

MEMBER'S MANUAL

The Law Society
of British Columbia



AMENDMENT PAGES

2017: No. 1 March

Highlights

Law Society Rules 2015:* Contact information that members must provide to the Law Society is expanded to include telephone numbers and email addresses (Rules 2-9, 2-10 and 2-11: p. 43); the discretion to waive the fee for former lawyers or judges reinstating as retired members for the purpose of doing pro bono legal work has been transferred from the Credentials Committee to the Executive Director, to make the process more efficient (Rule 2-85(3): p. 85); a reference to the *BC Code* has been corrected (Rule 3-34: p. 118); to prevent the risk of breaching undertakings of confidentiality to the Crown, lawyers are no longer required to disclose certain information when reporting criminal charges to the Law Society (Rule 3-97: p. 150).

**Historical notes are only published in the website version of the Rules.*

Code of Professional Conduct for British Columbia: An Introduction to the *BC Code* has been adopted, based on the preface in the Federation of Law Societies' model code (pp. vii-viii); language rights provisions from the Federation's model code are adapted for BC (rules 3.2-2.1 and 3.2-2.2, including commentary: p. 14.1); lawyers have a duty to sign court orders that have been granted or agreed to, notwithstanding subsequent instructions of a client to the contrary (rules 3.7-9, commentary [6] and 5.1-2, commentary [5]: pp. 54 and 64); a rule regarding incriminating physical evidence is also adapted from the model code (rule 5.1-2.1, including commentary: p. 64).

Filing: File the amended pages in your *Member's Manual* as follows:

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After filing, insert this sheet at the front of the *Manual* for reference.

Updates: This amendment package updates the *Member's Manual* to **March 28, 2017**. The previous amendment package was 2016: No. 3 December.

To check that your copy of the *Manual* is up to date, consult the contents checklist on the next page. If you have further questions about updating your *Manual*, contact the Communications department: telephone 604.697.5838 or toll-free 1.800.903.5300 or email communications@lsbc.org.

[continued over]

Website: The *Legal Profession Act*, Law Society Rules and *Code of Professional Conduct for British Columbia* can be accessed in the Publications section of the Law Society website at lawsociety.bc.ca in both HTML (for online use) and PDF (for printout, including printout of *Member's Manual* replacement pages).

Refer to the Law Society website for the most current versions of the Act, Rules and Code.

MEMBER'S MANUAL CONTENTS CHECKLIST

2017: No. 1 March

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Member information

Annual practice declaration

- 2-8** (1) In this rule, “**declaration**” means the Annual Practice Declaration in a form approved by the Executive Committee.
- (2) A practising lawyer must complete and deliver a declaration to the Executive Director in each calendar year.
- (3) A declaration is not delivered under this rule unless it is
- (a) complete to the satisfaction of the Executive Director,
 - (b) received by the Executive Director by the date set by the Executive Director, and
 - (c) signed by the practising lawyer.
- (4) The Executive Director must not issue a practising certificate to a lawyer who fails to deliver a declaration as required under this rule, unless the Credentials Committee directs otherwise.

Definitions

- 2-9** In Rules 2-10 [*Business address*] and 2-11 [*Residential address*], “**address**” includes
- (a) the name under which a lawyer carries on business, and
 - (b) street address, including suite number if applicable, and mailing address, if that is different from the street address;

“**contact information**” includes the following for the purpose of a lawyer receiving communication from the Society, including confidential communication:

- (a) a telephone number;
- (b) an email address;

“**place of practice**” includes

- (a) a lawyer’s chief place of practice or employment, including the residence of a lawyer who carries on a law practice from the lawyer’s residence, and
- (b) any other location from which a lawyer conducts the practice of law or is held out to conduct the practice of law.

Business address

- 2-10** A lawyer must advise the Executive Director of the address and contact information of all of the lawyer’s places of practice and inform the Executive Director immediately of a change of address or contact information of any of the lawyer’s places of practice.

Residential address

- 2-11** A lawyer who does not carry on the practice of law must advise the Executive Director of the address and contact information of the lawyer’s residence and any change in the address and contact information of the lawyer’s residence.

Practice history

- 2-12** (1) In this rule, “**practice history**” means a record of
- (a) the dates and places that a lawyer or former lawyer has practised law or been enrolled in the admission program, including the name of the firms through which the lawyer or former lawyer practised law, and
 - (b) dates of any periods since call and admission during which the lawyer or former lawyer has been a non-practising or retired member or a former member.
- (2) At the request of any person, the Executive Director may disclose all or part of the practice history of any member or former member of the Society.

Paralegals

Supervision of limited number of designated paralegals

- 2-13** (1) In this rule, “**designated paralegal**” means an individual permitted under section 6.1 [*Supervision*] of the *Code of Professional Conduct* to give legal advice and represent clients before a court or tribunal.
- (2) A lawyer must not supervise more than 2 designated paralegals at one time.

Unauthorized practice

Unauthorized practice of law

- 2-14** (1) A lawyer must not knowingly facilitate by any means the practice of law by a person who is not a practising lawyer or otherwise permitted to practise law under sections 15 to 17 or Rule 2-39 [*Conditions for MDP*].
- (2) Without limiting subrule (1), a lawyer must not knowingly do any of the following:
- (a) act as an agent or permit his or her name to be used or held out in any way that enables a person to engage in the unauthorized practice of law;
 - (b) send a process or other document to a person or do any other act that enables a person to engage in the unauthorized practice of law;
 - (c) open or maintain an office for the practice of law unless the office is under the personal and actual control and management of a practising lawyer.
- (3) When the Society obtains a court order or an agreement restraining a person who is not a practising lawyer from the practice of law, the Executive Director may publish generally a summary of the circumstances and of the order or agreement, in a form that appears appropriate to the Executive Director.

Reinstatement

Reinstatement of former lawyer

- 2-85** (1) A former lawyer may apply for reinstatement as a member of the Society by delivering the following to the Executive Director:
- (a) an application for reinstatement in a form approved by the Credentials Committee, including written consent for the release of relevant information to the Society;
 - (b) the appropriate application fee specified in Schedule 1.
- (2) An applicant for reinstatement may apply for the following status on reinstatement:
- (a) practising lawyer, only if the applicant has met the conditions for practising law under Rule 2-89 [*Returning to practice after an absence*];
 - (b) non-practising member on compliance with Rule 2-3 [*Non-practising members*];
 - (c) retired member if the lawyer is qualified under Rule 2-4 (1) [*Retired members*] and on compliance with Rule 2-4 (2) and (3).
- (3) On an application under subrule (2) (c), the Executive Director may waive payment of all or part of the application fee on any conditions that the Executive Director considers appropriate.
- (4) The Executive Director may issue a practising certificate to an applicant on reinstatement on payment of the following:
- (a) the prorated practice fee specified in Schedule 2;
 - (b) the prorated annual insurance fee specified in Schedule 2, unless exempt under Rule 3-43 [*Exemption from liability insurance*];
 - (c) any surcharge for which the lawyer is liable under Rule 3-44 (2) [*Deductible, surcharge and reimbursement*].
- (5) The Executive Director may issue a non-practising or retired member certificate to an applicant on reinstatement on payment of the appropriate prorated fee specified in Schedule 3.
- (6) Subject to subrule (7), the Executive Director must consider an application for reinstatement of a former lawyer and may conduct or authorize any person to conduct an investigation concerning the application.

- (7) The Executive Director must not consider an application for reinstatement of a former lawyer unless the former lawyer has
- (a) submitted all trust reports required under Rules 3-79 [*Trust report*] and 3-84 (1) [*Former lawyers*],
 - (b) paid all assessments accrued under Rule 3-80 [*Late filing of trust report*] before and after the former lawyer ceased to be a member of the Society unless the Discipline Committee orders the assessments need not be paid under Rule 3-80 (3), and
 - (c) paid all costs of trust reports ordered under Rule 3-81 (6) [*Failure to file trust report*].
- (8) If an applicant for reinstatement is a disbarred lawyer, the Executive Director must refer the application to the Credentials Committee.
- (9) On an application for reinstatement to which subrules (7) and (8) do not apply, the Executive Director may
- (a) reinstate the applicant without conditions or limitations, or
 - (b) refer the application to the Credentials Committee for consideration.
- (10) Subject to subrule (11), when the Executive Director refers an application for reinstatement to the Credentials Committee under subrule (9), the Committee may
- (a) reinstate the applicant without conditions or limitations,
 - (b) reinstate the applicant with conditions or limitations on the applicant's practice if the applicant consents in writing to those conditions or limitations, or
 - (c) order a hearing.
- (11) The Credentials Committee must order a hearing in the following circumstances:
- (a) section 19(3) applies;
 - (b) the Committee cannot reach another disposition of the matter under subrule (10);
 - (c) the Committee resolves to order a hearing.
- (12) An applicant for reinstatement must give written notice of the application as directed by the Executive Director, and persons so notified may appear in person or by counsel at the hearing and be heard on the application.

Subsequent application for reinstatement

- 2-86** A person whose application for reinstatement is rejected under section 22 (3) [*Credentials hearings*] may not make a new application for reinstatement until the earlier of the following:
- (a) 2 years after the date on which the application was rejected;
 - (b) the date set by the panel when the application was rejected or by the review board on a review under Part 5 [*Hearings and appeals*].

- (3) On a referral by the Executive Director or on the recommendation of the Discipline Committee or the Practice Standards Committee, or on its own motion, the Credentials Committee may inquire into a lawyer's suitability to receive credit as a mentor and may do any of the following:
 - (a) conduct or authorize any person to conduct an investigation concerning the fitness of the lawyer to act as a mentor;
 - (b) require the lawyer to appear before the Credentials Committee and to respond to questions of the Committee;
 - (c) order the lawyer to produce any documents, records or files that the Credentials Committee may reasonably require.
- (4) After allowing the lawyer to make submissions, the Credentials Committee may do any of the following:
 - (a) permit the lawyer to receive credit as a mentor;
 - (b) permit the lawyer to receive credit as a mentor subject to conditions or limitations;
 - (c) order that the lawyer not receive credit as a mentor.
- (5) The onus is on the lawyer to show cause why an order should not be made under subrule (4) (b) or (c).

Late completion of professional development

- 3-31** (1) A practising lawyer who fails to comply with Rule 3-29 [*Professional development*] by December 31 is deemed to have been in compliance with the Rules during the calendar year if the lawyer does all of the following before April 1 of the following year:
- (a) completes the remainder of the required professional development;
 - (b) certifies the completion of the required professional development as required in Rule 3-29 (3) (b);
 - (c) pays the late completion fee specified in Schedule 1.
- (2) Required professional development completed before April 1 that is applied to the requirement for the previous year cannot be applied to the requirement for the calendar year in which it is completed.
- (3) A practising lawyer who complies with Rule 3-29 (3) (a) [*Professional development*] by December 31 but fails to comply with Rule 3-29 (3) (b) by December 31 is deemed to have been in compliance with the Rules during the calendar year if the lawyer does both of the following before April 1 of the following year:
- (a) certifies the completion of the required professional development as required in Rule 3-29 (3) (b);
 - (b) pays the late reporting fee specified in Schedule 1.

Failure to complete professional development

- 3-32** (1) Subject to subrules (2) and (3), a practising lawyer who fails to comply with Rule 3-29 [*Professional development*] by April 1 of the following year is suspended until all required professional development is completed and completion is certified to the Executive Director as required by Rule 3-29.
- (2) When there are special circumstances, the Practice Standards Committee may, in its discretion, order that
- (a) the lawyer not be suspended under subrule (1), or
 - (b) a suspension under subrule (1) be delayed for a specified period of time.
- (3) At least 60 days before a suspension under subrule (1) can take effect, the Executive Director must deliver to the lawyer notice of the following:
- (a) the date on which the suspension will take effect;
 - (b) the reasons for the suspension;
 - (c) the means by which the lawyer may apply to the Practice Standards Committee for an order under subrule (2) and the deadline for making such an application before the suspension is to take effect.

Division 4 – Specialization and Restricted Practice

Definitions

3-33 In this division

“**course of study**” means an educational program consisting of activities approved by the Executive Director for the purpose of qualifying as a family law mediator, arbitrator or parenting coordinator;

“**professional development**” means activities approved by the Executive Director for credit as professional development for family law mediators, arbitrators or parenting coordinators.

Advertising

3-34 A lawyer must not advertise any specialization, restricted practice or preferred area of practice except as permitted in the *Code of Professional Conduct*, section 4.3 [*Advertising nature of practice*].

Family law mediators

- 3-35** (1) A lawyer may act as a family law mediator only if the lawyer
- (a) possesses sufficient knowledge, skills and experience relevant to family law to carry out the function of a mediator in a fair and competent manner,
 - (b) has completed a course of study in family law mediation approved by the Credentials Committee, and

Calculation of interest

- 3-92** (1) In calculating the interest owing to a claimant under Rule 3-91 [*Adjudication of claims*], the Executive Committee must allow interest, for each 3-month period, at 2% below the prime lending rate of the Society’s banker on March 31, June 30, September 30 and December 31 respectively, in each year, with interest to be compounded on June 30 and December 31 in each year.
- (2) Interest calculated under subrule (1) is payable from the first day of the month following receipt of the unclaimed money by the Society, until the last day of the month before payment out by the Society.

Efforts to locate the owner of funds

- 3-93** From time to time, the Executive Director must conduct or authorize efforts to locate the owner of money held under this Part.

Payment to the Law Foundation

- 3-94** Before paying the principal amount received under Rule 3-89 [*Payment of unclaimed trust money to the Society*] to the Foundation under section 34 [*Unclaimed trust money*], the Executive Director must be satisfied that the owner of the money cannot be located following efforts to locate the owner.

Division 9 – Real Estate Practice

Definitions

- 3-95** In this division,
- “**closing date**” means the date upon which the documents to effect a transaction are filed as a pending application in the appropriate land title office;
- “**discharge of mortgage**” means any discharge of mortgage that releases any portion of the land or interest in land charged by the mortgage;
- “**mortgage**” means one of the following registered in a land title office in British Columbia:
- (a) a mortgage of land or an interest in land;
 - (b) a debenture or trust deed containing a fixed charge on land or an interest in land;
- “**mortgagee**” includes the holder of a fixed charge under a debenture or trust deed that is a mortgage;
- “**notary**” means a member of the Society of Notaries Public of British Columbia.

Report of failure to cancel mortgage

- 3-96** A lawyer must deliver to the Executive Director within 5 business days a report in a form approved by the Executive Committee when
- (a) the lawyer delivers funds to
 - (i) a mortgagee to obtain a registrable discharge of mortgage, or
 - (ii) another lawyer or a notary on the undertaking of the other lawyer or notary to obtain and register a discharge of mortgage, and
 - (b) 60 days after the closing date of the transaction giving rise to the delivery of such funds, the lawyer has not received
 - (i) a registrable discharge of mortgage from the mortgagee, or
 - (ii) satisfactory evidence of the filing of a registrable discharge of mortgage as a pending application in the appropriate land title office from the other lawyer or notary.

Division 10 – Criminal Charges

Reporting criminal charges

- 3-97** (1) This rule applies to lawyers, articulated students, practitioners of foreign law and applicants.
- (2) Subject to subrule (4), a person who is charged with an offence under a federal or provincial statute, or an equivalent offence in another jurisdiction, must immediately provide to the Executive Director written notice of the charge.
- (3) [rescinded]
- (4) No notification is required under subrule (2) if a person is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act*.

Introduction

- (1) One of the hallmarks of civilized society is the rule of law. Its importance is reflected in every legal activity in which citizens engage. As participants in a justice system that advances the rule of law, lawyers hold a unique and important role in society. Self-regulatory powers have been granted to the legal profession in Canada on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to Canada's robust legal system. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more than mere technical proficiency is expected of them. A special ethical responsibility comes with membership in the legal profession. This *Code of Professional Conduct for British Columbia* attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the justice system and other members of the profession.
- (2) The *Legal Profession Act* provides that it is the object and duty of the Law Society of British Columbia to uphold and protect the public interest in the administration of justice. A central feature of that duty is to ensure that lawyers can identify and maintain the highest standards of ethical conduct. This Code attempts to assist lawyers to achieve that goal. While the Code should be considered a reliable and instructive guide for lawyers, the obligations it identifies are only the minimum standards of professional conduct expected of members of the profession. Lawyers are encouraged to aspire to the highest standards of competence, integrity and honour in the practice of their profession, whether or not such standards are formally addressed in the Code.
- (3) The Code is published under the authority of the Benchers of the Law Society of British Columbia for the guidance of BC lawyers. It is significantly related to the Federation of Law Societies' Model Code of Professional Conduct, though there are points of variance from the Model Code that the Benchers have considered to be appropriate for guiding practice in British Columbia. Where there is a corresponding provision in the Model Code, the numbering of the *BC Code* is similar to that of the Model Code. The *BC Code* is not a formal part of the Law Society Rules but, rather, an expression of the views of the Benchers about standards that British Columbia lawyers must meet in fulfilling their professional obligations.

Code of Professional Conduct for British Columbia

- (4) The Code is divided into three components: rules, commentary and appendices. Each of these components contain some statements that are mandatory, some that are advisory and others with both mandatory and advisory elements. Some issues are dealt with in more than one place in the Code, and the Code itself is not exhaustive of lawyers' professional conduct obligations. In determining lawyers' professional obligations, the Code must be consulted in its entirety and lawyers should be guided in their conduct equally by the language in the rules, commentary and appendices. Mandatory statements have equal force wherever they appear in the Code.
- (5) A breach of a provision of the Code by a lawyer may or may not be the basis of disciplinary action against that lawyer. A decision by the Law Society to take such action will include a consideration of the language of the provision itself and the nature and seriousness of the conduct in question.
- (6) The correct or best answer to ethical questions that arise in the practice or lives of lawyers may often be difficult to discern, whether or not the Code addresses the question directly. Lawyers should always be aware that discussion of such questions with Benchers, Law Society practice advisors, the Law Society's Ethics Committee or other experienced and trusted colleagues is the approach most likely to identify a reasonable course of action consistent with lawyers' ethical obligations. This Code is intended to be a valuable asset for lawyers in the analysis, discussion and resolution of such issues.

[Introduction added 12/2016]

Honesty and candour

3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

Commentary

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

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

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

Language rights

3.2-2.1 A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.

[added 12/2016]

3.2-2.2 Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary

[1] The lawyer should advise the client of the client's language rights as soon as possible.

[2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the *Canadian Charter of Rights and Freedoms*, s.19(1) and Part XVII of the *Criminal Code* regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.

[3] When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by rule 3.1-2 and related commentary.

[4] Civil trials in British Columbia must be held in English: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42. Under section 530 of the *Criminal Code*, R.S.C 1985, c. C-46 an accused has the right to a criminal trial in either English or French.

[rule and commentary added 12/2016]

When the client is an organization

3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary

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

[2] In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (section 3.4).

3.7-6 If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary

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

Obligatory withdrawal

3.7-7 A lawyer must withdraw if:

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

Manner of withdrawal

3.7-8 When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

3.7-9 On discharge or withdrawal, a lawyer must, as soon as practicable:

- (a) notify the client in writing, stating:
 - (i) the fact that the lawyer is no longer acting;
 - (ii) the reasons, if any, for the withdrawal; and
 - (iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;
- (a.1) notify in writing all other parties, including the Crown where appropriate, that the lawyer is no longer acting;
- (b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;
- (c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

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- (d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;
- (e) promptly render an account for outstanding fees and disbursements;
- (f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and
- (g) notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer is no longer acting and comply with the applicable rules of court and any other requirements of the tribunal.

[amended 07/2015]

Commentary

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

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

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

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

[6] In the absence of a reasonable objection, a lawyer who is discharged or withdraws continues to have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to while the lawyer was counsel. This duty continues, notwithstanding subsequent instructions of the client.

[[6] added 03/2017]

Confidentiality

3.7-9.1 Subject to exceptions permitted by law, if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.

Commentary

[1] One such exception is that in *R. v. Cunningham*, 2010 SCC 10, which establishes that, in a criminal case, if the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court. See para. 31:

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *R. v. McClure*, 2001 SCC 14 and *Smith v. Jones*, [1999] 1 S.C.R. 455). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

Duty of successor lawyer

3.7-10 Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

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

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Chapter 5 – Relationship to the Administration of Justice

- (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;
- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
- (g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;
- (h) make suggestions to a witness recklessly or knowing them to be false;
- (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
- (j) improperly dissuade a witness from giving evidence or advise a witness to be absent;
- (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
- (l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation
- (m) abuse, hector or harass a witness;
- (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;
- (o) needlessly inconvenience a witness; or
- (p) appear before a tribunal while under the influence of alcohol or a drug.

Commentary

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

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

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also rules 3.2-5 and 3.2-6 and accompanying commentary.

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

[5] In the absence of a reasonable objection, lawyers have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to. This duty continues, notwithstanding subsequent instructions of the client.

[[5] added 03/2017]

Incriminating physical evidence

5.1-2.1 A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. A lawyer's possession of illegal things could constitute an offence and may require that the client obtain new counsel or disadvantage the client in other ways. It is imperative that a lawyer consider carefully the implications of accepting incriminating physical evidence. A lawyer should obtain the advice of senior criminal counsel or a Law Society practice advisor before agreeing to take possession. Where a lawyer already has possession this advice should be promptly obtained with respect to how the evidence should be handled.

[3.1] Unless a lawyer's handling of incriminating physical evidence is otherwise prescribed by law, the options available to a lawyer who has taken possession of such evidence include, as soon as reasonably possible:

- (a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;
- (b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination;
- (c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it; or
- (d) returning the evidence to its source, provided doing so will not cause the evidence to be concealed, destroyed or altered.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary, electronic or other evidence is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

[7] A lawyer must never take possession of an item the mere possession of which is illegal, such as stolen property, unless specific dispensation is afforded by the law, such as under the “innocent possession” exception, which allows a person to take possession of such an item for the sole purpose of promptly turning it over to the police.

[rule and commentary added 12/2016]

Duty as prosecutor

5.1-3 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

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

Disclosure of error or omission

5.1-4 A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.