322, 49 W.W.R. 641 (B.C.C.A.); *Hogan v. Hello* (1962), 1 N.B.R. (2d) 306 (Q.B.); *Deck v. Rody*, [1977] 2 C.P.C. 348 (Sask. Q.B.); *Deans v. Armstrong* (1983), 149 D.L.R. (3d) 295 at 307 (B.C.S.C.); *Usipuiik v. Jensen, Mitchell & Co.*, [1986] 3 B.C.L.R. (2d) 283 (S.C.) per Southin J. [Cancellation of contingency agreement if insufficient steps taken to determine likelihood of success]; *Nofell v. Fan Estate* (1995), 140 N.S.R. (2d) 61 (S.C.) [The Court must approve contingency fee settlements where the action is for a person under a legal disability]; *Harnish v. Perry Rand* (S.C.), S.H. 78622, Goodfellow J., 9 August 1994, S367/16; *Commonwealth Syndicate Ltd. v. Laxton* (1990), 74 D.L.R. (4th) 260, [1991] 1 W.W.R. 315 (C.A.), leave to appeal to S.C.C. refused 79 D.L.R. (4th) vii, 135 N.R. 77n; *Kyoto v. Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259, 67 O.A.C. 297 (Div. Ct.).

Nova Scotia court decisions dealing with contingency fees include the following: *Lacelles v. Rizzetto*, N.S.S.C., S.SN. 105309, 15 January 1997, MacDonald J., S404/31 (as yet unreported) [contingency fee to affect only lump sum payment, not future payments]; *Costello (Guardian ad litem of) v. MacKenzie*, N.S.S.C., S.SN. 101470, 16 December 1996, MacDonald, S.J., S406/9 (as yet unreported) [agreement must be filed with prothonotary pursuant to *Civil Procedure Rules* 63.17-63.21]; *Oatway v. Bannister* (1988), 88 N.S.R. (2d) 373 (S.C.T.D.), affd (1989) 93 N.S.R. (2d) 134 (S.C.A.D.) [contingency fees payable only on lump sum, not on monthly payments]; *Downey v. Metropolitan Transit Commission* (1992) 110 N.S.R. (2d) 411 (S.C.T.D.); *Re A Solicitor* (1977), 22 N.S.R. (2d) 168 (S.C.T.D.)

Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia and Quebec permit regulated "contingent fees"; the remaining Canadian jurisdictions do not. See Nova Scotia *Civil Procedure Rules*, 63.17-63.22.

In certain provinces local law requires that clients be expressly advised of their right to have any contingency fee agreement or other agreement agreeing to fees in advance judicially reviewed. See NB E-2; Law Society Act, R.S.M. 1987, c. L100, s. 58(4); Alberta Supreme Court Rule 616(2)(f), *Solicitors Act*, R.S.O. 1990, c. S.15, ss. 17-19, *Legal Profession Act*, R.S.B.C. 1996, c. 255, s. 87(14).

See also Smith, *supra*, note 1, at 39-41.

See the Nova Scotia Barristers' Society "Contingency Fee Practice Advisory", Revised, March 2001

12. For codes of ethics dealing with this, see ABA-MR 1.5;

See also Lester Brickman, *Nonrefundable Retainers Revisited* (1993) 72 *North Carolina L.R.* 1.

See also Re: Sather, (May 22, 2000), Colo. Sup. Ct. 99SA72, online: (E-SLIPS) <http://www.cobar.org/coappcts/scndx.htm>. "all client funds — including engagement retainers, advance fees, flat fees, etc.--must be held in trust until there is a basis on which to conclude that the attorney 'earned' the fee; otherwise, the funds must remain in the client's trust account because they are not the attorney's property."



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**13.** *Supra*, note 1: *Re Sather*. Fees are unearned until the attorney performs legal services or otherwise confers a benefit on the client. "We hold that an attorney earns fees only by conferring a benefit on or performing a legal service for the client."

**14.** *Supra* note 1. *Re: Sather*, "In contrast to engagement retainers, a client may advance funds — often referred to as "advance fees", "special retainers", lump sum fees", or "flat fees"— to pay for specified legal services to be performed by the attorney and to cover future costs".

Such arrangements shall be reduced to writing and signed by the lawyer and client, confirming the terms. Any such agreement will be strictly construed against the lawyer upon dispute. See Rule 12 and Commentary 12.1.

See Part 10 of the Regulations dealing Trust Accounts. Subject to Regulation 10.3.6, advances must be deposited into a lawyer's trust account and dealt with in accordance with Regulations 10.2, 10.3 and 10.4.

**15.** For codes of ethics dealing with this see ABA-MR - 1.5; 1.16(d).

*Ibid.*, The Colorado Supreme Court held that attorneys are prohibited from entering into 'non-refundable' fee agreements unless the non-refundable clause of the agreement is fully communicated to the clients. A fee labelled 'non-refundable' misinforms the client about the nature of the fee; interferes with the client's basic rights in the attorney-client relationship; and discourages the client from discharging his or her attorney for fear of loss of advance fees not yet earned by the lawyer. The label of 'non-refundable' misleads the client into believing that there isn't a right to seek an entitled refund if the fees are excessive or unearned.

See also note 1. L. Brickman; *Nonrefundable Retainers Revisited*; at p. 8. "The overriding public policy supporting the prohibition against nonrefundable retainers—to protect the client's inviolate right to discharge her lawyer at any time, for any reason, without penalty."

Section 67 of the *Legal Profession Act* provides that "Notwithstanding any other enactment, a lawyer's account may be taxed by (a) an adjudicator; or (b) a judge." Section 65(a) of the *Legal Profession Act* defines "account" as "the fees, costs, charges and disbursements to be paid by a client or a party to a matter as a result of an order of a court" and section 65(b) defines "adjudicator" as "an adjudicator of the Small Claims Court of Nova Scotia."

**16.** *Supra*, note 3.

**17.** *Supra*, note 1; *Re: Sather*, "We note that unless the fee agreement expressly states that a fee is an engagement retainer and explains how the fee is earned upon receipt, we will presume that any advance fee is a deposit from which an attorney will be paid for specified legal services."



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### Chapter 13 – Duties to Other Lawyers

#### Rule

A lawyer has a duty to treat and deal with other lawyers courteously and in good faith.<sup>1</sup>

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#### Guiding Principles

The public interest requires that a matter entrusted to a lawyer be dealt with effectively and expeditiously. Fair and courteous dealing on the part of each lawyer engaged in a matter contributes materially to this end. A lawyer who does not comply with this Rule does a disservice to the client, and neglect of the Rule impairs the ability of a lawyer to perform his or her function properly.<sup>2</sup>

#### Commentary

##### Objectivity

**13.1** A lawyer has a duty not to allow any ill feeling that may exist or be engendered between clients to influence his or her conduct toward the other lawyer or that lawyer's client. 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. A lawyer has a duty not to make disparaging remarks to or about another lawyer. Haranguing or offensive tactics interfere with the orderly administration of justice and have no place in the legal system.<sup>3</sup>

##### Avoidance of Sharp Practice

**13.2** A lawyer has a duty to avoid sharp practice and not to take advantage of or act without fair warning on a slip, irregularity or a mistake on the part of another lawyer which does not go to the merits of the case or does not result in any sacrifice or prejudice of the client's rights. A lawyer has a duty not to impose on another lawyer, unless required by the transaction, impossible, impractical or manifestly unfair conditions of trust. This includes insistence upon conditions with respect to time restraints and the payment of penalty interest.<sup>4</sup>

##### Misdirected Information - Use of Opponent's Documents

**13.2A** A lawyer who has access to or comes into possession of a document which the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, has a duty to:

- (a) return the document, unread and uncopied, to the party to whom it belongs, or
- (b) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:
  - (i) of the extent to which the lawyer is aware of the contents, and
  - (ii) what use the lawyer intends to make of the content of the document.

**13.3** A lawyer has a duty to accede to a reasonable request for a trial date, an adjournment, a waiver of a procedural formality and any similar matter that does not prejudice the rights of the client. A lawyer who knows that another lawyer has been consulted in a matter has a duty not to proceed by default in the matter without enquiry and warning.<sup>5</sup>



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**13.4** A lawyer has a duty not to use a tape recorder or other device to record a conversation, whether with a client, another lawyer or anyone else, even if lawful, without first informing the other person of his or her intention to do so.<sup>6</sup>

**13.5** A lawyer has a duty to answer with reasonable promptness any professional letter or communication from another lawyer that requires an answer and has a duty to be punctual in fulfilling a commitment.<sup>7</sup>

### Undertakings

**13.6** A lawyer has a duty

- (a) not to give or request an undertaking that cannot be fulfilled;
- (b) fulfill every undertaking given;
- (c) to honour a trust condition once accepted; and
- (d) to provide a written confirmation of an undertaking in unambiguous terms.<sup>8</sup>

### Trust Conditions

**13.7** A lawyer has a duty to

- (a) to provide a written confirmation of a trust condition in unambiguous terms;
- (b) state the time within which the conditions must be met.

**13.8** A lawyer who does not intend to accept personal responsibility has a duty to make that intention clear in the undertaking. 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.<sup>9</sup>

**13.9** If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, he or she has a duty to immediately return the subject of the trust condition to the person imposing the trust condition unless the terms can be forthwith amended in writing on a mutually agreeable basis.

### Respect for another lawyer's solicitor-client relationship

**13.10** A lawyer has a duty not to communicate with or attempt to negotiate or compromise a matter with a party, including a government official or body, represented by a lawyer except through or with the consent of that lawyer.<sup>10</sup>

### Acting as Counsel

**13.11** A lawyer who is retained by another lawyer as counsel or adviser in a matter has a duty to act only as counsel or adviser and to respect the relationship between the other lawyer and his or her client.

### Acting against another lawyer

**13.12** A lawyer has a duty to avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of another lawyer, but has a duty when requested, to advise and if appropriate represent a client in a complaint involving another lawyer.<sup>11</sup>

### Lay persons

**13.13** A lawyer has a duty to comply with this Rule in his or her conduct toward a lay person lawfully representing himself or herself or another person.

### Duties to other lawyers in adversary proceedings

**13.14** In adversary proceedings the lawyer's function as an advocate is openly and necessarily partisan.



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Accordingly, the lawyer is not obliged, save as required by law or by this Handbook, to assist an adversary or advance matters derogatory to the client's case.<sup>12</sup>

**13.15** In civil matters a lawyer has a duty to avoid resorting to frivolous or vexatious pre-trial procedures, including examination for discovery objections, or attempting to gain advantage from slips or oversights not going to the real merits, or tactics which will merely delay or harass or impose expensive hardships on the other side. Such practices can readily bring the administration of justice and the profession into disrepute.<sup>13</sup>

**13.16** A lawyer has a duty to fulfill an undertaking given to another lawyer. Unless clearly qualified in writing, the lawyer's undertaking is a personal promise and responsibility.<sup>14</sup>

**13.17** A lawyer has a duty to be at all times courteous and civil to those engaged on the other side.<sup>15</sup>

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### Notes

1. For codes of ethics dealing with this, see ABA-MR 3.4. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), Chapter 9, "The Lawyer and his Colleagues," and especially at 199-202.

See also R.S. Huestis, "Fighting Words" (Feb. 1986) 12:4 *N.S.L.N.* 45.

2. " ... [B]esides the duty which an attorney owes to the court and his client, he is bound as regards the opposite party and his professional brethren, to conduct his business with fairness and propriety." *Dobie v. McFarlane* (1832), 2 U.C.Q.B. (O.S.) 285 at 323, per Macaulay J.

3. " ... it is the duty of counsel 'to try the merits of the cause and not to try each other.' " NB D-4.

A member of the Nova Scotia Barristers' Society was reprimanded in 1987 for his use of foul language to another lawyer inside and outside court. In its decision the Discipline Subcommittee stated: "The proposition that there is a difference between making such utterances in public or private is similarly flawed. The harm is perhaps much more widespread when clients and other members of the public become aware of such personal antagonisms. However, discourtesies exchanged in private conversations between solicitors can be equally harmful to effective administration of justice when personalities, rather than legal issues, become determinative of the approach adopted by counsel. It is a fundamental prerequisite to our system of law that legal adversaries go out of their way to be courteous to each other." *Re N.T.B.*, Formal Hearing Panel Decision, N.S.B.S.-D24, December 22, 1987, at 6.

But see Legal Ethics Ruling 1994-6:

(2) It is proper and appropriate for a lawyer:

- (a) to send a copy of any correspondence to the Society, by way of complaint, to the lawyer against whom the complaint is made;
- (b) to draw another lawyer's attention to the provisions of the ... Handbook;
- (c) to draw another lawyer's attention to the lawyer's intention to file a complaint.

4. "Truth and not trickery, simplicity and not duplicity, candor and not craftiness in the conduct of legal affairs ...." J. Boyd, "Legal Ethics" (1905), 4 *Can. L. Rev.* 85.

" ... [T]o build up a client's case on the slips of an opponent is not the duty of a professional man' ... 'Solicitors do not do their duty to their clients by insisting upon the strict letter of their rights. That is the sort of thing which, if



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permitted, brings the administration of justice into odium.' " *Re Arthur and Town of Meaford* (1915), 34 O.L.R. 231 at 233, per Middleton J. (Ont. H.C.). See also *Meadwell Enterprises Ltd. v. Clay & Co.* (1983), 44 B.C.L.R. 188 (S.C.).

" ... [W]e do not think that [the defendant's attorney's] conduct was marked with candor in not drawing the plaintiff's attorney's notice to such objections in the procedure as he had or intended to insist upon until the day before the opening of the court at which the trial was to be had ..." *Cushman et al. v. Reid* (1869), 20 U.C.C.P. 147 at 153, per Gwynne J.

See Notices From The Discipline Committee, No. 101, *Discipline Digest*, Issue No. 19, May 1998 [Inclinations to write sharp letters to fellow practitioners].

5. " ... the attorney, I think, is not bound to lay before his client every opportunity he may have of shutting out the other party from a hearing, nor bound to take or follow the direction of his client as to the degree of liberality which he shall observe in his practice." *Shaw v. Nickerson* (1850), 7 U.C.Q.B. 541 at 544, per Robinson C.J.

6. See also A. Maloney, "Professional Conduct" (1972), 6 *Gazette* 14; M. Koehn, "Attorneys, Participant Monitoring, and Ethics: Should Attorneys Be Able to Surreptitiously Record Their Conversations?" (1990-91), 4 *Georgetown J. Legal Ethics* 403-433.

7. "Delay, and particularly protracted delay, discredits the profession and is a disservice to the public. Delay by any other name is still delay, and protected delay is conduct unbecoming a barrister." *Re J.S.C., Formal Hearing Panel Decision*, N.S.B.S.-D26, March 3, 1988, at 4.

8. For codes of ethics dealings with this, see the Codes the CBA, the Law Society of Upper Canada, of the Law Society of Manitoba, the Law Society of New Brunswick and the Law Society of Alberta.

Also see Chapter 19, Commentary 19.4 on Supervision of employees.

Use of the words in an undertaking stating 'on behalf of my client' or 'on behalf of the vendor/purchaser' does not relieve the lawyer giving the undertaking of personal responsibility.

See the Law Society of Upper Canada, Rules of Professional Conduct, Rule and Commentary 6.03(8).

"Mr. Bagambiire has been a member of the Nova Scotia Barristers' Society for many years ... His experience should have told him, that holding an honest belief, that an undertaking could be satisfied at some future date, cannot support the giving of an undertaking. The giving of an undertaking, which you are not absolutely certain can be fulfilled, for the purpose of gaining time to allow investments to mature or financing to be arranged, is totally unacceptable...No solicitor accepting such an undertaking should expect anything less, unless clear unequivocal conditions are placed on the undertaking." *Re Bagambiire Formal Hearing Panel Decision*, N.S.B.S. – 43, November 15, 1990, at 12.

"While I share counsel for Mr. Hammond's view that caution should be exercised in implying terms in lawyers' undertakings, I am satisfied that the *Heringa* decision supports the Law Society's position that, in appropriate circumstances, such terms may be implied. In that regard, while the English practice is to start with a general prohibition against implying terms into undertakings, there are stated exceptions. The importation of reasonable time for completion...is one of those exceptions." *Hammond v. Law Society of British Columbia*, 2004 BCCA 560, at paragraph 63.



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See also B.G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book Ltd., 2002), 9-17 – 9-29 and G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline (3rd ed.)* (Toronto: Carswell, 1993, 2001) at 17-7.

See also Deborah E. Gillis, "Elevating Undertakings to the Top Floor" (Paper presented at the 2006 Real Property Conference: Crown Interests and Due Diligence Under LRA: "The Sophomore Year", 2 February 2006) [unpublished], on real estate undertakings.

9. For a code of ethics dealing with this, see Lund, A21.

10. For a code of ethics dealing with this, see Lund, D7.

"The principle was laid down long ago ... that once it appears a person has an attorney there can be no effective dealing except through him ... a lawyer 'should never in any way ... attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except through such lawyer.' " *Nelson v. Murphy et al.* (1957), 65 Man. R. 252 at 267, 9 D.L.R. (2d) 195 at 213; 22 W.W.R. 137 at 142, per Tritschler J.A. (Man. C.A.).

" ... [The lawyer should] not hold any communication of the kind that passed here, except with the Solicitor of the opposite party, and even had the defendant come to the office of then plaintiff's Solicitor, as the latter alleges, of his own accord, he should have refused to negotiate with him personally." *Bank of Montreal v. Wilson* (1867), 2 Chy. Chrs. 117 at 119, per Van Koughnet C.

See also Re T.R.C., Formal Hearing Panel Decision, N.S.B.S.-D4, November 7, 1980; *Everingham v. Ontario* (1992), 88 D.L.R. (4th) 755, 8 O.R. (3d) 121 (Div. Ct.).

See also Legal Ethics Ruling 1992-11, cited in Chapter 14, note 16, *infra*.

See K. Eaton, "Ethics and the Halifax Lawyer" (Oct. 1974) 1:2 *N.S.L.N.* 1.

For a code of ethics dealing with this, see ABA-MR 4.2; ABA Formal Opinion 95-396 "Communication with Represented Persons" (discussed in E.K. Thorp and K.A. Weber, "Recent Opinions from the American Bar Association Standing Committee on Ethics and Professional Responsibility" (1995-96) 9 *Georgetown J. Legal Ethics* 1009 at 1025-1035.

11. For codes of ethics dealing with this, see ABA EC 2-28; ABA-MR 6.2(a); Lund, C4. Also see M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 97-98; Smith, *supra*, note 1, at 201, fn. 24.

12. For codes of ethics dealing with this, see ABA-MR 3.4; Lund, A20.

Cf. Legal Ethics Ruling 1992-8: "Lawyers are encouraged to give reasonable notice of their intention to commence an action either to the defendant or the defendant's counsel. It is, however, not unethical for a lawyer to fail to give such notice."

For a view of how much the lawyer is obliged to disclose to the other side, see *Clark v. O'Brien* (1995), 148 N.S.R. (2d) 249 (C.A.). See also *Cunliffe v. Law Society of British Columbia* (1984), 11 D.L.R. (4th) 280, 13 C.C.C. (3d) 560 (B.C.C.A.).



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Cf. *Rent v. Nova Scotia Barristers' Society*, [1991] N.S.J. No. 180 (QL) "...in the course of litigation the lawyer owes no duty to the opposing party."

**13.** For a code of ethics dealing with this, see ABA-MR 3.4. See Orkin, *supra*, note 11, at 60-63 for instances of dilatory tactics held to be improper.

**14.** See Deborah E. Gillis, "Elevating Undertakings to the Top Floor" (Paper presented at the 2006 Real Property Conference: Crown Interests and Due Diligence Under LRA: "The Sophomore Year", 2 February 2006) [unpublished], on real estate undertakings, p. 8:

In closing, to minimize your risk when giving or accepting undertakings, consider the following tips:

- Seek and provide verification that an undertaking has been fulfilled
- Obtain client's written authorization to release information relating to mortgage - i.e. mortgage numbers, mortgage name and address
- Don't accept an undertaking from anyone other than a lawyer
- Don't accept an undertaking that can't be fulfilled
- Honour your undertakings scrupulously
- Follow-up on undertakings given and accepted
- Post LRA - make sure mortgage release covers parent parcel as well as other parcels if applicable
- Confirm particulars of parties names and recording references on releases before recording
- Establish what happens if undertakings are unfulfilled within a specified time period
- Diarize and time manage undertakings given and received
- Don't close a file unless all undertakings have been fulfilled

**15.** For codes of ethics dealing with this, see Lund, C1, D6.



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### Chapter 14 – Duties to the Court

#### Rule

When acting as an advocate, the lawyer has a duty to treat the court with candour, courtesy and respect.<sup>1</sup>

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#### Guiding Principles

A lawyer has a duty not to

- (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 another party;<sup>2</sup>
- (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;<sup>3</sup>
- (c) subject to Commentary 1, appear before a judge when the lawyer, the lawyer's associates or the client have business or personal relationships with such judge that give rise to real or apparent pressure, influence or favouritism affecting the impartiality of such judge or which might place the lawyer in a preferred position;<sup>4</sup>
- (d) attempt or allow anyone else to attempt, directly or indirectly, to influence the decision or actions of a court or any of its officials by any means except open persuasion as an advocate;<sup>5</sup>
- (e) knowingly attempt to deceive or participate in the deception of a court or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive or exaggerated or inflammatory affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;<sup>6</sup>
- (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;<sup>7</sup>
- (g) knowingly assert something for which there is no reasonable basis in evidence or the admissibility of which must first be established;<sup>8</sup>
- (h) deliberately refrain from informing the court of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;<sup>9</sup>
- (i) dissuade a material witness from giving evidence, or advise such a witness to be absent;<sup>10</sup>
- (j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another;
- (k) needlessly abuse, hector or harass a witness;<sup>11</sup>
- (l) needlessly inconvenience the court or a witness;
- (m) needlessly pursue trivial, irrelevant matters.<sup>12</sup>

#### Commentary

##### Disclosure to court and counsel

**14.1** The Rule contained in Guiding Principle (c) is not violated if the lawyer discloses to the judge before whom the matter is to be heard, and all other counsel, the circumstances giving rise to a possible conflict. It is the judge, not the lawyer, who is to decide if the matter should be heard by the judge.

##### Errors or omissions

**14.2** On discovering an error or omission done unknowingly that, if done knowingly would have constituted a breach of this Rule, a lawyer has a duty to the court, subject to the Rule relating to Confidentiality, to disclose the error or omission and to do all that can reasonably be done in the circumstances to rectify it.



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### **A client unsympathetic to the Rule**

**14.3** If the client wishes to adopt a course of action that would involve a breach of this Rule, the lawyer has a duty to

- (a) refuse to take the course of action;
- (b) do everything reasonable to prevent it; and
- (c) withdraw or seek leave of the court to do so, if the client persists in such a course.<sup>13</sup>

### **The lawyer as witness**<sup>14</sup>

**14.4** A lawyer who appears as an advocate in a proceeding, and every partner or associate of that lawyer in the practice of law has a duty not to submit an affidavit or testify in the proceeding, except as permitted by local rule or practice or as to purely formal or uncontroverted matters.

**14.5** A lawyer has a duty not to undertake a matter when it is probable that the lawyer or a partner or associate of the lawyer will be required to give evidence. If the engagement is accepted and the improbable occurs, the lawyer has a duty to withdraw and the matter should be entrusted to a lawyer outside of the original lawyer's firm. If this is seen to impose on the client a substantial hardship because of cost, delay or inability in locating alternative counsel, the original lawyer should bring the problem and the client's difficulty to the attention of the court and other counsel to attempt to secure a means for resolving the problem.

**14.6** A lawyer who is an advocate in a proceeding has a duty not to express, in the proceeding, personal opinions or beliefs, assert in the proceeding anything that is properly subject to legal proof, cross-examination or challenge, and not to become an unsworn witness or put his or her own credibility in issue.

**14.7** A lawyer who is a necessary witness in a proceeding has a duty to

- (a) testify; and
- (b) entrust the conduct of the case to someone else.

**14.8** There are no restrictions upon an advocate's right to cross-examine another lawyer and the lawyer who appears as a witness should not expect to receive special treatment by reason of professional status.

**14.9** A lawyer who has been a witness in a proceeding has a duty not to appear as an advocate in any appeal from a decision in the proceeding.

### **Interviewing witnesses**

**14.10** A lawyer may properly seek information from any potential witness, whether or not under subpoena, but has a duty in the course of doing so to

- (a) disclose the lawyer's interest; and
- (b) take care not to subvert or suppress any evidence or to attempt to procure a witness from giving evidence by such means, for example, the removal of the witness from the jurisdiction.<sup>15</sup>

### **Ex parte proceedings**

**14.11** When opposing interests are not represented, for example in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot obtain, the lawyer has a duty to take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.<sup>16</sup>

### **Communicating with witnesses**

**14.12** A counsel 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, from the time when the witness is called



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into the witness box until the time when the witness concludes his or her testimony under examination, cross-examination or re-examination and is dismissed from the witness box.<sup>17</sup>

### Agreements guaranteeing recovery

**14.13** In civil proceedings the lawyer has a duty not to mislead the court about the position of the client in the adversary process. Thus, where a lawyer representing a client has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery from one or more parties to the proceeding notwithstanding the judgment of the court, the lawyer has a duty to disclose full particulars of the agreement to the court and all other parties.<sup>18</sup>

### Undertakings

**14.14** A lawyer has a duty to fulfill an undertaking given to the court. <sup>19</sup>

### Scope of the Rule

**14.15** The principles of this Rule apply generally to the lawyer as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.<sup>20</sup>

Distinction between contempt and breach of ethical and professional duties

**14.16** Legal contempt of court and breach of ethical or professional duty are not identical. A consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit disciplinary action.

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### Notes

1. For codes of ethics dealing with this, see ABA-MR-3; Lund, A17, C1. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 123-132.

"Lawyers' duties to their clients require them to vary their manner as circumstances require, and at times lawyers must ask questions in a way that would rightly be regarded as discourteous on social occasions. They should abandon courtesy, however, only when and to the extent necessary to discharge their duty properly. It is improper to belittle a witness who has done nothing to deserve contempt." G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), § 4.14 at 4-38.

2. For codes of ethics dealing with this, see Lund, A19.

3. For codes of ethics dealing with this, see Lund, A15.

See also *Eastholme Realty v. Grundy*, [1954] O.W.N. 583 (C.A.); *Parry v. Parry*, [1926] 2 W.W.R. 185 (Sask. C.A.); *Waschuk v. Waschuk* (1955), 14 W.W.R. 169 (Sask. C.A.); *Stanley v. Douglas*, [1951] 4 D.L.R. 689 (S.C.C.); *R. v. Hayward* (1981), 59 C.C.C. (2d) 134 (Nfld. C.A.).

4. For codes of ethics dealing with this, see Lund, E3.

But see Legal Ethics Ruling 1996-1: "It is not unethical for a lawyer who is a Small Claims Court Adjudicator to appear before another Small Claims Court Adjudicator on behalf of a client, but in order to preclude any perception of impropriety, it is recommended that the Adjudicator acting as Counsel should publicly advise the presiding Adjudicator and all parties present of his/her status at the beginning of the matter."



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5. For codes of ethics dealing with this, see ABA-MR 3.5; Lund, A16.

In *Toronto Transit Commission v. Aqua Taxi Limited*, [1955] O.W.N. 857 (H.C.), where a sealed letter improperly attempting to influence a decision has been delivered to a judge, the Court, while exonerating the lawyers concerned, made it clear that any involvement in such conduct would be most improper.

6. Where a lawyer joined in a scheme to mislead the Court by arranging proceedings to result in an apparent acquittal which could then be used to answer prior pending proceedings for the same offence (a Justice, a constable and another lawyer being misled in the process), the Court said: "These facts ... establish a stupid, but nevertheless unworthy, attempt to pervert the course of justice, and most certainly constitute conduct unbecoming a barrister and solicitor in the pursuit of his profession." *Banks v. Hall*, [1941] 2 W.W.R. 534 at 537 (Sask. C.A.).

A lawyer counselling false evidence would be guilty of perjury if it were given (*Criminal Code*, R.S.C. 1985, c. C-34, ss. 22, 131), and of counselling if it were not (*Criminal Code*, R.S.C. 1985, c. C-34, s. 464).

It is an offence to fabricate anything with intent that it be used as evidence by any means other than perjury or incitement to perjury (*Criminal Code*, R.S.C. 1985, c. C-34, s. 137). Similarly, it is an offence wilfully to attempt in any manner to obstruct, pervert or defeat the course of justice (*Criminal Code*, R.S.C. 1985, c. C-34, s.139).

"The swearing of an untrue affidavit ... is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit .... He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon file.... A solicitor who has innocently put on the file an affidavit by his client which he had subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act ..." *Myers v. Elman*, [1940] A.C. 282 at 293; [1939] 4 All E.R. 484 at 491; 109 L.J.K.B. 105 at 110; 162 L.T. 113 at 116; 56 T.L.R. 177 at 180, per Viscount Maugham (H.L.).

"[Counsel] had full knowledge of the impropriety of the paragraphs in the affidavit ... [and] is bound to accept responsibility for [them].... If he knows that his client is making false statements under oath and does nothing to correct it his silence indicates, at the very least, a gross neglect of duty." *Re Ontario Crime Commission* (1962), 37 D.L.R. (2d) 382 at 391; [1963] 1 O.R. 391 at 400; [1963] 1 C.C.C. 117 at 127, per McLennan J.A. (C.A.).

For a code of ethics dealing with this, see Lund, A13.

See guidelines to prevent introduction of perjured evidence and correcting perjured evidence if offered in G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), at 4-36 - 4-37.

7. For codes of ethics dealing with this issue, see ABA-MR 3.3, 4.1; Lund, A14.

Cf. J.D. Piorkowski, Jr., "Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limits of 'Coaching' " (1987-88), 1 *Georgetown J. Legal Ethics* 389-410.

8. For codes of ethics dealing with this issue, see ABA-MR 3.3, 4.1.

A line of older cases held that there could be unrestricted use of groundless questions on cross-examination, but more recent cases suggest that there are limitations on suggestions that can be put to a witness during cross because of the potential weight accorded such a suggestion. See *R. v. Nealy* (1986), 30 C.C.C. (3d) 460 (Ont. C.A.); *R. v. Wilson* (1983), 5 C.C.C. (3d) 61 (B.C.C.A.). See also W.D. Delaney, "Limits on the Scope of Cross-



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Examination: Must Counsel Have a Reasonable Basis for Suggestions Put to a Witness?" (1997) 23:1 *N.S.L.N.* 189.

9. For codes of ethics dealing with this issue, see ABA-MR 3.3; Lund, A14.

See *Glebe Sugar Refining Company Ltd. v. Greenoch Port and Harbour Trustees*, 125 L.T. 578, 37 T.L.R. 436, 65 Sol. J. 551 (H.L.) for a strong statement by Lord Birkenhead on the duty of counsel to disclose to the court authorities bearing one way or the other, "The extreme impropriety of such a course [withholding a known pertinent authority] could not be made too plain." This case was quoted and approved in *Plant v. Urquhart*, [1922] 1 W.W.R. 632 at 638, 65 D.L.R. 242 at 247, per McPhillips J. (C.A.). See also *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

10. For codes of ethics dealing with this, see Lund, A18; ABA-MR 3.4.

11. See, for example *R. v. Lociacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. Bradbury* (1973), 14 C.C.C. (2d) 139 (Ont. C.A.); *R. v. Mahonin* (1957), 119 C.C.C. 319 (B.C.S.C.).

12. See, for example *Osolin v. The Queen* (1993), 86 C.C.C. (3d) 481 (S.C.C.); *Meddoui v. The Queen*, [1991] 3 S.C.R. 320; *Brownell v. Brownell*, [1907-10] 42 S.C.R. 368; *R. v. Rowbotham* (No. 5) (1977), 2 C.R. (3d) 293 (Ont. Co. Ct.); *R. v. Teneycke* (1996), 108 C.C.C. (3d) 53 (B.C.C.A.).

13. "Upon learning of fraudulent testimony participated in by his client, counsel has a duty to withdraw from the case and to advise the court and the adverse party of the fraud." NB B-8.

See also M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 127.

14. For codes of ethics dealing with this, see ABA-MR 3.7; Lund, C2.

"It is to be borne in mind that the function of counsel in any Court is that of an advocate; he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness." *Cairns v. Cairns* (1931), 26 Alta. L.R. 69 at 80, [1931] 4 D.L.R. 819 at 827, [1931] 3 W.W.R. 335 at 345, per McGillivray J.A. (C.A.).

"It is improper, in my opinion, for Counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's cause." *Boucher v. R.*, [1955] S.C.R. 16 at 26, per Locke J.

As to the impropriety of a lawyer witness later appearing as counsel, see *Imperial Oil v. Grabarchuck* (1974), 3 O.R. (2d) 783 (C.A.); *Phoenix v. Metcalfe*, [1974] 5 W.W.R. 661 (B.C.C.A.). Cf. *Essa (Township) v. Guergis et al.* (1993), 15 O.R. (3d) 573; *Harvard Investments Ltd. v. Winnipeg (City)*, [1994] 6 W.W.R. 127 (Man. Q.B.); *R. v. Hayward* (1981), 59 C.C.C. (2d) 134 (Nfld. C.A.); *Stevens v. Salt* (1995), 22 O.R. (3d) 675 (Gen. Div.).

Nova Scotia decisions dealing with counsel as witness include: *R. v. Smith* (1993), 121 N.S.R. (2d) 436 (S.C.); *Turner-Lienaux v. Nova Scotia (Attorney General)* (1992) 111 N.S.R. (2d) 351 (S.C.T.D.); *Oakfield Builders Ltd. v. LeBlanc* (1977), 25 N.S.R. (2d) 556 at 571 (S.C.T.D.), per Cowan J.



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On the (in)advisability of conducting one's own case, see *Town of Mahone Bay v. Saunders*, N.S. S.C.T.D., S.B.W. 0140, 22 July 1977, Cowan, C.J. "If a lawyer is personally involved in a matter which is the subject of litigation, he should ... abstain from personally conducting any part of the proceeding. He should retain a solicitor to act on his own behalf."

Cf. P.R. Taskier and A.H. Casper, "Vicarious Disqualification of Co-Counsel Because of 'Taint' " (1987-88), 1 *Georgetown J. Legal Ethics* 155-194.

15. For codes of ethics dealing with this, see ABA-MR 3.4; Lund, A18.

"I do not know of any rule that a defence counsel cannot interview a witness that may be called for the Crown .... The Crown, by issuing a lot of subpoenas, cannot throw a cloud over a lot of witnesses, excluding the defence from the preparation of their case." *R. v. Gibbons*, [1946] O.R. 464 at 477, (1946), 86 C.C.C. 20 at 28, per Roach J.A. (C.A.).

Cf. *R. v. Dye* (1992), C.L.R. 449 [Successful appeal from a conviction after it was disclosed that the prosecution witnesses had prepared their testimony by previously appearing in a televised version of the trial]. *R. v. Swezey* (1986), 63 Nfld. & P.E.I.R. 308 (Nfld. S.C., T.D.); *vyd* (1987) 66 Nfld. & P.E.I.R. (Nfld. C.A.) [Lawyer found guilty of counselling a witness to be forgetful and evasive on the stand; sentence reduced on appeal].

16. For a code of ethics dealing with this, see Lund, A20.

17. Commentary 15 to Rule 10 of the Rules of Professional Conduct of the Law Society of Upper Canada  
"15. The lawyer should observe the following guidelines respecting communication with witnesses giving evidence:

- (a) during examination in chief: it is not improper for the examining lawyer to discuss with the witness any matter that has not been covered in the examination up to that point;
- (b) during examination in chief by another lawyer of a witness who is unsympathetic to the lawyer's cause: the lawyer not conducting the examination in chief may properly discuss the evidence with the witness;
- (c) between completion of examination in chief and commencement of cross-examination of the lawyer's own witness: there ought to be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination in chief;
- (d) during cross-examination by an opposing lawyer: while the witness is under cross-examination the lawyer ought not to have any conversation with the witness respecting the witness's evidence or relative to any issue in the proceeding;
- (e) between completion of cross-examination and commencement of re-examination: the lawyer who is going to re-examine the witness ought not to have any discussion respecting evidence that will be dealt with on re-examination;
- (f) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause: the lawyer may properly discuss the witness's evidence with the witness;
- (g) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause: any conversations ought to be restricted in the same way as communications during examination in chief of one's own witness;
- (h) during re-examination of a witness called by an opposing lawyer: if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.



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If there is any question whether the lawyer's behaviour may be in violation of a rule of conduct or professional etiquette, it will often be appropriate to obtain the consent of the opposing lawyer and leave of the court before engaging in conversations that may be considered improper or a breach of etiquette.

However, "It is submitted with respect that in some respects [this commentary] may inhibit the discovery of truth and go beyond what was the practice in High Court." J. Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1981), at 106.

In Nova Scotia the rule has long existed that it is improper for counsel to communicate with a witness called in chief during a break or adjournment until the witness's cross-examination has concluded.

Cf. Legal Ethics Ruling 1992-11: "It is unethical for a lawyer to communicate with a witness concerning the evidence of that witness during any adjournment of the oral discovery of that witness, unless all counsel consent and then only for an expressly agreed purpose."

**18.** See *J. & M. Chartrand Realty Ltd. v. Martin* (1981), 22 C.P.C. 186 (Ont. H.C.); Smith, *supra*, note 1, at 128.

Cf. J.H. Quinn III and T.B. Weaver, "Mary Carter Agreements" (1994) 20 *Litigation* 41.

**19.** "Whether or not the word "undertaking" was used in any or all of those conversations is almost secondary. The fact remains that any officer of the Court fully understands that a request from a Court, answered in the positive and without any preconditions, should be treated as if it were an undertaking. It should not be the function of our Courts to obtain a legally binding contractual commitment or formal undertaking. Such formality would not contribute to the atmosphere of trust and confidence that must exist between bench and bar in such matters." *Nova Scotia Barristers' Society v. Richey*, [2002] L.S.D.D. No. 30 at para. 113.

**20.** For codes of ethics dealing with this, see ABA-MR 3.9.



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### **Duties to the Public**



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### Chapter 15 – Making Legal Services Available

#### Rule

Lawyers have a duty to make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means which are compatible with the integrity, independence and effectiveness of the profession.<sup>1</sup>

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#### Guiding Principles

It is essential that a person requiring legal services be able to find, with a minimum of difficulty and delay, a lawyer who is qualified to provide such services. It is therefore important that the members of the legal profession make known the availability of legal services to the public to assist each member of the public in finding a lawyer who is competent to deal with his or her particular problem.<sup>2</sup>

#### Commentary

##### Assisting individuals in finding a lawyer

**15.1** The individual lawyer who is consulted by a prospective client has a duty to assist the person in finding a lawyer willing and able to deal with the problem. If unable to act, for example, because of lack of qualification in the particular field, the lawyer has a duty to assist the client in finding a practitioner who is qualified and able to act. Such assistance should be given willingly and, except in very special circumstances, without charge.<sup>3</sup>

**15.2** A lawyer who is already engaged to represent a person in a matter and who is asked by another person to assist that other person in finding a lawyer to represent that person in the matter has a duty not to refer that person to another lawyer where the lawyer has reason to believe that the other lawyer is not competent to represent that person in the matter.

**15.3** The lawyer may also assist in making legal services available by participating in legal aid plans, prepaid legal services plans and referral services, by engaging in programs of public information, education or advice concerning legal matters, and by being considerate of those who seek advice but are inexperienced in legal matters or who cannot explain their problems.<sup>4</sup>

**15.4** The lawyer has a general right to decline particular employment (except when assigned as counsel by a court) but it is a right the lawyer should be slow to exercise if the probable result would be to make it very difficult for a person to obtain legal advice or representation. Generally speaking, the lawyer should not exercise this right merely because the 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. As stated in the above paragraphs, the lawyer who declines employment has a duty to assist the person to obtain the services of another lawyer competent in the particular field and able to act.<sup>5</sup>

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#### Notes

1. For codes of ethics dealing with this, see ABA-MR 7; ABA-MR 1.16; Lund, at 30. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 82-85.

2. The Nova Scotia Barristers' Society permits members to advertise areas of practice. Regulations 7.6.1 and 7.6.8.



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Cf. K.E. Kelleher, "The Availability Crisis in Legal Services: A Turning Point for the Profession" (1992-93), 6 *Georgetown J. Legal Ethics* 953-976.

3. For codes of ethics dealing with this, see ABA-MR 7, 16.

4. E.g., the Lawyer Referral Service operated by the Public Legal Education Society of Nova Scotia. In regard to prepaid legal services, note that in Ontario litigation between the United Auto Workers and the Law Society of Upper Canada over the legality of the Law Society's guidelines and the validity of the UAW's plan was settled in accordance with the Law Society's five guidelines which would ensure that participants are preserved the right to choose counsel of their choice. (Noted by K.Hamilton, *Recent Court Decisions Affecting the Governing of the Legal Profession in Canada* (August 17, 1989), p. 48.)

5. For codes of ethics dealing with this, see NB C-4. See also M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 87-88; Smith, *supra*, note 1, at 18.

See Legal Ethics Ruling 1995-1: "It is not unethical for a lawyer to refuse to represent a person unfit to stand trial and who by reason thereof cannot provide instructions. Where a Court or an Administrative Tribunal directs counsel to represent such a person, it may be appropriate for a guardian to be appointed to give instructions."

"A lawyer has a duty not to refuse to act on the basis of unpopularity of the client or the cause, or the personal opinion of the lawyer. This central principle is closely allied with the principle that lawyers do not express their own opinions, but make submissions on behalf of their clients." G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), § 4.2 at 4-3.

"... lawyers need not endorse their clients' positions, and should not be identified with their clients or their clients' beliefs; they need only believe that the truth is more likely to be revealed, and mistakes and prejudices to be avoided, if the issues in the case are rationally debated by the presentation of divergent points of view." G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), §4.2 at 4-4. See also Commentary 14.6, above.

See also W.B. Wendel, "Lawyers and Butlers: The Remains of Amoral Ethics" (1995-96), 9 *Georgetown J. Legal Ethics* 161.



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### Chapter 16 – The Lawyer in Public Office

#### Rule

A lawyer who holds public office has a duty, in the proper discharge of that office, to adhere to standards of conduct as high as those which this Handbook requires of a lawyer engaged in the practice of law.<sup>1</sup>

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#### Guiding Principles

For the purposes of this Rule a lawyer is in public office where the lawyer holds any legislative or administrative office at any level of government whether or not such office was attained because of professional qualification.<sup>2</sup>

#### Commentary

##### Rationale for the Rule

**16.1** A lawyer in public office is in the public eye. The legal profession can be brought readily into disrepute by failure on the part of a lawyer in public office to observe professional standards of conduct.

##### Conflict of interest

**16.2** A lawyer in public office has a duty not to allow personal or other interests to conflict with the proper discharge of official duties.

**16.3** The lawyer holding part-time public office has a duty not to accept any private legal business where the duty to the client will or may conflict with the duties of that office. If some unforeseen conflict arises, the lawyer has a duty to terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this type of conflict but has a duty to guard against allowing the lawyer's independent judgment in the discharge of official duties to be influenced by the lawyer's own interests or by the interests of persons closely related to or associated with the lawyer or of former or prospective clients or of former or prospective associates within the meaning of Commentary 16.4.<sup>3</sup>

**16.4** For the purposes of the preceding paragraph, a person closely related to or associated with a lawyer include a spouse, child, or any relative of the lawyer (or the lawyer's spouse) living under the same roof, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as trustee or in a similar capacity, a corporation of which the lawyer is a director or in which the lawyer or some closely related or associated person owns or controls, directly or indirectly, more than ten percent of the voting rights attached to all outstanding equity shares of the corporation and a partnership or partners, associates or employees thereof of which the lawyer is a member.<sup>4</sup>

**16.5** Subject to any special rules applicable to a particular public office, the lawyer holding public office who sees the possibility of a conflict of interest has a duty to declare such interest at the earliest opportunity and take no part in any consideration, discussion or vote with respect to the matter in question.<sup>5</sup>

##### Appearances before official bodies

**16.6** Where the lawyer or any of the lawyer's associates is a member of an official body such as, for example, a school board or municipal council, the lawyer has a duty not to appear professionally before that body. However, subject to the rules of the official body, it is not improper for the lawyer to appear professionally before a committee of any such body if such associate is not a member of that committee.<sup>6</sup>



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**16.7** A lawyer has a duty not to represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity. Similarly, the lawyer has a duty not to advise upon a ruling of an official body of which the lawyer either is a member or was a member at the time the ruling was made.<sup>7</sup>

### **Disclosure of confidential information**

**16.8** A lawyer who has acquired confidential information by virtue of holding public office has a duty to keep such information confidential and not divulge or use it even though the lawyer has ceased to hold such office.<sup>8</sup>

### **Disciplinary action**

**16.9** Conduct of a lawyer in public office which reflects adversely on the lawyer's integrity or professional competence may subject the lawyer to disciplinary action.<sup>9</sup>

### **Duty after leaving public employment**

**16.10** After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving, because to do so would give the appearance of impropriety even if none existed. However it is not improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority by which the lawyer had formerly been employed.

### **Retired judges**

**16.11** A judge who returns to practice after retiring or resigning from the bench should not without the approval of the Society appear as a lawyer before the court of which the former judge was a member or before courts of inferior jurisdiction thereto in the province where the judge exercised judicial functions. If in a given case the former judge should be in a preferred position by reason of having held judicial office the administration of justice would suffer; if the reverse were true, the client might suffer. There may, however, be cases where the Society would consider that no preference or appearance of preference would result, for example, where the judge resigned for good reason after only a very short time on the bench. In this paragraph "judge" refers to one who was appointed as such under provincial legislation or section 96 of the *Constitution Act*, 1987 and "courts" include administrative boards and tribunals.

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### **Notes**

**1.**For codes of ethics dealing with this, see ABA-MR 1.11; Lund, E3. See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 238-239.

**2.**Common examples include Senators; Members of the House of Commons; members of provincial legislatures; cabinet ministers; municipal councillors; school trustees; members and officials of boards, commissions, tribunals and departments; commissioners of inquiry; arbitrators and mediators; Crown prosecutors and many others. For a general discussion, see E. Goodman, "The Lawyer in Public Life," [1971] *Pitblado Lectures* 129.

**3.**Cf. generally *Handbook*, Chapter 7, above, Rule relating to Conflict of Interest Between Lawyer and Client.

"When a lawyer is elected to ... public office of any kind, or holds any public employment ... his duty as the holder of such office or employment requires him to represent the public with undivided fidelity. His obligation as a lawyer ... continues; ... it is improper for him to act professionally for any person ... [who] is actively or specially interested in the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment." Canon 49 of the Illinois State Bar Association and of the Chicago Bar Association as reproduced in G. Brand, *Bar Associations, Attorneys and Judges: Organization, Ethics, Discipline* (Chicago: American Judicature Society, 1956), at 179.



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4. Both human and financial relationships are envisaged.

5. See *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299. See also *House of Assembly Act*, R.S.N.S. (1992 Supp.), c. 1.

6. "It is unethical for a barrister, his partner or anyone with whom he is associated, to represent a client as counsel in a matter in which he, any partner or person with whom he is associated, has at any stage acted as a member of any tribunal dealing with such of any related matter." Legal Ethics Ruling 1992-5.

For a code of ethics dealing with this, see ON Rule 18. Note 2 of the Ontario ruling makes specific mention in the footnote of municipal councillors. Local authorities have increasingly been concerned with zoning, planning and development matters in which lawyers frequently act professionally.

7. "... a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation." ABA-MR 1.12(a).

8. Statutory oaths of office commonly impose obligations of "official secrecy."

9. In *Barreau de Montreal v. Claude Wagner*, [1968] B.R. 235 (Q.B.), it was held that the respondent, then provincial Minister of Justice, was not subject to the disciplinary jurisdiction of the Bar in respect of a public speech in which he had criticized the conduct of a judge, because he was then exercising his official or Crown functions. In *Gagnon v. Barreau de Montreal*, [1959] B.R. 92 (Q.B.) it was held that on the application for readmission to practice by a former judge his conduct while in office might properly be considered by the admissions authorities.

P.G.M., a member of the Nova Scotia Barristers' Society, was disbarred in 1988 for having submitted for reimbursement expense accounts beyond expenses actually incurred, while holding office as an MLA, for which conduct he had been charged with, tried and found guilty of uttering forgery and fraud. In its reasons for judgement Discipline Subcommittee "A" of the Society stated:

"It is an irony of our times that lawyers in the abstract sense are frequently the subject of low public esteem, while individually held in high esteem by their own clients. Where possible, this Discipline Subcommittee must ensure its responses unequivocally demonstrate to both client and lawyer alike that the strict standards of honesty and integrity which have traditionally characterized lawyers in Nova Scotia remain unchanged. To permit a lawyer to remain a member of our profession when he has knowingly forged the signature of another, and as an elected official fraudulently deprived the Crown of its monies, would be to invite renewed public distrust and outcry." Re P.G.M., Formal Hearing Panel Decision, N.S.B.S.-D27, March 21, 1988, at 8.



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### Chapter 17 – The Lawyer as Prosecutor

#### Rule

When acting as a prosecutor, the lawyer has a duty to

- (a) act, in the exercise of any prosecutorial function including the exercise of prosecutorial discretion, fairly and dispassionately;<sup>1</sup>
- (b) act in the spirit of the decision of Mr. Justice Rand in *Boucher v. R.*, which is to say to seek justice, not merely to strive to obtain a conviction and to present to the court in a firm and fair manner evidence that the lawyer considers to be credible and relevant;<sup>2</sup>
- (c) not prevent or impede one charged with an offence or in peril of such a charge from being represented by counsel or from communicating at reasonable times with counsel; and
- (d) disclose to defence counsel or to the party charged, if unrepresented, in a full, fair and timely fashion, before, during and after a trial, as circumstances may dictate, all such matters as are required to be disclosed in accordance with the policies and standards of Crown disclosure determined, from time to time, by law or by directive of the Attorney General, whether such disclosures may tend to show guilt or innocence or would affect punishment.<sup>3</sup>

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#### Guiding Principles

1. For the purposes of this Chapter, "prosecutorial discretion" includes the power to conduct a prosecution, the power to proceed with multiple offences, the power to make submissions with respect to detention in custody, the power to negotiate a plea, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to appeal and the power to withdraw charges.<sup>4</sup>

2. Lawyers acting as prosecutors customarily possess and exercise discretionary powers quite unlike other lawyers. Crown Attorneys draw their powers from the Attorney General for whom they act as agent and to whom they are accountable. They are accountable for their professional conduct also to the Society which is the institution in Nova Scotia charged with the responsibility for the formulation, promulgation and enforcement of standards of conduct for its members. The Society, however, when considering the conduct of its member lawyers who act as prosecutors, must at all times be mindful of the public policy, legal and constitutional considerations that gravitate in favour of permitting prosecutors to function independently.<sup>5</sup> The Society is to understand the difference between taking to task professional misconduct or conduct unbecoming lawyers who practise as Crown Attorneys on the one hand and interference with the exercise of prosecutorial discretion to the detriment of the administration of justice on the other and to operate only within the realm of the former.<sup>6</sup>

In relation to the Crown Attorneys, Society disciplinary investigation or review is to be restricted to those complaints showing conduct amounting to a manifestly deliberate and improper use of the office of the Crown Attorney.

#### Commentary

##### Duty not to make unilateral representations

17.1 Except as required or permitted by law, the court or accepted practice, the prosecutor has a duty not to initiate or indulge in unilateral communications with the court concerning the matter currently before the court without the consent of all other counsel involved or the accused, if unrepresented. Delivery of pre-trial memoranda or other material to the court without contemporaneously making reasonable efforts to forward it to other counsel or the accused, if unrepresented, is a violation of this duty.



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### **Plea bargaining**

**17.2** A prosecutor has a duty not to negotiate and recommend a plea agreement if the defence, by such agreement, is obliged to plead guilty to an offence or charge not reasonably supported by the facts.

### **Applicability of other Rules in the Handbook**

**17.3** The other Rules and provisions in the Handbook apply, *mutatis mutandis*, to lawyers acting as prosecutors.

### **Applicability of duties to prosecutors other than Crown Attorneys**

**17.4** The duties in this Chapter and in the Handbook 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 and 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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### **Notes**

1. The Report of the Royal Commission on the Donald Marshall, Jr. Prosecution, Volume I, page 238 states, on this subject, as follows:

#### 25.12 Prosecutorial discretion in the conduct of trials

Once the Crown has determined that a prosecution will proceed, the adversarial aspects of the criminal justice system are evident. The accused is normally represented by defence counsel, the Crown's case is presented by the prosecutor and the trial is conducted before an independent judge with or without a jury.

While the courtroom setting is adversarial, the Crown prosecutor must make sure the criminal justice system itself functions in a manner that is scrupulously fair. The phrase 'criminal convictions system' is not a mistake of history - we do not have a 'criminal convictions system'. Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The Crown prosecutor as the representative of the State is responsible for seeing that the State's system of law enforcement works fairly.

See also *R. v. R.(A.J.)* (1994), 20 O.R. (3d) 405 (C.A.) [Duty not to act belligerently towards people such as other counsel, parties, and witnesses].

2. "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." *Boucher v. R.*, [1955] S.C.R. 16 at 23, 20 C.R. 1 at 8, 110 C.C.C. 263 at 270, per Rand J.

See also K. Bresler, "I Never Lost a Trial': When Prosecutors Keep Score of Criminal Convictions" (1995-96), 9 *Georgetown J. Legal Ethics* 537.

3. See, for example, *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 re: the duty of prosecutors to disclose all evidence that might affect the accused (in terms of guilt, innocence, punishment).



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However, see G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993), at 2-6: "...Canadian rules of professional conduct are silent on the subject of a lawyer's duty to disclose relevant documents in civil litigation, and discipline proceedings are rarely initiated as a result of lawyers' failure to disclose."

4. See *Nelles v. Ontario* (1989), 98 N.R. 321, per Lamer J. (S.C.C.), particularly the paragraphs under the entitlement "The Role of the Attorney General and Crown Attorney."

5. For a discussion of public policy considerations of Crown Attorneys in the context of immunity from and exposure to the tort of malicious prosecution, see the paragraphs of Mr. Justice Lamer's decision in *Nelles*, *supra*, note 3, under the entitlement "Policy Considerations."

6. For a case in which a law society was found to have overreached itself and exceeded reasonable limits in its instigation of disciplinary proceedings against a Crown Attorney in the course of such prosecutor's exercise of prosecutorial discretion, see *Hoem v. Law Society of British Columbia* (1985), 63 B.C.L.R. 36, 20 D.L.R. (4th) 433, [1985] 5 W.W.R. 1, 20 C.C.C. (3d) 239, (B.C.C.A.). See also, however, *Cunliffe v. Law Society of British Columbia*, [1984] 4 W.W.R. 451; 40 C.R. (3d) 67 (B.C.C.A.), in which the court upheld the citing by the Law Society of British Columbia of a Crown Attorney (Bledsoe) for conduct unbecoming a barrister and professional misconduct for not informing the defence of particulars of witnesses whose evidence was crucial to the accused's defence.



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# LEGAL ETHICS HANDBOOK

## Duties to the Profession



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### Chapter 18 – Duties to the Profession Generally

#### Rule

A lawyer has a duty to uphold the integrity of the profession and to promote the reputation of the profession for fairness, justice and honesty.<sup>1</sup>

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#### Guiding Principles

Public confidence in the profession requires that lawyers respect and zealously guard those values and principles and modes of conduct and behaviour that promote the ideals set forth in this Handbook. Conduct by a lawyer which does not promote the ideals of fairness, justice and honesty will adversely affect the image and morale of the profession and the public perception of the legal system.<sup>2</sup>

#### Commentary

##### Duty to report

**18.1** A lawyer has a duty to report to the Society<sup>3</sup>, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- (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,
- (d) the incapacity of a lawyer,
- (e) conduct that raises a substantial question as to the lawyer's integrity, trustworthiness, or competency as a lawyer, and
- (f) any other situation where a lawyer's clients are likely to be significantly prejudiced.

**18.2** Subject to the Discussion below, the duty to report in 18.1 does not apply to those members providing confidential support services through professional support groups, such as the Lawyers' Assistance Program and the Risk and Practice Management Program.

**18.3** 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 traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental or family disturbances, substance abuse or addictions. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible, for example, through the confidential Nova Scotia Lawyers' Assistance Program.



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The Society supports professional support groups in their commitment to the provision of confidential counseling. Therefore, lawyers providing peer support for professional support groups will not be called upon 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 which involves theft of client trust funds or causing serious harm to others. The Society's duty to protect the public in this regard must take priority in these circumstances regardless of a lawyer's attempts at rehabilitation.

### **Obligations with respect to misappropriated funds**

**18.4** Notwithstanding a client's instructions, a lawyer has the duty not to attempt to recover from another lawyer funds allegedly misappropriated by that other lawyer without full disclosure to the Society.

### **Duty of prompt reply**

**18.5** A lawyer has a duty to reply promptly to any communication from the Society, particularly where such communication relates to a possible breach of this Handbook.<sup>4</sup>

### **Participation in professional activities**

**18.6** In order that the profession may discharge its public responsibility of providing independent and competent legal services and to maintain the system of justice in Nova Scotia at the highest possible level, a lawyer has a duty to do everything possible to assist the profession and the national, provincial and local governing bodies of the profession to function properly and effectively.

**18.7** In this regard, participation in such activities as law reform, continuing legal education, panel discussions, legal aid programs, law school involvement, community legal services, professional conduct and discipline committee work, liaison with other professionals and other activities of the Society or local or national associations, although time consuming and without tangible reward, is essential to the maintenance of a strong and independent profession worthy of public esteem.<sup>5</sup>

### **Duty to meet financial obligations**

**18.8** The lawyer has a duty, quite apart from any legal liability, to meet financial obligations incurred in the course of practice, such as agency accounts, obligations to members of the profession and fees or charges of witnesses, sheriffs, special examiners, registrars, reporters and public officials. Where the lawyer incurs an obligation on behalf of a client that the lawyer is not prepared to pay personally, the lawyer has a duty to make his or her position clear in writing at the time the obligation is incurred.<sup>6</sup>

### **Outside interests**

**18.9** A lawyer has a duty to the profession not to become involved in a dishonourable business, investment, property or occupation.<sup>7</sup>

### **Human dignity**

**18.10** A lawyer has a duty to uphold human dignity in the conduct of the lawyer's professional practice. This duty embodies the duty to respect and foster human rights and freedoms including, among other things, those set forth in the *Canadian Charter of Rights and Freedoms*.

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### **Notes**

1. For codes of ethics dealing with this, see ABA-MR 8.



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"The legal profession ... has emerged over the centuries in order to fill a pressing public need for protection ... under the law of the rights and liberties of the individual, however humble, if necessary against the state itself." Lund, introductory.

2. "Public confidence in the profession would be shaken if such conduct were tolerated ... no solicitor could escape [striking off] simply by showing that there had been no dishonesty and no concealment, and that no client had suffered ..." In *Re a Solicitor* (1959), 103 Sol. J. 875, per Parker L.C.J. (Q.B.D.).

3. In this Rule, "capacity" means a member's ability to practice law with reasonable skill and judgment that is not substantially impaired by a physical, mental or emotional condition, disorder or addiction.

For more information on triggering events for the duty to report, see B.G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book Ltd., 2002), 11-8 to 11-16, and in particular 12-20:

The decision of a lawyer to so report may be two-tiered: a discretion to report a suspected breach of the rules of conduct, and a duty to report where there is a reasonable likelihood that someone will suffer serious damage as a consequence of an apparent breach.

At para. 33, Smith quotes Allan Hutchinson on 'why lawyers should report other lawyers to a law society':

One of the [lawyers' duties] ought to be the recognition that, while lawyers have a primary obligation to ensure that their own performance conforms to the highest norms of professional morality, there is a secondary requirement to urge colleagues to meet similar standards. It is what makes law a public profession rather than a private initiative... In an important sense, the moral prestige and fate of each lawyer are inextricably tied to the actions and worth of all other lawyers.

See also G. MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (3rd ed.) (Toronto: Carswell, 1993, 2001) at 25-18 to 25-21.

See also Law Society of Alberta, *Code of Professional Conduct*, Chapter 3 Relationship of the Lawyer to the Profession, Rule 4.

See also R. Larkin, "Colleagues in Crisis" *The Society Record* 20:7 (December 2002) 1.

4. "The reprehensible thing about the solicitor's conduct is his indefensible ignoring of the communications of the Law Society." *Re X.*, (1920), 16 Alta. L.R. 542 at 543, per Walsh J.

Cf. *Nova Scotia Barristers' Society v. Saunders* (1982), 55 N.S.R. (2d) 1 (N.S.S.C., A.D.).

**5. For a code of ethics dealing with this, see ABA-MR 6.3.**

6. For a code of ethics dealing with this, see Lund, D10, F5.

7. For a code of ethics dealing with this, see Lund, D1.



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## LEGAL ETHICS HANDBOOK

### Chapter 19 – Unauthorized Practice and the Duty to Supervise

#### Rule

A lawyer has a duty to

- 1) assist in preventing the unauthorized practice of law;<sup>1</sup>
  - 2) assume complete professional responsibility for all matters entrusted to him or her; and
  - 3) shall directly supervise non-lawyers to whom particular tasks and functions are delegated.
- 

#### **Guiding Principles**

For the purposes of this Rule, a non-lawyer includes law firm staff, legal assistants, paralegals and employees, but does not include articled clerks. 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 who uses a non-lawyer to educate the latter concerning duties that may be assigned to the non-lawyer and then to supervise the manner in which such duties are carried out.

#### **Commentary**

##### **Rationale for the Rule**

**19.1** 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 free from control, regulation and, in the case of misconduct, from discipline by any responsible governing body. The competence and integrity of any such unauthorized persons may not have been regulated for by an independent body. Moreover, the client of the lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege including the lawyer's duty of confidentiality and the professional standards of care that the law requires of lawyers as well as the authority that courts exercise over lawyers. Other safeguards include group professional liability insurance, rights with respect to the taxation of accounts for legal services, rules respecting trust monies and requirements for the maintenance of compensation funds.<sup>2</sup>

##### **Delegation**

**19.2** (i) Where a non-lawyer has received specialized training or education and is competent to do independent work under the supervision of a lawyer, a lawyer may delegate work to the non-lawyer. A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers, public officials, or with the public generally whether within or outside the offices of the law firm of employment.

(ii) A lawyer may permit a non-lawyer to perform tasks delegated and supervised by a lawyer as long as the lawyer maintains a direct relationship with the client. Generally, 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 turns on the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which in the public interest, must be exercised by the lawyer whenever it is required.

(iii) A non-lawyer may receive instructions from established clients if the supervising lawyer provides approval before any work commences. In so doing, this does not constitute the acceptance of a retainer by a non-lawyer. For the purposes of this rule, an "established client" is one that has an ongoing relationship with the firm, regardless of whether that client has an active matter with the firm at that time. Such a client has more than an incidental relationship with the firm; rather, the nature of that client's business requires that the firm be prepared to act for that client at any time should the need arise.



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(iv) A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

### 19.3

- (a) accept a retainer;<sup>3</sup>
- (b) give legal advice;
- (c) act finally without reference to the lawyer in matters involving professional legal judgment;
- (d) be held out as a lawyer;
- (e) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a support role to the lawyer appearing in such proceedings;
- (f) be named in association with the lawyer in any pleading, written argument, or other like document submitted to a court;
- (g) be remunerated on a sliding scale related to the earnings of the lawyer, except where the non-lawyer is an employee of the lawyer;
- (h) conduct negotiations with third parties, other than routine negotiations where the client consents and the results of the negotiations are approved by the supervising lawyer before action is taken;
- (i) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are communicated to the lawyer as soon as reasonably possible;<sup>4</sup>
- (j) sign correspondence containing a legal opinion;
- (k) sign correspondence, unless it is of a routine administrative nature, the non-lawyer has been specifically directed to sign the correspondence by the supervising lawyer, the fact the person is a non-lawyer is disclosed, and the capacity in which the person signs the correspondence is indicated;
- (l) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction;
- (m) perform any of the duties that only lawyers may perform or do things that lawyers may themselves not do; or
- (n) give or accept an undertaking.

### Client fees

**19.4** A lawyer is to approve the amount of any fee to be charged to a client for legal work.

### Lawyers and affiliated entities

**19.5** In addition to the requirements of this rule and the commentaries thereunder, a lawyer has a duty not to delegate to an affiliated entity or an affiliated entity's staff any tasks in connection with the provision of legal services without obtaining the client's informed consent.<sup>5</sup>

### Suspended or disbarred lawyers

**19.6** Without the express approval of the Society, a lawyer has a duty not to 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, is suspended, has undertaken not to practice, or who has been involved in disciplinary action and has been permitted to resign and has not been reinstated or readmitted.<sup>6</sup>

### Electronic registration of documents

**19.7** Where a lawyer has personalized encrypted electronic access to any system for the electronic submission or registration of documents, the lawyer

- (a) has a duty not to permit others, including a non-lawyer employee, to use such access; and
- (b) has a duty not to disclose the lawyer's password or access phrase or number to others.



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**19.8** 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 on his or her own behalf or as a delegate of the lawyer, the lawyer has a duty to ensure that the non-lawyer

- does not permit others to use such access;
- does not disclose his or her password or access phrase or number to others; and
- maintains and understands the importance of maintaining the security of the electronic registration system.

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### Notes

1. For codes of ethics dealing with this, see ABA-MR 5.5; Lund, E5, E6.

See also D.L. Rhode, "The Delivery of Legal Services by Non-Lawyers" (1990-91), 4 *Georgetown J. Legal Ethics* 209-233.

2. Cases and statutes provide that certain acts amount to the practice of law, see, for example: B.C.: *Legal Profession Act*, R.S.B.C. 1996, c. 255, s. 26. Man.: *Law Society Act*, R.S.M. 1987, c. L100, s. 56 (2). N.B.: *Law Society Act*, S.N.B. 1973, c. 80, s. 15(1). Nfld.: *Law Society Act*, R.S.N. 1990, c. L-9, s. 2(2). N.S.: *Legal Profession Act*, S.N.S. 2004, c. 28, s. 16(1). N.W.T.: *Legal Profession Act*, R.S.N.W.T. 1988, c. L-2, s. 1. P.E.I.: *Law Society and Legal Profession Act*, R.S.P.E.I. 1988, c. L-6, s. 21. Que.: *Bar Act*, R.S.Q. 1977, c. B-1, s. 128. Y.T.: *Legal Profession Act*, R.S.Y.T. 1986, c. 100, s. 1(2).

3. **'retainer'** – for the purposes of this rule, "retainer" means either the agreement to represent a new client for whom the lawyer or firm has never acted or a new matter for a current client.

4. A non-lawyer may take instructions from a client only in relation to standard transactions in which that non-lawyer is experienced. Such transactions would include real property matters and incorporations. No action should be taken by the non-lawyer in response to the client's instructions which would result in the client's rights, duties or obligations being impacted prior to the non-lawyer confirming those instructions with the lawyer.

For a Code of Ethics on this issues, see ON R.5.01(02) and Commentary.

5. For a Code of Ethics on this issue, see ON R.2.04 (10.1) – (10.3) and Commentary.

6. In cases of hardship or illness and for other good cause governing bodies may well permit regulated and limited employment, for example to help rehabilitate an offender or one recovering from a disability. Their concern is to protect the public, not necessarily to inhibit individuals.

In *R. v. Saxton*, [1986] 4 W.W.R. 19; 44 Alta. L.R. (2d) 85 (Q.B.), the Court held that a suspended member was entitled to use the designation "Q.C., Barrister and Solicitor" after his name, because any member is a barrister and solicitor according to the definitions in the Legal Profession Act, and because a person is entitled to use the designation "Q.C." until it is removed. The member was not engaging in the unauthorized practice of law by issuing pleadings on his own behalf, but he was practising when he issued pleadings on behalf of another legal entity without stating that he was filing them as agent or officer of the company. See also *Re Green and Law Society of N.W.T.* (1980), 114 D.L.R. (3d) 762 (N.W.T.S.C.) and *Smith*, id., at 254.

Cf. *Codina v. Law Society of Upper Canada* (1996), 93 O.A.C. 214 (Ont. Gen. Div.); *Law Society of Upper Canada v. Junger* (1991), 85 D.L.R. (4th) 12 (Ont. Gen. Div.), affd 133 D.L.R. (4th) 287 (Ont. C.A.).



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The statutes of all provinces prohibit the practice of law by unauthorized persons: Alta.: *Legal Profession Act*, R.S.A. 1980, c. L-9, ss. 103-104. B.C.: *Legal Profession Act*, R.S.B.C. 1996, c. 255, s. 26. Man.: *Law Society Act*, R.S.M. 1987, c. L100, s. 56(1). N.B.: *Law Society Act*, S.N.B. 1973, c. 80, s. 15(5). Nfld.: *Law Society Act*, R.S.N. 1990, c. L-9, s. 86(1). N.S.: *Legal Profession Act*, S.N.S. 2004, c. 28, ss. 16(2) and 17(1). N.W.T.: *Legal Profession Act*, R.S.N.W.T., 1988, c. L-2, s. 68(1). Ont.: *Law Society Act*, R.S.O. 1990, c. L.8, s. 50(1), (2). Ont.: *Solicitors Act*, R.S.O. 1990, c. S.15, s. 1. P.E.I.: *Law Society and Legal Profession Act*, R.S.P.E.I. 1988, c. L-6, ss. 19-20. Que.: *Bar Act*, R.S.Q. 1977, c. B-1, ss. 132 et seq. Sask.: *Legal Profession Act*, R.S.S. 1978, c. L-10, s. 5. Y.T.: *Legal Profession Act*, R.S.Y.T. 1986, c. 100, ss. 102-103.

"When a man says in effect, ["]I am not a lawyer but I will do the work of a lawyer for you,["] he is offering his services as a lawyer. In offering his services as a lawyer he is holding himself out as a lawyer even though he makes it clear he is not a properly qualified lawyer." *R. v. Woods*, [1962] O.W.N. 27 at 30, per Miller C.C.J.

"However, to protect the public it is necessary to prevent unqualified persons from doing acts for reward which they are not competent to do and which, in the long run, cause more litigation and expense to the public than if the services had been originally performed by a qualified person." *R. v. Nicholson* (1979), 96 D.L.R. (3d) 693 at 701, per McDermid J.A. (Alta. S.C.A.D).

"... lawyers are an essential part of the litigation process. They are responsible to make good any damage caused by their fault, and the Law Society is in place to maintain standards and provide protection to the public. That is one of the reasons which lie at the root of the restrictions upon non-lawyers appearing in the court." *Great West Life Assurance Company v. Royal Anne Hotel Ltd.* (1986), 6 B.C.L.R. (2d) 175 at 188, 31 D.L.R. (4th) 37 at 50, per Esson J.A. (C.A.).

On the question of whether the activities of independent firms of paralegals constitute the unauthorized practice of law see *R. v. Lawrie & Pointts Ltd.* (1987), 59 O.R. (2d) 161 (C.A.); *Law Society of British Columbia v. Lawrie & Pointts Advisory Ltd.* (1987), 18 B.C.L.R. (2d) 247, 46 D.L.R. (4th) 456, [1988] 1 W.W.R. 351 (S.C.); *Law Society of Upper Canada v. Burch* (1989), 70 O.R. (2d) 487, 63 D.L.R. (4th) 275 (S.C.).

See *Scott v. Mentiplay* (1988), 67 Sask. R. 169, [1988] 3 W.W.R. 232 (sub nom. *R. v. Scott*) (Q.B.); *Law Society of British Columbia v. Lawrie* (Part I) (1987), 46 D.L.R. (4th) 456, 38 C.C.C. (3d) 525 (B.C.S.C.), (Part II) 31 B.C.L.R. (2d) 209 (S.C.), affd 84 D.L.R. (4th) 540, 67 C.C.C. (3d) 461 (C.A.); *Law Society of Manitoba v. Lawrie* (1989), 61 D.L.R. (4th) 259, [1989] 5 W.W.R. 229 (Man. Q.B.); *Re A.(A.)* (1995), 29 Alta. L.R. (3d) 155, 36 C.P.C. (3d) 23 (Prov. Ct.) [Appearance by non-lawyer in child custody case constituted unauthorized practice when there was no reason to use an agent in lieu of a lawyer]; *Gillespie v. Gotlibowicz* (1996), 28 O.R. (3d) 402, 90 O.A.C. 1251 (Div. Ct) [Non-lawyer not allowed to appear in Divisional Court on rent control matters]; *Burton v. Burton* (1996), 185 A.R. 289, [1996] 7 W.W.R. 112 (Q.B.) [Paralegal permitted to prepare divorce petition and documentation but not permitted to represent in court]; *Law Society (British Columbia) v. Guntensperger* (1993), 83 B.C.L.R. (2d) 194 (S.C.) [Small Claims Court rule allowing representation by "authorized employee" refers to regular employees employed in the day-to-day business of the litigant].

See, generally, M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957), at 350-353; F.A.R. Bennion, *Professional Ethics: The Consultant Professions and Their Code* (London: Charles Knight & Co. Ltd., 1969), at 54; B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 248-255.



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### Chapter 20 – Seeking Business

#### Rule

A lawyer has a duty not to seek business in a manner that

- (a) is inconsistent with the public interest;
- (b) detracts from the integrity and dignity of the profession; or
- (c) does not comply with the regulations or rulings of the Society.<sup>1</sup>

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#### Guiding Principles

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

A lawyer violates the Rule if, in the course of seeking business, the lawyer

- (a) states or causes or permits to have stated, anything any part of which is inaccurate, misleading or likely to mislead, derogatory, not in good taste or that constitutes self-aggrandizement;
- (b) does anything which might reasonably raise unjustified expectations about the results that the lawyer can achieve, the time in which the result can be achieved or the cost of completing the matter;
- (c) misrepresents the competence and experience of the lawyer or his or her associates;
- (d) implies that the lawyer can obtain results not achievable by other lawyers or that the lawyer is in a position of influence;
- (e) interferes with an existing relationship between another lawyer and his or her client for the purpose of obtaining the client's retainer, unless the change of retainer is initiated by the client;
- (f) compares the quality of the lawyer's services with that of other lawyers;
- (g) exploits a person who is vulnerable or has suffered a traumatic experience and has not yet had a chance to recover; or
- (h) violates any of the regulations or rulings of the Society with respect to seeking business.<sup>2</sup>

#### Commentary

##### Public accessibility to legal services

**20.1** It is in the public interest that members of the public know and have access, without difficulty or delay, to appropriate legal services of the order that they require. It follows that a lawyer may advertise the availability, nature and kind of his or her legal services.

**20.2** As the practice of law becomes increasingly complex and as many individual lawyers restrict their activities to particular fields of law, the reputations of lawyers and their competence or qualification in particular fields may not be sufficiently well known to enable a person to make an informed choice. One who has had little or no contact with lawyers or who is a stranger in the community may have difficulty finding a lawyer with the special skill required for a particular task.

**20.3** Telephone directories, legal directories and referral services may help find a lawyer but not necessarily the right one for the work involved.



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**20.4** Appropriate advertising of legal services by the lawyer may assist the public and thereby result in increased access to the legal system. A lawyer, therefore, may advertise legal services to the general public, subject to the regulations and rulings of the Society.<sup>3</sup>

### Constraints on seeking business

**20.5** Despite the lawyer's economic interest in earning a living, advertising, direct solicitation or any other means by which the lawyer seeks to obtain work must be consistent with the public interest and must not detract from the integrity, independence or effectiveness of the legal profession. A lawyer, when seeking business, has a duty not to mislead the uninformed or arouse unattainable hopes and expectations. This could result in distrust of legal institutions and lawyers. A lawyer's attempts to seek business must not be so undignified, in bad taste or otherwise offensive as to be prejudicial to the interests of the public or the legal profession.<sup>4</sup>

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### Notes

1. N.S.B.S. Regulation 7.6 deals with advertising.

See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), Chapter 4, "The Lawyer and Advertising."

For a code of ethics dealing with this, see Lund, D2.

2. N.S.B.S. Regulation 7.6.2 states:

### Types of Advertising Permitted

7.6.2 Advertising by a practising lawyer or law firm shall be

- (a) accurate and not capable of misleading the public;
- (b) be of a dignified nature,
- (c) in good taste,
- (d) of a size commensurate with the amount of information being given, and
- (e) otherwise such as not to bring the practising lawyer, the law firm or the profession into disrepute.

N.S.B.S. Regulation 7.6.3 states:

### Restriction

7.6.3 Advertising by a practising lawyer or law firm shall not

- (a) refer to the quality of service to be provided;
- (b) claim any superiority for a practising lawyer or law firm over any other practising lawyer or law firm;
- (c) use the words "specialist" or "specializing" or other words suggesting a recognized special status or accreditation;
- (d) use any language which indicates that a lawyer was formerly a judge.

Legal advertising rules have been challenged under the *Canadian Charter of Rights and Freedoms: Law Society of Manitoba v. Savino*, [1983] 6 W.W.R. 538 (Man. C.A.); *Klein and Dvorak v. Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Div. Ct.).

In *Maroist v. Barreau du Québec*, [1987] R.J.Q. 2322 (C.A.) the member challenged the constitutionality of the Bar's regulations on lawyer advertising. The Court concluded that: 1) commercial speech is included in the freedom of expression guaranteed by the *Charter*; 2) the Bar's regulations constitute restrictions on said freedom; and 3) the Bar has not adduced evidence justifying these restrictions as required by section 1 of the *Charter*.



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See R. Sharpe, "Commercial Expression and the Charter" (1987), 37 *U. Toronto L.J.* 229; N. Shapiro, "Don't Toy Around - A Look at Character Merchandising" (1985), 1 *Intel. Prop. J.* 85; D. Lucas, "The Regulations of Advertising" (1985), 3 *Can. J. Ins. L.* 22; C. Mitchell, "The Impact, Regulation and Efficacy of Lawyer Advertising" (1982), 20 *Osgoode Hall L.J.* 119.

For a code of ethics dealing with this, see Lund, D4, E5.

Legal Ethics Ruling 1992-1 proscribes the use of a lawyer's name by a collection agency: "It is unethical for a lawyer to permit a collection agency to use the lawyer's name or stationery in making demands for the payment of debts."

3. In *Ford v. Quebec (Attorney General)*, the Supreme Court of Canada held that "commercial expression" is expression within the meaning of both s. 2(b) of the Canadian *Charter* and s. 3 of the Quebec *Charter*. The Court stated:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection." [1988] 2 S.C.R. 712 at 767; 36 C.R.R. 1 at 46; 90 N.R. 84 at 145 (*sub nom. Chaussure Brown's Inc. et al. v. Québec (Procureur Général)*).

4. See also L.L. Hill, "A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation" (1991-92), 5 *Georgetown J. Legal Ethics* 393; E.S. Roth, "Confronting Solicitation of Mass Disaster Victims" (1988-89), 2 *Georgetown J. Legal Ethics* 967.



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### **Duties to Uphold and Improve Justice and the Administration of Justice**



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### Chapter 21 – Justice and the Administration of Justice

#### Rule

The lawyer has a duty to encourage public respect for justice and to uphold and try to improve the administration of justice.<sup>1</sup>

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#### Guiding Principles

The admission to and continuance in the practice of law imply a basic commitment by the lawyer 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. Because of changes in human affairs and the imperfection of human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.<sup>2</sup>

The 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 public authorities. The lawyer, therefore, has a duty to provide leadership in seeking improvements to the legal system. Any criticisms and proposals the lawyer makes in doing so should be *bona fide* and reasoned. In discharging this duty, the lawyer should not be involved in violence or injury to the person.

#### Commentary

##### Scope of the Rule

**21.1** The obligation outlined in this Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community.

**21.2** The lawyer's responsibilities are greater than those of a private citizen.

**21.3** The lawyer has a duty not to subvert the law by counselling or assisting in activities which are in defiance of it and has a duty not to do anything to lessen the respect and confidence of the public in the legal system of which the lawyer is a part.

**21.4** The lawyer has a duty not to weaken or destroy public confidence in legal institutions or authorities by broad, irresponsible allegations of corruption or partiality. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer lends weight and credibility to any public statements.<sup>3</sup> For the same reason the lawyer should not hesitate to speak out against an injustice.

##### Criticism of the Court

**21.5** Although proceedings and decisions of courts are properly subject to scrutiny and criticism by all members of the public including lawyers, members of courts are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers.

**21.6** Firstly, the lawyer has a duty to avoid criticism that is petty, intemperate or unsupported by a *bona fide* belief in its real merit, bearing in mind that, in the eyes of the public, professional knowledge lends weight to the lawyer's judgements or criticism.



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**21.7** Secondly, if the 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.

**21.8** Thirdly, where a court is the object of unjust criticism, the lawyer, as a participant in the administration of justice, is uniquely able to and should support the court both because its members cannot defend themselves and because the lawyer is thereby contributing to greater public understanding of the legal system and therefore respect for it.<sup>4</sup>

### Improving the administration of justice

**21.9** The lawyer who seeks legislative or administrative changes has a duty to disclose whose interest is being advanced, whether it be the lawyer's interest, that of a client, or the public interest. The lawyer may advocate such changes on behalf of a client without personally agreeing with them, but the lawyer who purports to act in the public interest has a duty to espouse only those changes which the lawyer conscientiously believes to be in the public interest.<sup>5</sup>

### Notes

1. "In view of the vital part played by lawyers in the administration of Justice, they are under an obligation to strive to maintain respect for that administration...." Lund, at 27.

2. Cf. the oath / affirmation taken by lawyers in Nova Scotia upon admission to the Bar which states:

I ... swear / affirm that as a Barrister and Solicitor, I shall, to the best of my knowledge and ability, conduct all matters and proceedings faithfully, honestly and with integrity. I shall support the Rule of Law and *uphold and seek to improve the administration of justice*. I shall abide by the ethical standards and rules governing the practice of law in Nova Scotia. [emphasis added].

For cases dealing with the need for the appearance of propriety and freedom from bias, see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *Szebelledy v. Construction Insurance Co. of Canada* (1985), 11 C.C.L.I. 140; *Shaughnessy Brothers Investments Ltd. v. Lakehead Trailer Park* (1985) Canada (1991), 5 O.R. (3d) 248 (Gen. Div.).

3. "[L]awyers, because of what they are as opposed to who they are ... are required to assume responsibilities of citizenship well beyond [the basic requirements of good citizenship] ... This ... is necessary because we are the profession to which society has entrusted the administration of law and the dispensing of justice." R. MacKimmie, "The Presidential Address" (1963), 6 *Can. B.J.* 347 at 348.

For lucid and divergent views as to the limits to which lawyers may properly go in defying the law, see editorial "Civil Disobedience and the Lawyer" (1967), 1:3 *Gazette* 5 and response thereto in (1968), 2:3 *Gazette* 44.

4. For codes of ethics dealing with this, see ABA-MR 8.2. Tribunals generally possess summary "contempt" powers, but these are circumscribed and are not lightly resorted to. Means exist through Attorneys-General and Judicial Councils for the investigation and remedying of specific complaints of official misbehaviour and neglect; in particular cases these should be resorted to in preference to public forums and the media.

See also G.V. La Forest, "Integrity in the Practice of Law" 21 *Gazette* (1987), 41-45.

5. For a code of ethics dealing with this, see ABA-MR 3.9.



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### **Duties When Speaking or Writing Publicly**



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### Chapter 22 – Public Appearances and Public Statements by Lawyers

#### Rule

A lawyer who makes public appearances or public statements has a duty, in doing so, to comply with the rules of this *Handbook*.<sup>1</sup>

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#### Guiding Principles

A lawyer's duties towards his or her client, other lawyers, the court, the profession and the public and to uphold justice and the administration of justice, continue to apply when the lawyer appears and speaks or writes publicly. Involvements with the news and other media require the same degree of compliance with the rules of ethical behaviour and professional conduct as exist in the lawyer's more conventional environment such as a law office or courtroom or boardroom.

#### Commentary

##### Duty to client

**22.1** When contemplating a public statement concerning a client's affairs, the lawyer has a duty to the client to be satisfied that any public communication is in the best interests of the client and within the scope of the retainer. The lawyer has a duty to the client to be qualified to represent the client effectively before the public, to adequately prepare for the public appearance and not to permit any personal interest or other cause to conflict with the client's interests.

##### Other duties

**22.2** A lawyer who chooses to comment on a specific case shall not do so without the instruction and consent of the client. The lawyer has a duty not to disclose confidential information about the client or the client's affairs without the informed consent of the client, preferably in writing.

**22.3** The lawyer when making public appearances or public statements has a duty to treat other lawyers and the court with courtesy and respect. The lawyer also has a duty to uphold and to encourage public respect for justice and the administration of justice.

##### Relevance of the rules on Seeking Business

**22.4** The rules contained in this Handbook relating to Seeking Business apply with equal force to a lawyer in the course of making public appearances and public statements.

##### The lawyer and the media

**22.5** The media pay greater attention to legal matters than was the case formerly. This is reflected in more coverage of the passage of legislation at national, provincial and municipal levels as well as of cases before the courts that are thought to have social, economic or political significance. Interest has been heightened by the adoption of the *Canadian Charter of Rights and Freedoms*. As a result media reporters regularly seek out the views not only of lawyers directly involved in particular court proceedings but also of lawyers who represent special interest groups or have recognized expertise in a given field in order to obtain information or provide commentary.

**22.6** Where the lawyer, by reason of professional involvement or otherwise, is able to assist the media in conveying accurate information to the public, it is proper for the lawyer to do so, provided that there is no



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infringement of the lawyer's obligation to the client, the profession, the court or the administration of justice and provided also that the lawyer's comments are made bona fide and without malice or ulterior motive.

**22.7** The lawyer may make contact with the media to publicize such things as fund raising, expansion of the interests of charitable institutions and organizations, promoting public institutions or political organizations or speaking on behalf of organizations which represent various racial, religious or other special interest groups.

### **Assisting public understanding**

**22.8** Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases or to offer opinion on causes that have been or are about to be instituted. It is permissible to provide such commentary in order to assist the public to understand the legal and other issues involved.

**22.9** The lawyer may also be involved as an advocate for special interest groups whose objective is to bring about changes in legislation, government policy or even a heightened public awareness about certain issues. The lawyer may properly comment about such matters.

### **The circumstances define the duty**

**22.10** Given the variety of cases that can arise in the legal system, whether in civil, criminal or administrative matters, it is not possible to set down guidelines that would anticipate and effectively deal with every possible situation. In some circumstances it is not appropriate for the lawyer to have any contact whatever with the media; in others there may be a positive duty to contact the media in order to properly serve the client.

### **Commenting on cases after final adjudication**

**22.11** A lawyer, if asked, may comment on a specific case after the final determination of the matter and the case report has become a matter of public record. In doing so the lawyer has a duty not to malign the court or any officer of the court.

### **Commenting on cases before the court**

**22.12** Nothing in this Handbook prevents a lawyer from commenting upon the issues and implications of a case before the court or after the rendering of a decision as long as the comment is reasoned, informed and made bona fide in accordance with the spirit and the letter of the Rules in this Handbook. The lawyer must bear in mind that, if the lawyer or an assistant is involved in the proceedings about which the comment is intended to be made, there is the risk that the comment may be or may appear to be partisan rather than objective.

### **Guarding against media abuses**

**22.13** The lawyer should bear in mind when making public appearances or making public statements that ordinarily the lawyer has no control over any editing that may follow or determining the context in which the appearance or statement may be used.

**22.14** It may be prudent for a lawyer who plans a public statement to issue a written release or to give a statement from a prepared text and to retain a reliable record of the statement so that if the lawyer is misquoted or quoted out of context or misinterpreted by the media the lawyer can readily and effectively attempt to correct the error.

**22.15** A lawyer has a duty to a client whose case has been misrepresented or misconstrued by the media to contact the party responsible for the misrepresentation or misconstruction and to attempt to correct the problem as soon as the error comes to the lawyer's attention.

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### Notes

1. 1. See B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), Chapter 5, "The Lawyer and the Media."



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## The Spirit of the Rules



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### Chapter 23 – Avoiding Questionable Conduct

#### Rule

The lawyer has a duty to carry out all of the duties in the *Handbook* in the spirit as well as the letter.<sup>1</sup>

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#### Guiding Principles

The lawyer should try at all times to observe a standard of conduct that reflects credit on the profession and the system and administration of justice generally, and inspires the confidence, respect and trust of clients, those with whom the lawyers work and the community.<sup>2</sup>

#### Commentary

##### **The consequences of irresponsible conduct and the appearance of such conduct**

**23.1** Public confidence in the profession and the system and administration of justice may be eroded by irresponsible conduct of the individual lawyer and by conduct which appears to be irresponsible.<sup>3</sup>

##### **The consequences of trying to circumvent the legal system**

**23.2** Our legal system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal profession and the administration of justice into disrepute.<sup>4</sup>

##### **Extension of duties to those with whom the lawyer works**

**23.3** A lawyer's duty to conduct himself or herself with integrity and entirely within the spirit and letter of this *Handbook* extends to all with whom the lawyer works, including partners, associates, students-at-law and staff.

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#### Notes

1. Cf. dictum of Hewart, L.C.J. in *R. v. Sussex JJ; ex parte McCarthy*, [1924] 1 K.B. 256 at 259; [1923] All E.R. 233 at 234: "...[It is] of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

2. "...[C]onsumers of legal services must be confident in knowing that behind every law office door will be found a lawyer whose trustworthiness and integrity can be accepted without question. If the people of Nova Scotia who seek out the services of a lawyer feel compelled to inquire in advance whether such lawyer has been convicted of such serious indictable offences as we are dealing with here, our Bar will inevitably see a serious erosion of its reputation and the trust upon which the profession is based. ... [T]his Discipline Subcommittee must ensure its responses unequivocally demonstrate to both client and lawyer alike that the strict standards of honesty and integrity which have traditionally characterized lawyers in Nova Scotia remain unchanged." Re P.G.M., Formal Hearing Panel Decision, N.S.B.S.-D27, March 21, 1988, at 7.

3. For a code of ethics dealing with this, see ABA-MR 8.4(f).

In *Novak v. Benchers of Law Society of B.C.* (sustaining the disbarment of a lawyer who had negotiated a reward through the police for the return of stolen securities) the Discipline Committee said: "In exposing himself to these situations the Respondent divested himself of the dignity and forthright dealing that one may expect of a lawyer, gave rise to the reasonable conclusion that he was associated with the possessors of the goods, and that he was participating in some way in the reward. Whether in fact he was doing so is perhaps not important." (1972), 31



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D.L.R. (3d) 89 at 97, [1972] 6 W.W.R. 274 at 280, per McKay J.(B.C.S.C.). See also B.G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989), at 239-246.

Cf. *Markus v. Nova Scotia Barristers' Society*, [1989] N.S.J. No. 127 (QL).

4. For a code of ethics dealing with this, see ABA-MC, EC 9-4; ABA-MR 8.4.

"There should be the very contrary to the secrecy and subterfuge which marks every step of this transaction, dishonourable alike to counsel and the magistrate." *R. v. LeBlanc*; *R. v. Long*, [1939] 2 D.L.R. 154 at 165, (1939), 71 C.C.C. 232 at 244, 13 M.P.R. 343 at 357, per Baxter C.J. (N.B. App. Div.).



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### Chapter 24 – Discrimination

#### Rule

A lawyer has a duty to respect the human dignity and worth of all persons and to treat all persons with equality and without discrimination.

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#### Guiding Principles

A lawyer discriminates in contravention of this Rule when a lawyer makes a distinction based on an irrelevant characteristic or perceived characteristic of an individual or group such as age, race, colour, religion, creed, sex, sexual orientation, disability, ethnic, national or aboriginal origin, family status, marital status, source of income, political belief or affiliation, if the distinction has the effect of imposing burdens, obligations, or disadvantages on an individual or on a group not imposed on others or if the distinction has the effect of withholding or limiting access to opportunities, benefits, or advantages available to individuals or groups in society.

#### Commentary

**24.1** A lawyer has a duty to ensure that no one is denied services or receives inferior service because of any irrelevant characteristics or beliefs including those enumerated in the Guiding Principles.

**24.2** A lawyer has a duty to ensure that the lawyer's employment practices do not offend the Rule or the Guiding Principles.

**24.3** This Rule should be read in conjunction with Chapters 1 and 23 and Commentary 18.9.<sup>1</sup>

**24.4** This Rule does not preclude making distinctions

- (a) based on a *bona fide* qualification, or
- (b) where such discrimination is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

**24.5** This Rule does not apply to bona fide retirement or pension plans or terms and conditions of group or employee insurance plans based on age, or *bona fide* mandatory retirement plans, schemes or practices.

**24.6** This Rule does not preclude any program, activity or affirmative action that has as its object the amelioration of conditions or disadvantages for individuals or groups including those who are disadvantaged because of a characteristic referred to in the Guiding Principles.<sup>2</sup>

#### Notes

**1.** A lawyer has a duty to become familiar with and understand section 15 of the *Canadian Charter of Rights and Freedoms* and provincial and federal human rights legislation. A lawyer should cultivate a knowledge and understanding of Canadian jurisprudence on the meaning of equality and discrimination and on adverse impact analysis, both of which warn of the danger of assuming that good intentions or uniform rules necessarily accomplish equality.

**2.** In the case of *Gene Keys v. Pandora Publishing Association* (March 17, 1992), a Nova Scotia Human Rights Board of Inquiry held that in order to achieve equality for a disadvantaged group, sometimes the different treatment of non-disadvantaged groups was necessary. That case involved a complaint by a man against a



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feminist newspaper that refused to print his letter to the editor in the newspaper. He claimed that he was being discriminated against on the basis of sex. The Board of Inquiry stated:

I am also satisfied that as a matter of law the concepts of equality and discrimination under the Act must be consistent with those concepts in the *Charter*. McIntyre, J. in *Andrews* stated that the promotion of equality in the prohibition against discrimination has a more specific goal than the mere elimination of distinctions and that identical treatment may produce inequality. It follows, accordingly, that a disadvantaged group may undertake a program or activity which has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those discriminated against on the basis of sex even if that results in distinctions being made with respect to the advantaged group.