THE LAW SOCIETY OF BRITISH COLUMBIA

REVISED AGENDA

MEETING: Benchers

DATE: Friday, January 22, 2010

TIME: **7:30 a.m.** Continental breakfast
8:30 a.m. Meeting begins
1:00 p.m. Meeting adjourns and lunch begins

PLACE: **Benchers Room, 9th Floor, Law Society Building**

BENCHERS' OATH OF OFFICE: At the next regular Benchers meeting attended by a Bencher after being elected or appointed as a Bencher or taking office as President or a Vice-President, the Bencher must take an oath of office (in the form set out in Rule 1-1.2) before a judge of the Provincial Court or a superior court in British Columbia, the President or a Life Bencher.			
CONSENT AGENDA: The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.			
(a)	**Discipline Guidelines Task Force**	Memorandum from Mr. Lucas to be distributed electronically prior to meeting	Tab A
1	**Minutes of December 11, 2009 meeting**	Minutes of the regular session Minutes of the *in camera* session (Benchers only)	Tab 1 p. 100
REGULAR AGENDA			
2	**President's Report**	Written report to be distributed electronically prior to meeting	
3	**CEO's Report**	Written report to be distributed electronically prior to meeting	
4	**Report on Outstanding Hearing & Review Reports**	Report to be distributed at the meeting	
GUEST PRESENTATIONS			
5	**Law Foundation of BC Annual Review**	Mary Mouat (Board Chair) and Wayne Robertson, QC (Executive Director) to report	

6	**University of Victoria Law School Report**	Dean Donna Greschner to report	
2009-2011 STRATEGIC PLAN IMPLEMENTATION: MATTERS FOR DISCUSSION AND/OR DECISION			
7	**Updating the 2009-2011 Strategic Plan**	Report from the Executive Committee Mr. McGee and Mr. Lucas to report	Tab 7 p. 700
OTHER MATTERS FOR DISCUSSION AND/OR DECISION			
8	**LSBC Submission to the Special Committee of the Legislature for Review of the FOI Act**	Draft submissions Mr. Hoskins to report	Tab 8 p. 800
9	**FLS Council and Executive Committee Update**	Report by Ian Donaldson, QC	
10	**Accreditation of the Canadian Common Law Degree**	Report from the Credentials Committee Mr. Stewart to report	Tab 10 p. 1000
11	**FLS Model Code of Conduct**	Memorandum from the Ethics Committee Mr. Hume to report	Tab 11 p. 1100
14	**Quebec Mobility Agreement**	Memorandum from Ms. Small Mr. Stewart to report	Tab 14 p. 1400
15	**Nominations to 2010 Finance Committee**	Memorandum from Mr. McIntosh Nomination of two Benchers-at-large and one appointed Bencher	Tab 15 p. 1500
16	**Election of Appointed Bencher to 2010 Executive Committee**	Memorandum from Mr. McIntosh Election of one appointed Bencher	Tab 16 p. 1600
18	**Discussion of Costs Awarded by Hearing Panels**	Memorandum from Ms. Wiseman, Ms. Boyd and Mr. Wredenhagen Mr. Vertlieb to report	Tab 18 p. 1800
FOR INFORMATION ONLY			
17	**Executive Committee and Benchers Meeting Schedule for 2010**		Tab 17 p. 1700
IN CAMERA SESSION			
20	**LSBC Litigation Report**	LSBC Litigation Report Mr. Cameron to report	Tab 20 p. 2000

Memo

The Law Society of British Columbia

To Benchers

From Michael Lucas

Date January 19, 2010

Subject **Proposed Discipline Guidelines Task Force**

As will be recalled, there has, since late summer 2009, been a fair amount of discussion by the Benchers concerning discipline-related policies and processes at the Law Society and about the advisability of focusing part of the strategic priorities of the Society around these issues.

Toward that end, there was some discussion at the Benchers' meeting of December 11, 2009 about creating a task force to address discipline policies, processes and guidelines. No resolution was passed, however.

Therefore, it is proposed that the following resolution be passed by consent:

> BE IT RESOLVED that the benchers create the Discipline Guidelines Task Force, with a mandate to be drafted by the Task Force and submitted to the benchers for approval at the next opportunity.

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THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, December 11, 2009

PRESENT:

Gordon Turriff, QC, President
Glen Ridgway, QC, 1st Vice-President
Gavin Hume, QC, 2nd Vice-President
Rita Andreone
Kathryn Berge, QC
Joost Blom, QC
Leon Getz, QC
Carol Hickman
William Jackson
Patrick Kelly
Stacy Kuiack
Bruce LeRose, QC
Barbara Levesque
Jan Lindsay
David Mossop, QC
Suzette Narbonne
Thelma O'Grady
Peter Lloyd
David Renwick, QC
Richard Stewart, QC
Ronald Tindale
Art Vertlieb, QC
Herman Van Ommen
James Vilvang, QC
Kenneth Walker
Dr. Maelor Vallance
David Zacks, QC
(by telephone)

ABSENT:

Haydn Acheson
Robert Brun, QC
Terence La Liberté, QC
Meg Shaw, QC

STAFF PRESENT:

Tim McGee
Stuart Cameron
Su Forbes, QC
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Lesley Pritchard
Susanna Tam
Alan Treleaven
Adam Whitcombe
Carmel Wiseman

GUESTS:

Dom Bautista, Executive Director, Law Courts Center
Johanne Blenkin, Executive Director, BCCLS
Dean Mary Ann Bobinski, Faculty of Law, University of BC
James Bond, President, CBABC
Patricia Bond, 2010 Bencher, Vancouver County
David Crossin, QC, 2010 Bencher, Vancouver County
Azul Depordash, Trial Lawyers Association
Ron Friesen, CEO, CLEBC
Anna Fung, Life Bencher
Dean Donna Greschner, Faculty of Law, University of Victoria
Todd McKendrick, Chair, CLEBC Board of Directors
Stephen McPhee, Vice-President, CBABC
Jane Mundy, Reporter, Lawyers Weekly
Caroline Nevin, Executive Director, CBABC

GUESTS: Wayne Robertson, QC, Executive Director, Law Foundation of BC
Alan Ross, 2010 Bencher, Vancouver County
Catherine Sas, QC, 2010 Bencher, Vancouver County

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on November 13, 2009 were approved as circulated.

2. Revised Minutes of the May 8th meeting

The revised minutes of the meeting held on May 8, 2009 were approved as circulated.

Consent Resolutions

The following resolutions were **passed unanimously and by consent**.

3. Term of Office and Term Limits for Benchers

BE IT RESOLVED to amend the Law Society Rules by rescinding Rule 1-1(1) and substituting the following:

(1) The term of office for an appointed Bencher begins on the date that the appointment is effective and ends on January 1 of the next even-numbered year.

(1.1) Despite subrule (1), an appointed Bencher continues to hold office until a successor is appointed.

BE IT RESOLVED *to amend the Law Society Rules as follows effective January 2, 2010:*

1. By adding the following Rule:

Term limits

1-1.1 (1) A Bencher is ineligible to be elected or appointed as a Bencher if

(a) at the conclusion of the Bencher's term of office, he or she will have served as a Bencher for more than 7 years, whether consecutive or not, or

(b) the Bencher has been elected Second Vice-President-elect.

(2) Despite subrule (1)(a) but subject to subrule (1)(b), a Bencher who was a Bencher on January 10, 1992 and who, at the conclusion of his or her term of office, will not have served as a Bencher for more than 11 years, whether consecutive or not, is eligible to be elected or appointed as a Bencher.

2. By rescinding Rule 1-2 and substituting the following:

Life Benchers

1-2 (1) A person, including the Attorney General, who is ineligible for further election or appointment as a Bencher under Rule 1-1.1 is a Life Bencher on leaving office as a Bencher.

(3) A Life Bencher

(a) may attend and speak at meetings of the Benchers,

(b) has no vote in Bencher meetings,

(c) except as a member of a committee under Rule 1-47, may not exercise any of the powers of a Bencher, and

(d) is ineligible to be elected or appointed as a Bencher.

(4) A Bencher who was a Bencher on January 10, 1992 and who has served for at least 7 years as a Bencher is a Life Bencher on leaving office as a Bencher,

(5) A person who was a Life Bencher on January 1, 2010 continues to be a Life Bencher.

3. By rescinding Rule 1-21(2) and substituting the following:

(2) An incumbent Bencher who qualifies under subrule (1) and is not disqualified under Rule 11.1 is eligible to be nominated as a candidate for re-election as a Bencher.

4. Anonymous Publication of Discipline Decisions

BE IT RESOLVED *to amend the Law Society Rules as follows:*

1. In Rule 4-38(1) and (2) by striking the phrase "Subject to Rule 4-38.1, the Executive Director" **and substituting** "The Executive Director".

2. In Rule 4-38.1, by rescinding subrules (2) to (5), (7) and (8) and substituting the following:

(2) If all allegations in the citation are dismissed by a panel, the publication must not identify the respondent unless the respondent consents in writing.

(3) On an application under subrule (4) or on its own motion, the panel may order that publication not identify the respondent if

(a) the panel has imposed a penalty that does not include a suspension or disbarment, and

(b) publication of the identity of the respondent could reasonably be expected to identify an individual, other than the respondent, and that individual would suffer serious prejudice as a result.

(4) An individual affected, other than the respondent, may apply to the panel for an order under subrule (3) before the written report on findings of fact and verdict is issued or oral reasons are delivered.

5. Oath of Office for Benchers

BE IT RESOLVED *to amend the Law Society Rules by adding the following Rule:*

Oath of office

1-1.2 (1) At the next regular meeting of the Benchers attended by a Bencher after being elected or appointed as a Bencher or taking office as President or a Vice-President, the Bencher must take an oath of office in the following form:

I, [name] do swear or solemnly affirm that:

I will abide by the Legal Profession Act, the Law Society Rules and the Professional Conduct Handbook, and I will faithfully discharge the duties of [a Bencher/President/First or Second Vice-President], according to the best of my ability; and

I will uphold the objects of the Law Society and ensure that I am guided by the public interest in the performance of my duties.

(2) An oath under this Rule must be taken before a judge of the Provincial Court or a superior court in British Columbia, the President or a Life Bencher.

6. Continuing Professional Development

BE IT RESOLVED *to amend the Law Society Rules by rescinding Rule 3-18.3(7) and substituting the following:*

(6.1) A lawyer who ceases to be a practising lawyer without completing all required professional development must complete the uncompleted portion in the next calendar year in which the lawyer is a practising lawyer, in addition to the required professional development for that calendar year.

(7) A practising lawyer who is in breach of this Rule has failed to meet a minimum standard of practice, and the Executive Director may refer the matter to the Discipline Committee or the Chair of the Discipline Committee.

7. Amendment to Rule 4-24.1 - Summary Hearing Rule

BE IT RESOLVED *to amend the Law Society Rules by rescinding Rule 4-24.1(1)(c) and substituting the following:*

(c) failed to respond to a communication from the Society;

(d) breached an order made by a hearing panel.

8. 2010 Fee Schedules

BE IT RESOLVED *to amend the Law Society Rules, effective January 1, 2010, as follows:*

1. In Schedule 1, by rescinding items A2 and A3 and substituting the following:

A. Annual fee $

2. Special Compensation Fund assessment (Rule 2-70) 50.00

3. Liability insurance base assessment (which may be increased or decreased in individual cases in accordance with Rule 3-22(1)):

(a) member in full-time practice 1600.00

(b) member in part-time practice 800.00

2. In Schedule 2, by revising the prorated figures in each column accordingly; and

3. In the headings of schedules 1, 2, and 3, by striking the year "2009" and substituting "2010".

9. Rule amendments consequential to amendment of law school faculty call and admission rules

BE IT RESOLVED *to amend the Law Society Rules as follows:*

1. By rescinding Rule 2-26.1(5)(c) and substituting the following:

   (c) is imposed by Rule 2-48.1, 2-49.1 or 2-54.

2. By rescinding Rule 2-32(4) and substituting the following:

   (4) The articling term cannot be reduced by more than 5 months by any other Rule or the combined effect of any Rules.

10. Election of appointed Bencher to the Executive Committee

BE IT RESOLVED *to amend the Law Society Rules by rescinding Rule 1-39(7) to (9) and substituting the following:*

(8) At the last regular meeting of the Benchers in each calendar year, the appointed Benchers must elect one appointed Bencher to serve as a member of the Executive Committee for the following calendar year.

(9) All Benchers appointed, or eligible to be appointed, for a term that includes all or part of the calendar year for which members of the Executive Committee are to be elected are eligible for election to the Executive Committee under subrule (8).

(12) If, because of a tie vote or for any other reason, the Benchers fail to elect 3 members of the Executive Committee under subrules (4) and (5), or if a vacancy occurs in any position elected under this rule, the Benchers or the appointed Benchers, as the case may be, must hold an election to fill the vacancy at the next regular meeting of the Benchers.

REGULAR AGENDA – for Discussion and Decision

11. President's Report

Mr. Turriff reported on a number of his activities conducted on behalf of the Law Society in the past month, including:

- travelling to Chilliwack to attend a reception hosted by David Renwick, QC and to speak to the local Rotary Club and two classes of high school students
- travelling to Kelowna to represent the Law Society at the 2009 Yale County Bench and Bar Dinner
- travelling to Los Angeles to attend the Fall Meeting of the CBA BC Branch, a highlight of which was a session on professional ethics and responsibility led by Past-President John Hunter, QC and Mr. Ridgway

- travelling to Victoria to attend a Call and Admission Ceremony, and deliver a 125th Anniversary speech to the Rotary Club.

Mr. Turriff thanked Ms. Berge and Mr. Stewart for hosting him at the Victoria call ceremony.

Mr. Turriff welcomed newly elected 2010-11Benchers Patricia Bond, David Crossin, QC, Lee Ongman, Alan Ross and Catherine Sas, QC. He then presented Mr. Ridgway with his 2010 President's Pin.

Mr. Turriff congratulated Ms. Hickman, Ms. Lindsay and Mr. Vertlieb on their recent election to the 2010 Executive Committee and thanked Ms. Berge, Ms. O'Grady and Mr. Renwick for also participating in the election. Mr. Kelly then announced that Ms. Leveque has been elected by the appointed Benchers as their Executive Committee representative for 2010.

Mr. Turriff referred the Benchers to the 2009 Benchers Survey and asked them to complete and return it to Mr. McIntosh by the end of the meeting.

12. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers, including the following matters:

- Update – New Bencher Orientation Program – January 15, 2010
- Update – 2009-2011 Strategic Plan Annual Review
- Update – Collective Bargaining
- Update – Chief Legal Officer Recruitment
- 2009 Employee Survey
- Human Resources Strategic Plan

Human Resources Manager Donna Embree briefed the Benchers on the Law Society's Human Resources Strategic Plan. She outlined the plan's two goals and accompanying priorities:

- To make the Law Society an employer of choice
    - Develop and implement a strategic leadership development program and skills development program
    - Develop an engaged and motivated work force
- To shift the Law Society's Human Resources approach from a transactional orientation to a service and resource focus
    - Implement a HR System
    - Modernize HR processes

Ms. Embree noted the importance of aligning the Law Society's HR goals with the strategic priorities set by the Benchers. Mr. McGee acknowledged the value of the contributions made by Ms. Embree in her first year with the Law Society.

Mr. McGee presented each of the Benchers with a bound copy of the speech (Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia) delivered by Mr. Turriff in September 2009 to the Conference of Regulatory Officers in Perth, Australia. Mr. McGee noted that a good number of requests for copies have been received. He credited the Communications department for completing this important public outreach initiative, particularly Denise Findlay, Cara McGregor, Carol Oakley and Lesley Pritchard, all under Adam Whitcombe's leadership.

Mr. Turriff expressed his appreciation to Law Society staff for their assistance, particularly to Michael Lucas and Collette Souvage for their research.

13. Report on Outstanding Hearing and Review Reports

The Benchers received a report on outstanding hearing decisions.

GUEST PRESENTATIONS

14. University of Victoria Law School Report

This matter was put over to the January meeting.

STRATEGIC PLANNING AND PRIORITIES MATTERS – for Discussion and/or Decision

15. Regulating Multi-Disciplinary Partnerships – Report and Recommendations of the Ethics Committee

Mr. Hume briefed the Benchers as Ethics Committee Chair. He provided background and context, noting that at their July 2009 meeting the Benchers approved in principle the regulation of members of multi-disciplinary partnerships (MDPs) by the Law Society, on two conditions:

- Resolution of the issue of insurance coverage for claims that may arise from the action of non-lawyer members of a firm
- Development of draft Law Society Rules for the Benchers' review and approval

Mr. Hume advised that the Ethics Committee has gone through the current Rules and the proposed new Rules with care to ensure that MDPs will only be allowed to extent that they support the practice of law. He reviewed highlights of the proposed new Rules, including:

- MDPs are subject to the regulatory requirements expected of a lawyer
- MDPs' non-lawyer members will not interfere with the practice of law and professional judgment of their lawyer members
- MDPs' provision of legal services will be under the actual control of their lawyer members

Mr. Hume moved (seconded by Mr. Van Ommen) that the Benchers adopt the resolutions to adopt the Law Society Rules and the *Professional Conduct Handbook* set out at pages 1542 and 1550 of the meeting materials, respectively (appended to these minutes as Appendix 1).

Mr. Walker moved (seconded by Ms. Lindsay) that the subject of regulation of MDPs by the Law Society be referred to the Independence & Self-governance Advisory Committee for further review.

In the ensuing discussion, several issues were raised, including:

- The current priority of the MDP issue for the federal Competition Bureau
- The proposed Rules contemplate the regulation of members of MDPs, but not the MDPs themselves
- Whether the subject of regulation of MDPs should be referred to the profession for input
- Whether now is the time for a principled decision by the Benchers

The motion to refer was defeated.

In the ensuing discussion of the main motion, a number of issues were raised, including:

- Implications of the fact that relatively few MDPs have taken up the opportunity provided to them in Ontario
  - Small numbers mean ease of regulation or waste of resources
- Implications of both regulating and not regulating MDPs
  - for small and rural communities
  - for the legal profession's national and global competitiveness
  - for protection of the public interest
- Procedural and practical implications of regulating MDPs
- Confirmation by Ms. Forbes that the Lawyers Insurance Fund will arrange suitable coverage of non-lawyer members of MDPs if the Benchers decide to proceed with their regulation
- Various start-up considerations, including
  - credentialing processes
  - notice to the profession and public
- Confirmation of "the practice of law" as the regulatory context for the actions of non-lawyer members of MDPs, and the consequences of those actions

The main motion was carried by more than a two-thirds majority of the voting Benchers (16 for and 7 against).

The Benchers agreed that July 1, 2010 will be the implementation date for the new Rules, subject to the Credentials Committee's determination that more time is needed to prepare the Law Society's administrative procedures for credentialing non-lawyer members of MDPs.

16. Benchers' Investigative and Adjudicative Functions: Analysis and Recommendations

Ms. Lindsay presented the report of the Independence and Self-Governance Advisory Committee (page 1600 of the meeting materials). She noted that the Committee had been directed by the Benchers to examine the dual prosecutorial and adjudicative roles of Benchers.

Ms. Lindsay moved (seconded by Mr. Jackson) that the Benchers resolve to strike a task force to develop models for separation of the Law Society's adjudicative and investigative functions (based on Option 1 in the Committee's report), and to make recommendations about which model to adopt.

In the ensuing discussion the Benchers considered a number of issues, including the following:

- the consensus view of the Independence and Self-Governance Advisory Committee that the Law Society's current system for investigating and adjudicating complaints works well, and has some support from BC's courts
- whether the current system may raise an apprehension of bias
    - in the public mind
    - in government
    - in the legal profession
- implications of any such apprehension of bias for the legal profession's independence and self-regulation
- implications for improving the efficiency of use of Law Society resources and the quality of adjudication by expanding the pool of potential tribunal members beyond currently elected and appointed Benchers

The motion was carried.

17. Delivery of Legal Services Task Force Report

Mr. Vertlieb outlined the task force report (set out at page 1700 of the meeting materials). Mr. Vertlieb outlined the background for the task force's formation, highlighted a number of key principles that guided the task force's analysis and approach, and reviewed its methodology and interim findings. He noted that information-gathering is the task force's current mandate, and that while the information that has been gathered is important, it does not change the task force's view that substantive changes to the Law Society's regulatory approach are needed to enhance the delivery of legal services in BC.

Mr. Vertlieb referred the Benchers to sections 3 and 4 of the task force report for an outline of methodologies proposed for the next stage of the task force's work, together with a statement of proposed mandate (pages 1717-1720 of the meeting materials, appended to these minutes as Appendix 2).

Mr. Mossop moved (seconded by Mr. Lloyd) that:

1. the Delivery of Legal Services Task Force be continued;

2. the methodology set out in section 3 of the task force report be approved; and

3. the revised mandate set out in section 4 of the task force report be approved.

The motion was carried.

19. Strategic Plan Annual Review: Phase 1

Mr. McGee reviewed the purpose of the annual review of the Law Society's three- year rolling strategic plan, describing the process as a tweaking – rather than re-writing – of the current plan.

Mr. Lucas described the purpose of the Law Society's Advisory Committees as identifying strategic issues of importance in the medium term (over the next five to seven years), monitoring those issues, and reporting back to the Benchers at least annually on whether and how the Strategic Plan should be updated. He outlined highlights of the various advisory committees' year-end reports, noting that the Benchers are being asked to consider the recommendations contained in those reports.

Mr. Lucas referred the Benchers to his memorandum at page 1900 of the meeting materials for more background on the current annual review of the 2009-2011 Strategic Plan, noting particularly the summary of the Executive Committee's deliberations and the conclusion at page 1902:

> **EXECUTIVE COMMITTEE DISCUSSIONS**
>
> The Executive Committee considered the recommendations of the Advisory Committees and other matters that may need to be addressed in the Strategic Plan. The Committee reached a general consensus that the plan need not, and likely ought not, be amended in a significant fashion, as it broadly identifies the important goals of the Law Society moving into the next two-year period. The Committee also agreed that the work being done on discipline matters ought to be more clearly identified in the Strategic Plan.
>
> **CONCLUSION**
>
> The current Strategic Plan and the Advisory Committee reports are presented to the Benchers for discussion and consideration at this meeting, from which it is hoped that some consensus can be reached on what, if any, modifications to the Strategic Plan need be incorporated. When giving thought to prioritization of the various recommendations, it would be useful to keep in mind this question: "is this a significant issue of importance to the public interest in the administration of justice that the Law Society should address in 2010 in order to appropriately discharge its mandate?"

Following remarks by the chairs of each of the advisory committees, a discussion ensued. A number of Benchers commented on the importance of legal aid funding as an access to justice issue. Others identified the need to provide for the working group or task force on separation of Benchers' prosecutorial and adjudicative powers that was approved earlier in the meeting. There was consensus on the need to incorporate into the Strategic Plan provision for the project to enhance the Law Society's discipline process that was launched in 2009 and to ensure that the Strategic Plan reflected a commitment to examine issues relating to the retention of Aboriginal lawyers in the legal profession.

The Benchers agreed that no resolution was needed to formalize their discussion, and directed staff to incorporate the input provided in the current discussion into draft revisions of the current Strategic Plan, for presentation at the January Benchers meeting.

OTHER MATTERS FOR DISCUSSION AND/OR DECISION

20. Remuneration of Appointed Benchers

Past-President Anna Fung, QC presented the report and recommendations of an informal 'blue ribbon' panel (Ms. Fung, Past-President Robert McDiarmid, QC and Life Appointed Bencher June Preston, MSW) regarding remuneration of the Law Society's appointed Benchers. Ms. Fung outlined the process followed and issues considered by the panel. She reviewed the panel's recommendations for implementation of a new policy to guide the Law Society's remuneration of its appointed Benchers, noting particularly:

- the narrowness of the current policy's qualifying criteria, particularly the restriction to meetings and hearings, and the lack of provision for travel
- the panel's conclusions that the new policy should not address the matters of preparation, reputational risk and remuneration of Life Appointed Benchers, for reasons set out in the panel's report (page 2003 of the meeting materials
- the proposed new policy would move the Law Society's per diem rate from the 32nd percentile to the 62nd percentile of the organizations surveyed by the panel
    - Alberta is at the 69th percentile

Ms. Fung noted that the Executive Committee has endorsed the panel's recommendations and has proposed the following resolution to give effect to these recommendations:

BE IT RESOLVED THAT:

1. *the Law Society's current policy for remuneration of appointed Benchers shall be replaced by the following per diem policy, effective January 1, 2010:*

    - **Appointed Bencher Event Day Per Diem – $250**

      All Appointed Benchers are eligible to receive $250 for every day—or portion thereof—during which they attend any meeting, hearing or other event at the request of the Law Society, inclusive of preparation and travel ("Law Society Event").

    - **Appointed Bencher Travel Day Per Diem – $125**

      In addition, all Appointed Benchers are eligible to receive $125 for every day—or portion thereof—when circumstances require them to travel for the purpose of attending a Law Society Event prior to or following the day of the event ("Law Society Travel").

Finally, Ms. Fung noted the panel's request that Law Society management report to the Executive Committee by March 2011 on the cost and operational experience of the revised policy for remuneration of appointed Benchers.

Ms. Hickman moved (seconded by Ms. Berge) that the Benchers adopt the resolution presented by the Executive Committee, and that the Benchers request Law Society management report to the Executive Committee by March 2011 on the cost and operational experience of the revised policy for remuneration of appointed Benchers.

The motion was carried unanimously.

OTHER BUSINESS

Mr. Turriff welcomed the Honourable Michael de Jong, Attorney General of BC, to the meeting as an *ex officio* Bencher.

Mr. de Jong applauded Mr. Turriff for his work as 2009 President of the Law Society, noting particularly the value of his efforts to connect the people of British Columbia with their legal institutions.

Mr. de Jong announced that the following appointments are effective immediately:

- Mr. Jackson as Queen's Counsel
- Ms. Lindsay as Queen's Counsel
- Ms. Shaw as Master of the Supreme Court of BC

***IN CAMERA* SESSION**

Discussion of Bencher Concerns

This matter was discussed *in camera*.

WKM
2009-12-23

11. Regulating Multi-Disciplinary Partnership

BE IT RESOLVED *to amend the Law Society Rules effective July 1, 2010 as follows:*

1. In Rule 1

   (a) by adding the following paragraph to the definition of "firm":

   (g) a multi-disciplinary practice;

   (b) by adding the following definitions:

   "multi-disciplinary practice" or "MDP" means a partnership, including a limited liability partnership or a partnership of law corporations, that is owned by at least one lawyer or law corporation and at least one individual non-lawyer or professional corporation that is not a law corporation, and that provides to the public legal services supported or supplemented by the services of another profession, trade or occupation;

   "professional corporation" includes a law corporation and means a corporation that is a company, as defined in the Business Corporations Act, and that is in good standing under that Act or that is registered under Part 10 of the Business Corporations Act, through which a member of a profession, trade or occupation is authorized under a statute governing the profession, trade or occupation to carry on the business of providing services to the public;

2. In Rule 2-10(1), by striking "sections 15 to 17 of the Act" and substituting "sections 15 to 17 of the Act or Rule 2-23.2".

3. By adding the following Rules:

Multi-Disciplinary Practice

Definition and application

2-23.1 (1) In Rules 2-23.1 to 2-23.12,

"legal services" means services that constitute the practice of law as defined in section 1 of the Act;

"member of an MDP" means a lawyer or non-lawyer who holds an ownership interest in the MDP.

(2) The responsibilities imposed under Rules 2 23.1 to 2 23.12 are not affected by the fact that a member of an MDP is carrying on the practice of a profession, trade or occupation or participating in the MDP as an employee, shareholder, officer, director or contractor of a professional corporation or on its behalf.

Conditions for Multi-Disciplinary Practice

2-23.2 (1) A lawyer must not practise law in an MDP unless

(a) the lawyer and all members of the MDP are in compliance with Rules 2 23.1 to 2 23.12 and the Professional Conduct Handbook,

(b) all lawyers who are members of the MDP have obtained express permission under this Division to practise law in the MDP,

(c) all non-lawyer members of the MDP are of good character and repute,

(d) all members of the MDP agree in writing

(i) that practising lawyers who are members of the MDP will have actual control over the delivery of legal services by the MDP,

(ii) that non-lawyer members of the MDP will not interfere, directly or indirectly with the lawyer's

(A) obligation to comply with the Act, these Rules and the Professional Conduct Handbook, and

(B) exercise of independent professional judgement,

(iii) to comply with the Act, these Rules and the Professional Conduct Handbook, and

(iv) to cooperate with and assist the Society or its agents in the conduct of a practice review, examination or investigation, and

(e) all members of the MDP who are governed by the regulatory body of another profession agree to report to the MDP any proceedings concerning their conduct or competence.

(2) For the purposes of this Rule, a lawyer has actual control over the delivery of legal services of the MDP if, despite any partnership agreement or other contract, the lawyer is able, in all cases and without any further agreement of any member of the MDP, to

(a) exercise independent professional judgement, and

(b) take any action necessary to ensure that the lawyer complies with the Act, these Rules and the Professional Conduct Handbook.

Application to practise law in Multi-Disciplinary Practice

2-23.3 (1) Before a lawyer may practise law in an MDP, the lawyer must submit the following to the Executive Director:

(a) an application in a form approved by the Credentials Committee;

(b) the application fee specified in Schedule 1 for each lawyer member of the proposed MDP;

(c) the investigation fee specified in Schedule 1 for each non-lawyer member of the proposed MDP;

(d) copies of all partnership agreements and other contracts that the lawyer proposes to enter into with other members of the proposed MDP.

(2) In addition to any other requirement determined by the Credentials Committee, in the form referred to in subrule (1), the lawyer must report full details of the arrangements that the lawyer has made to ensure that

(a) no non-lawyer member of the MDP provides services to the public, except

(i) those services that support or supplement the practice of law by the MDP, and

(ii) under the supervision of a practising lawyer,

(b) privileged and confidential information is protected under Rule 2 23.8,

(c) all members of the MDP comply with the rules respecting conflicts of interest as required under Rule 2 23.9,

(d) every member of the MDP obtains and maintains liability insurance as required under Rule 2 23.10,

(e) the lawyer and the MDP maintain trust accounts and trust accounting records in accordance with Rule 2 23.11, and

(f) all non-lawyer members of the MDP enter into the agreements required under Rules 2 23.2.

(3) Any number of lawyers proposing to practise law together in an MDP may submit a joint application under this Rule.

Consideration of application to engage in Multi-Disciplinary Practice

2-23.4 (1) On receipt of an application under Rule 2 23.3, the Executive Director must

(a) grant permission to practise law in the MDP,

(b) if the requirements for permission to practise law in an MDP have not been met, refuse permission, or

(c) refer the application to the Credentials Committee.

(2) The Executive Director must not grant permission under subrule (1) unless the Executive Director is satisfied of the following:

(a) all of the conditions set out in Rule 2 23.2 have been satisfied;

(b) the lawyer has made arrangements that will enable the lawyer and the MDP to comply with Rules 2 23.1 to 2 23.12.

(3) If the lawyer applying for permission under Rule 2 23.3 agrees, the Executive Director may impose restrictions or conditions on permission granted under subrule (1).

(4) Within 30 days after being notified of the decision of the Executive Director under subrule (1)(b), the lawyer may, by written notice, request a review by the Credentials Committee.

(5) If an application is referred to the Credentials Committee under subrule (1)(c) or a review is requested under subrule (4), the Credentials Committee must direct the Executive Director to

(a) grant permission to practise law in an MDP, with or without restrictions or conditions, or

(b) reject the application.

(6) If an application is rejected or if restrictions or conditions are imposed, the Credentials Committee must, on the written request of the lawyer applying, give written reasons for the decision.

Changes in MDP

2-23.5 (1) A lawyer practising in an MDP must immediately notify the Executive Director when

(a) ceasing to practise law in the MDP for any reason,

(b) any new person proposes to become a member of the MDP,

(c) any member of the MDP ceases to be a member of the MDP or to be actively involved in the MDP's delivery of services to clients or in the management of the MDP, or

(d) there is any change in the terms of the partnership agreement or other contract affecting the conditions under which members of the MDP participate in the MDP.

(2) When a new non-lawyer proposes to become a member of an MDP, the lawyer practising in the MDP must do the following at least 60 days before the proposed membership takes effect:

(a) notify the Executive Director in a form approved by the Credentials Committee;

(b) pay the investigation fee specified in Schedule 1.

(3) Any number of lawyers practising law in an MDP may notify the Executive Director jointly under subrule (1) or (2).

Cancellation of permission to practise law in an MDP

2-23.6 (1) If for any reason the Executive Director, in his or her sole discretion, is not satisfied that the lawyer is complying and will continue to comply with Rules 2 23.1 to 2 23.12, the Executive Director must cancel the permission granted under Rule 2 23.4.

(2) A cancellation under subrule (1) takes effect

(a) after 30 days notice to all lawyers who are current members of the MDP affected by the cancellation, or

(b) without notice or on notice less than 30 days on the order of the Credentials Committee.

(3) A lawyer who is notified of a cancellation under this Rule may apply within 30 days to the Credentials Committee for a review of the Executive Director's decision.

(4) When a lawyer applies for a review under subrule (3), the Credentials Committee must consider all the information available to the Executive Director, as well as submissions from or on behalf of the lawyer applying and the Executive Director and must

(a) confirm the decision of the Executive Director,

(b) direct the Executive Director to reinstate the permission, with or without restrictions or conditions specified by the Credentials Committee, or

(c) order a hearing before a panel under Part 5.

(5) The lawyer applying under subrule (3) or the Executive Director may initiate a review by the Benchers on the record of a decision under subrule (4) by delivering to the President and the other party a Notice of Review.

(6) Rules 5-15 and 5-17 to 5-21 apply to a review under this Rule, insofar as they are applicable and with the necessary changes.

(7) A lawyer who has applied for a review under subrule (3) may apply to the President for a stay of the cancellation pending the decision of the Credentials Committee on the review.

(8) The person who applies for a review under subrule (5) may apply to the President for a stay of the cancellation pending the decision of the Benchers on the review.

(9) When considering an application for a stay under subrule (8), the President must consider all the information available to the Executive Director, as well as submissions from or on behalf of the Executive Director and the lawyer concerned and must

(a) refuse the stay, or

(b) grant the stay, with or without restrictions and conditions.

(10) On an application under subrule (7) or (8), the President may designate another Bencher to make a determination under subrule (9).

(11) When a lawyer's permission to practise law in an MDP is cancelled under this Rule, the lawyer must immediately cease practising law in the MDP.

Lawyer's professional duties

2-23.7 (1) Except as provided in Rules 2 23.1 to 2 23.12, the Act, these Rules and the Professional Conduct Handbook apply to lawyers who practise in an MDP.

(2) A lawyer practising law in the MDP must take all steps reasonable in the circumstances to ensure that the non-lawyer members of the MDP

(a) practise their profession, trade or occupation with appropriate skill, judgement and competence,

(b) comply with the Act, these Rules and the Professional Conduct Handbook, and

(c) provide no services to the public except

(i) those services that support or supplement the practice of law by the MDP, and

(ii) under the supervision of a practising lawyer, as required under Chapter 12 of the Professional Conduct Handbook.

(3) A lawyer practising in an MDP must not permit any member or employee of the MDP to direct or control the professional judgement of the lawyer or to cause the lawyer or other members of the MDP to compromise their duties under the Act, these Rules or the Professional Conduct Handbook.

Privilege and Confidentiality

2-23.8 A lawyer practising law in an MDP must take all steps reasonable in the circumstances, including the implementation of screening measures if necessary, to ensure that no improper disclosure of privileged or confidential information is made to any person, including a person appointed by the regulatory body of another profession in relation to the practice of another member or employee of the MDP.

Conflicts of interest

2-23.9 (1) A lawyer practising law in an MDP must take all steps reasonable in the circumstances to ensure that the other members of the MDP will comply with the provisions of the Act, these Rules and the Professional Conduct Handbook respecting conflicts of interest as they apply to lawyers.

(2) This Rule applies when the MDP has provided legal services to a client or when a potential client has sought legal services from the MDP.

Liability insurance

2-23.10 (1) A lawyer practising law in an MDP must ensure that every non-lawyer member of the MDP providing services directly or indirectly to the public on behalf of the MDP

(a) maintains professional liability insurance

(i) on the terms and conditions offered by the Society through the Lawyers Insurance Fund and pays the insurance fee, and

(ii) in an amount equivalent to the total amount of coverage that the MDP maintains in excess of that required under Rule 3-21(1), and

(b) complies with the provisions of Part 3, Division 4 of these Rules as if the non-lawyer were a lawyer.

(2) If a non-lawyer member of an MDP agrees in writing, in a form approved by the Executive Committee. to engage in activities on behalf of the MDP for an average of 25 hours or less per week, the applicable insurance base assessment is the part-time insurance fee specified in Schedule 1.

Trust funds

2-23.11 (1) A lawyer practising law in an MDP that accepts any funds in trust from any person must maintain a trust account and a trust accounting system

(a) in accordance with Part 3, Division 7 of these Rules, and

(b) that are within the exclusive control of lawyers practising law in the MDP.

(2) A lawyer practising law in an MDP must ensure that all funds received by the MDP that would, if received by a lawyer, constitute trust funds, are handled through a trust account and accounting system that complies with these Rules.

Notifying the Law Society

2 23.12 (1) Each lawyer who practises law in an MDP must report to the Executive Director in a form approved by the Credentials Committee concerning the following:

(a) non-lawyers members of the MDP providing services to the public;

(b) the reasonable steps taken to protect privileged and confidential information under Rule 2 23.8;

(c) compliance with the rules respecting conflicts of interest;

(d) liability insurance maintained by non-lawyers under Rule 2 23.10,

(e) trust accounts and trust accounting records maintained under Rule 2 23.11;

(f) the agreements required under Rule 2 23.2 between the lawyer and all non-lawyer members of the MDP, and

(g) any other matter required by the Credentials Committee.

(2) The report required under this rule must be made annually on a date determined by the Executive Director, or more frequently as determined by the Credentials Committee.

4. In Rule 3-44(2), by rescinding paragraphs (b) and (c) and substituting the following:

(b) any certificate, final order or other requirement under a statute that requires payment of money to any party,

(c) a garnishment order under the Income Tax Act (Canada) if a lawyer is the tax debtor, and

(d) a judgment of any kind against an MDP in which the lawyer has an ownership interest.

5. In Rule 3-57, by rescinding subrule (1) and substituting the following:

(1) In this Rule, "fees" means fees for services performed by a lawyer or a non-lawyer member of the lawyer's MDP, and taxes on those fees.

6. In Rule 9-15, by adding the following subrule:

(2.11) Despite subrule (2.1), an LLP that is an MDP in which a lawyer has permission to practise law under Rules 2-23.1 to 2-23.12 may include non-lawyer members as permitted by those Rules.

AND BE IT FURTHER RESOLVED *to amend the Professional Conduct Handbook as follows:*

1. In Chapter 6

(a) by rescinding rule 7.1 and substituting the following:

Conflicts arising as a result of transfer between law firms

7.1 In Rules 7.1 to 7.9 and Appendix 5:

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship,

(b) in a partnership,

(c) in an arrangement for sharing space,5

(d) as a law corporation,

(e) in a government, a Crown corporation or any other public body,6 and

(f) in a corporation or other body;7 and

(g) in a Multi-Disciplinary Practice (MDP);8

(b) by adding the following footnote:

8. See the definition of "MDP" in Rule 1 and Rules 2 23.1 to 2 23.14 of the Law Society Rules.

2. In Chapter 9

(a) by rescinding rule 6 and substituting the following:

6. Subject to rule 6.1, a lawyer must not split, share or divide a client's fee with any person other than another lawyer.[1]

6.1 A lawyer permitted to practise in a Multi-Disciplinary Practice (MDP) under the Rules may share fees, profits or revenue from the practice of law in the MDP with a non-lawyer member of the MDP only if all the owners of the MDP are individuals or professional corporations2 actively involved in the MDP's delivery of legal services to clients or in the management of the MDP.[3]

(b) by adding the following footnotes:

2. See the definition of "professional corporation" in Rule 1 of the Law Society Rules.

3. This rule also allows a lawyer to share fees or profits of an MDP with a non-lawyer for the purpose of paying out the ownership interest of the non-lawyer acquired by the non-lawyer's active participation in the MDP's delivery of services to clients or in the management of the MDP.

See also the definition of **"MDP"** in Rule 1 and Rules 2 23.1 to 2 23.14 of the Law Society Rules.

3. In Chapter 12

(a) by rescinding rules 1 and 3 to 6 and substituting the following:

Responsibility for all business entrusted to lawyer

1. A lawyer is completely responsible for all business entrusted to the lawyer. The lawyer must maintain personal and actual control and management of each of the lawyer's offices. While tasks and functions may be assigned to staff and assistants such as students, clerks and legal assistants, or to non-lawyer members of a Multi-Disciplinary Practice (MDP),[1] the lawyer must maintain direct supervision over each non-lawyer staff member.

Signing correspondence

3. Letters on the letterhead of a law firm, including an MDP, when signed by a person other than a practising lawyer, must indicate the status or designation of the signing person for the information of the recipient.

Legal services performed by non-lawyers

4. There are many tasks that can be performed by an appropriately trained and experienced non-lawyer working under the supervision of a lawyer. This includes qualified legal assistants employed by the lawyer or the lawyer's firm, as well as members of an MDP in which the lawyer practises.

It is in the interests of the profession and the public for the delivery of more efficient, comprehensive and better quality legal services that the training and employment of legal assistants be encouraged.

5. Subject to this chapter, an appropriately trained and experienced non-lawyer may perform any task assigned and supervised by a lawyer, but the lawyer must maintain a direct relationship with the client and has full professional responsibility for the work.

5.1 A lawyer may assign tasks or functions to a non-lawyer if

(a) the training and experience of the non-lawyer is appropriate to protect the interests of the client, and

(b) provision is made for the professional legal judgement of the lawyer to be exercised whenever it is required.

6. Except as permitted under the Legal Services Society Act, section 12, a lawyer must not permit a non-lawyer to:

(a) perform any function reserved to lawyers, including but not limited to

(i) giving legal advice,

(ii) giving or receiving undertakings, and

(iii) appearing in court or actively participating in legal proceedings on behalf of a client, except in a support role to the lawyer appearing in the proceedings,

(b) do anything that a lawyer is not permitted to do,

(c) act finally and without reference to the lawyer in matters involving professional legal judgement, or

(d) be held out as a lawyer, or be identified other than as a non-lawyer when communicating with clients, lawyers, public officials or with the public generally.

(b) by adding the following footnote:

1. See the definition of "MDP" in Rule 1 and Rules 2 23.1 to 2 23.15 of the Law Society Rules. The definition of "member of an MDP" in Rule 2 23.1 applies in the context of this chapter.

4. In Chapter 13, by rescinding rule 5 and substituting the following:

Associating with a person whose character and fitness are in question

5. Except with the written approval of the Law Society, a lawyer must not employ, retain or otherwise associate in any capacity having to do with the practice of law with a person who, in any jurisdiction:

5. In Chapter 14, by rescinding rule 5 and substituting the following:

(a) by rescinding paragraphs (f) and (g) of rule 10 and substituting the following:

(f) a trademark agent, if registered as such under the Trade-marks Act,

(g) a practitioner of foreign law, if that person holds a valid permit issued under Law Society Rule 2-18, or

(h) a qualified member of another profession, trade or occupation, provided that the lawyer and the other person are members of a Multi-Disciplinary Practice (MDP)1 permitted under the Rules.

(b) by adding the following rules:

Multi-Disciplinary Practice

23. Unless permitted to practise law in an MDP under the Law Society Rules, a lawyer must not, in any marketing activity

(a) use the term Multi-Disciplinary Practice or MDP, or

(b) state or imply that the lawyer's practice or law firm is an MDP.

24. A lawyer practising law in an MDP must ensure that all marketing activity for the firm indicates that the firm is an MDP.

(c) by adding the following footnote:

1. See the definition of **"MDP"** in Rule 1 and Rules 2 23.1 to 2 23.15 of the Law Society Rules. The definition of "member of an MDP" in Rule 2 23.1 applies in the context of this chapter.

3. SUGGESTED METHODOLOGY FOR THE NEXT STAGE OF WORK

In sections 3 and 4 the Task Force sets out methodologies for the next stage of work, together with a proposed mandate. It is important to note that while the ideas represented in the proposed mandate are important, it will be impossible to implement all of them in the short term. The topic is too complex and the resources too limited, and no one organization can likely solve all the problems. However, there is much that the Society can do to make meaningful, incremental change. The Task Force therefore seeks guidance from the Benchers on how to prioritize the proposed mandate and methodology for the next stage of work in order to move the project forward and achieve tangible results. The Task Force believes that it is important for the Society to move forward with Stage 2 of this project.

1. **Improving supply of legal services:** How do we increase delivery of competent legal services? The focus here should include a substantive analysis of the following:
    a. In what circumstances, beyond those presently permitted, should nonlawyers be allowed to provide legal services?
    b. Are there ways to increase the number of lawyers available to the general public? (e.g. increasing the number of foreign-trained lawyers; establishing categories of limited licensing for lawyers that require less education, but are streamed to narrow areas of practice; working with the Provincial Court to set up a *pro bono* duty counsel program for young lawyers to act as counsel in small claims cases; establishing processes for legal assistants to obtain standing as a lawyer based on education and experience (a variation of the apprenticeship model); improving opportunities for Aboriginals to go to law school, etc.);
    c. Should we expand the permitted roles of articled students? If yes, how?
    d. Should we expand the permitted roles of legal assistants? If yes, how?
    e. Are there ways to improve training and resources for community advocates (e.g. such as the Chief Executive Officer's idea of using offsessions of PLTC to train community advocates)?
    f. Should solutions be tailored to particular areas of law where there is the greatest need and unmet demand? How can the work be focused to do the most good with the lowest risk of causing harm?
    g. Does the framework proposed by the Futures Committee in Attachment 2, and the concept of exclusive and concurrent jurisdiction raised by the Task Force, provide an adequate model for any changes? If not, how should it be modified?
    h. What should the regulatory and insurance framework look like for the recommended changes?

2. **Knowledge building:** Information outreach, communication, education:
    a. How do we improve public knowledge about the types of legal services that are available (e.g. unbundling, full retainer, legal aid, etc.), their relative affordability, and utility, etc.?
    b. How do we improve public knowledge of legal issues and dispute resolution, both to assist the public in general, and to facilitate better results for those who choose to go it alone, and those who are dealing with self-helpers (e.g. getting lawyers to contribute to content of sites like ClickLaw, encourage government to improve public education of civic rights and responsibilities, etc)?
    c. How do we increase the profession's understanding of the access to legal services challenges and some of the root causes of the public's perception of the justice system and lawyers?
    d. How do we bring more certainty to the cost of legal services?
    e. How do we improve public trust in the legal profession?

In order to make stage 2 manageable and productive it is important to recognize that some of this work is best handled by groups other than the Task Force, and in some cases may involve organizations other than the Law Society developing programs. For example, some of the knowledge building might best be accomplished by the government, particularly as it concerns public education, in other cases the CBA or CLE might be the logical group to spearhead particular knowledge building initiatives. While the Society would have a role to play in sharing information, it is not a given that the Society is the proper body to shepherd these developments.

The Task Force is cognizant that British Columbia has a diverse population and discrete groups might require tailored solutions. This is perhaps most evident in the needs of Aboriginal Communities. In recognition of this the Benchers may wish to have the Task Force liaise with the Equity and Diversity Advisory Committee early in stage 2 to determine what analysis can properly be transferred to that Committee for development. The Task Force and the Committee could then share information as their work developed, ultimately integrating the work of the Committee into the final report of the Task Force. It may be that a reconstitution of the Task Force is appropriate for stage 2 and this would provide an opportunity to ensure that at least one Task Force member is also on the Equity and Diversity Advisory Committee in order to facilitate information sharing. It may be that each Advisory Committee should have membership in the Task Force for this purpose.

Memo

The Law Society of British Columbia

To The Benchers

From Michael Lucas

Date January 14, 2010

Subject **Strategic Plan - revised for 2010**

Attached is the Strategic Plan, as re-drafted with revisions arising from the discussion at the December 11, 2009 Benchers' meeting.

For ease of reference, the substance of the revisions is summarized below:

- The addition of Initiative 1-1 to reflect the next steps of the work of the Delivery of Legal Services Task Force;

- Re-wording of Strategy 1-3 to incorporate Aboriginal lawyers into the strategy, as well as the addition of initiative 1-3c to address the work being planned by the Equity and Diversity Advisory Committee aimed at retaining Aboriginal lawyers in the profession;

- Addition of Strategy 1-4 to include the decision to work (in cooperation with interested parties) toward developing an economic analysis of the justice system in British Columbia in order to better understand in empirical terms the economic benefit of funding the justice system and the systems that support the rule of law;

- Re-wording of Initiative 2-2 to reflect the direction given by the Executive Committee in the Fall of 2009;

- Re-wording of Initiative 2-3 to reflect the Benchers' resolution concerning this subject made in December, 2009;

- Re-wording of Initiative 2-3 to better reflect the purpose of this initiative;

- Addition of Strategy 2-7 and Initiative 2-7 to reflect the work to be done in connection with discipline processes.

The revised Strategic Plan is attached. A version with the changes highlighted on it is also included.

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The Law Society of British Columbia

2009 – 2011 Strategic Plan

For: **The Benchers**

Date: **January 22, 2010**

Purpose of Report: **Decision**

Prepared on behalf of the Executive Committee

INTRODUCTION

The principal aim of the Law Society is a public well-served by a competent, honourable and independent legal profession. The Law Society's mandate described in s. 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice.

In order to develop strategies to discharge the Law Society's mission and mandate, the Benchers have created a process to plan for and prioritize strategic policy development. This process was created to enhance the ability of the Benchers to focus on policy development that would best ensure proper fulfillment of the mandate of the Society, and to optimize staff resources in the development of those policies and strategies.

Through this process, the Benchers have identified three principal goals, and a number of policy initiatives that will achieve those goals. In identifying these goals and strategies, the Benchers have been mindful not only of what the role of the Law Society is in relation to its mandate, but also of what may be achievable within that mandate.

This Strategic Plan is aimed at achieving concrete results that will improve the public interest in the administration of justice. The process has tried to avoid simply identifying issues on which the only action would be to make general comments on matters within the mandate of the Society.

The strategic policy setting process is also to be distinguished from the operation of the Law Society's core regulatory programs, such as discipline, credentials, and practice standards. These programs are fundamental to fulfilling the Law Society's mandate and will always be priorities for the Law Society. The Benchers have established a set of Key Performance Measures against which the performance of the core regulatory programs will continue to be measured on an annual basis.

PRINCIPAL GOALS

The three principal goals of this Strategic Plan are:

1. Enhancing access to legal services.
2. Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.
3. Effective education, both of legal professionals and those wishing to become legal professionals, and of the public.

These goals are set out below, together with a description of the strategies to pursue the goals and the initiatives being undertaken to implement each one. Collectively, these goals, strategies and initiatives constitute the Law Society's Strategic Plan for 2009 – 2011.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 1: Enhancing access to legal services

Protecting the public interest in the administration of justice requires the Law Society to work toward improving the public's access to legal services. Providing assurance about the competence and conduct of lawyers, who are able to advise clients independently of other interests, is a hollow goal if people cannot afford to retain such lawyers. Developing strategies to improve the public's ability to obtain affordable legal advice is a priority item. The following items were identified as desired outcomes through which the goal of enhancing access to legal services may be achieved.

Strategy 1–1

Increase the public's access to legal services by developing a new regulatory paradigm that may broaden the range of persons permitted to provide certain legal services.

Initiative 1–1

The Delivery of Legal Services Task Force has been created to identify the existing knowledge base and gaps in information that would be required for the Benchers to discuss the substantive policy issues around the scope of practice, develop a plan for acquiring the information that is missing, through (for example) consultations, surveys or other studies. The Task Force reported on the information identification issues to the Benchers in 2009.

After engaging in additional consultation as may be required, the Task Force will work in 2010 toward making recommendations about whether and how the delivery of competent legal services might be improved in a number of ways. This might be done through increasing public awareness of available legal resources and information or providing greater certainty and reliability regarding the cost of legal services. It might also involve increasing the availability of effective and affordable legal services in areas of greatest public need, including determining under what circumstances people other than lawyers might be allowed to provide legal services in circumstances that are not currently permitted.

Strategy 1–2

Find ways to reduce the impact of financial barriers to accessing justice.

Initiative 1–2

The justice system and lawyers' services are cost-based services. A variety of factors contribute to a high cost for these services, making them relatively inaccessible to many British Columbians. Evidence suggests, however, that a high proportion of low and middle income British Columbians will face a serious legal problem in the next three year period. Determining ways to reduce the impact of financial barriers to accessing legal advice will provide a significant benefit, and ought to increase public confidence in the legal system.

The Access to Legal Services Advisory Committee is currently analysing issues relating to costs in the legal system. The deliberations of that Committee and their research and findings will be passed on to the Delivery of Legal Services Task Force for consideration when addressing the substantive mandate of that Task Force.

Strategy 1–3

Improve the retention rate of lawyers in the legal profession including, in particular, Aboriginal lawyers.

A high attrition rate combined with a growing population and the continued complexity of legislation, regulation, and common law demonstrates a need to ensure that legally trained professionals will continue to be available to provide legal advice. Moreover, business models that do not encourage segments of the lawyer population, including women lawyers and Aboriginal lawyers, to remain in practice not only discourage some lawyers from practising law, but cause law firms to lose legal talent, reducing their own effectiveness and further diminishing access to justice. Public confidence in the justice system is enhanced by ensuring that the profession does what it can to retain a diversity of lawyers. The Benchers identified the following two initiatives to accomplish the desired outcome.

Initiative 1–3a

Preparing a business case for the retention of female lawyers in private practice.

Following up on a recommendation of the Women in the Legal Profession Task Force, a task force has been created to prepare a business case for the retention of women in private practice. That work is underway, including the preparation of a business case, and a report will be delivered to the Benchers by June 30, 2009.

This Initiative was completed in 2009.

Initiative 1–3b

Developing a plan to deal with the aging of the legal profession and the potential regulatory and access to legal services issues that might result.

Aging in the profession is already an issue in many rural communities in the province, and barring unforeseen events, is expected to continue or worsen. It is of less concern at present in larger centres, but this may be expected to change in coming years.

The Equity and Diversity Advisory Committee will review and work to define issues arising in connection with the aging of the legal profession, including the identification of what information on the subject currently exists as well as what information may need to be obtained through external consultation and research, and will make recommendations in 2010 concerning how the issue may be advanced as a strategic priority in the future.

Initiative 1-3(c)

Prepare a business case for enhancing diversity in the legal profession and retaining Aboriginal lawyers in particular.

The Equity and Diversity Advisory Committee will review recent research regarding retention of lawyers from diverse communities, and Aboriginal lawyers in particular, and develop a business case for diversity and the retention of Aboriginal lawyers in British Columbia.

Strategy 1-4

Developing in collaboration with interested parties a research project, through a suitable agency, of an economic analysis of the justice system in British Columbia in order to better understand in empirical terms the economic benefit of funding justice and the systems that support the rule of law.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 2: Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.

Public confidence in the ability of the Law Society to effectively regulate the competence and conduct of lawyers is critical in order for the Society to fulfill its mandate. It is also of critical importance in order to maintain the public's right to retain independent lawyers. The Benchers identified several desirable outcomes through which the goal of enhancing public confidence may be achieved.

Strategy 2–1

Effectively regulate those lawyers who have received or who receive a significant number of complaints, but which complaints, individually, are not sufficiently serious to result in formal disciplinary action or referral to the Practice Standards Committee.

Initiative 2–1

Through the Discipline Committee, a staff group has been created to examine a series of projects to reduce the number of complaints that complaints-prone lawyers receive. It is currently anticipated that options will be presented to the Benchers for consideration in early 2009, and if approved, necessary rule changes would be prepared implementation would take place soon after.

Strategy 2–2

Assess possible roles of an oversight or review board for Law Society core functions.

Initiative 2–2

Regulatory oversight or review boards exist in British Columbia in connection with the health professions, and have been created in some foreign jurisdictions in connection with the legal profession. Whether such boards improve public confidence is under debate. Is there a method to enhance the public confidence in the Law Society's decision making processes that does not run contrary to the fundamental constitutional principle of, and public right to, lawyer independence?

This issue formed the substantive policy program at the Benchers' June 2009 retreat. The Executive Committee discussed this topic at its September meeting and determined that the Law Society would best focus on regulatory oversight models that incorporated voluntary external review or review incorporating the Ombudsman's processes. The Committee instructed staff to develop this topic further for presentation to the Benchers at a later date, expected in the spring of 2010.

Strategy 2–3

Enhance public confidence in hearing panels by examining the separation of adjudicative and investigative functions of the Law Society.

Initiative 2–3

Effective self-regulation requires the Law Society to fulfill its mandate first and foremost in the public interest, and requires public confidence. Recognizing that other lawyer regulatory bodies in Canada and elsewhere address this issue differently than in British Columbia, options for the creation or appointment of hearing panels can be developed for the Benchers to allow for a consideration of whether there are ways to enhance confidence in the processes and decisions of hearing panels.

The Benchers have created a Task Force to develop models by which the separation of the adjudicative and investigative functions of the Law Society could be accomplished and to make recommendations about which model to adopt.

~~The topic is currently on the agenda of the Federation of Law Societies of Canada. Ideas that are developed through that body will no doubt inform future discussion on this issue by the Benchers.~~

Strategy 2–4

Effective data gathering to inform equity and diversity issues.

Initiative 2–4

The Law Society must understand and address systemic barriers faced by members of the public needing legal services and members of the profession on the basis of gender, ethnicity, race, disability and sexual orientation in order to demonstrate leadership in building a more representative profession. However, it is unwise to develop initiatives in the absence of relevant data. Through the Equity and Diversity Advisory Committee, the Law Society will develop strategies for gathering appropriate demographic data on the profession and assess

such data to inform the development of initiatives to promote equity and diversity.

Strategy 2–5

Develop and propose legislative amendments to improve lawyer regulation.

Initiative 2–5

Effective regulation and public confidence depend a great deal on having adequate tools to fulfill the Law Society's mandate. The *Legal Profession Act* has not been substantively amended for a decade. Given the particular legislative cycle, 2009 is a year in which the Law Society should consider if any amendments to legislation are needed to improve the Law Society's ability to meet its objects and duties. Together with advice from government relations consultants, the Act and Rules Subcommittee will consider whether any particular amendments are warranted at this time to achieve this outcome.

Strategy 2–6

Prepare a considered response to the Competition Bureau's "Study on Self-Regulated Professions."

In late 2007, the Competition Bureau published its "Study on Self-Regulated Professions", which identified several issues of concern, from the Bureau's point of view, with the regulation of the legal profession. The Federation of Law Societies commissioned an article authored by Professors Iacobucci and Trebilcock that critiqued the Bureau's study, and this has been forwarded to the Bureau. Substantive responses to specific items identified remains a desirable outcome, as described in the following initiatives.

Initiative 2–6a

Reconsidering rules relating to multi-disciplinary partnerships.

Issues relating to multi-disciplinary partnerships have been extensively debated by the Benchers, and therefore a great deal of research and consideration has already been applied to this topic. The Ethics Committee is currently considering the issue and will be presenting its conclusions to the Benchers, likely in the spring of 2009.

This Initiative has been completed and rules have been passed, to be effective July 1, 2010.

Initiative 2–6b

Enhancing lawyer mobility.

Through the Federation of Law Societies, all law societies in Canada have agreed to a National Mobility Agreement which facilitates the mobility of lawyers within Canada. Recently, one of the last items to be considered – mobility between members of the Barreau du Québec and members of common-law law societies – has been addressed. Rule changes will need to be approved to implement the agreement reached on this issue. The Act and Rules Subcommittee will consider appropriate rules and present them to the Benchers for approval, which is expected happen in early 2010.

Initiative 2–6c

Modernising provisions relating to advertising.

Consideration of possible changes to provisions relating to lawyers' advertising is under consideration by the Ethics Committee. Also, through the Federation of Law Societies, draft model rules on advertising are being prepared. The Ethics Committee will make recommendations to the Benchers in connection with these matters in 2009.

This Initiative was completed in 2009, and new rules and amendments to the Professional Conduct Handbook have been approved.

Initiative 2–6d

Reconsidering policies regarding referral fees.

The Competition Bureau recommendations concerning referral fees were related to multi-disciplinary partnerships, which have now been addressed by the benchers. A general reconsideration of policies regarding referral fees is currently an item for consideration by the Ethics Committee, who may make recommendations to the Benchers at a later date depending on the outcome of that consideration.

Strategy 2-7

Re-examine the rules and internal processes of the Law Society relating to complaints, investigations and dispositions of professional conduct and competence matters in order to identify methods to improve the timely, thorough, fair and appropriate disposition of complaints and hearings.

Initiative 2-7

The timely and effective handling of complaints concerning the professional conduct or competence of lawyers resulting in appropriate disposition and sanction (as necessary) is an integral responsibility of the Law Society.

The Law Society will, through a task force designed for this purpose, re-examine Law Society rules and processes for handling complaints and discipline hearings to determine if there are methods by which to improve the timely, thorough, fair and appropriate disposition of professional conduct concerns, including the consistency of decisions and sanctions.

A staff group will also examine operational processes in connection with complaints and hearings to determine if improved operational procedures, staffing resources or the use of technology exist by which improvements to the timely, thorough, fair and appropriate dispositions of complaints and hearings can be made.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 3: Effective public and lawyer education.

This goal may be divided into two parts. One is to ensure that lawyers who provide legal services are competent to do so. The public interest in the administration of justice is significantly diminished if lawyers are not competent, and the Law Society must make efforts either to ensure that lawyers obtain and retain pertinent information to improve, or at least maintain, competence. The other is to ensure that the public understands how the legal system in Canada works, and how concepts that may be less well understood or even taken for granted integrate within the legal system to provide for important public rights.

Past priority initiatives such as the Continuing Professional Development (CPD) initiative, were developed to address the first part of the education goal. Initiatives such as the public forums and the high school education unit on judicial and lawyer independence were developed to address the "public education" part of the goal. The policy development of each of those initiatives are now completed, and they will remain as operational items for the Law Society.

The Benchers have identified the development of the following items as desired outcomes through which the education goal may be accomplished. Each item will be considered by the Lawyer Education Advisory Committee who will, as appropriate, develop initiatives, or options for initiatives, to be considered by the Benchers.

Strategy 3–1

Design and implement a plan to support the mentoring of lawyers.

Initiative 3–1

Mentoring is a time-honoured method through which lawyers can be educated by other lawyers who possess certain relevant skills or experience. When the CPD Program was approved for implementation, "mentoring," was not included as an approved CPD activity. A promise was made to consider developing criteria for a program that would address the requirements of the CPD program. A mentoring program is expected to be presented to the Benchers for consideration in the spring of 2009

This Initiative was completed in 2009.

Strategy 3–2

Develop and implement initiatives to more effectively educate lawyers on the topic of professionalism.

Initiative 3–2

Professionalism lies at the heart of lawyering, yet from an education perspective it is not a topic that receives much dedicated attention. Development of initiatives that would focus on the issues of principle and values that inform or underlie specific rules of professional conduct would fill a sizable void in the education options available to lawyers, and would assist lawyers in meeting the requirements of the CPD program. An examination of programs available in other jurisdictions, together with the development of options for such programs in British Columbia, for consideration by the Benchers will be a worthwhile initiative to achieve the goal of effective education.

Strategy 3–3

Develop and implement initiatives to improve advocacy skills for lawyers.

Initiative 3–3

Advocacy is a particular lawyering skill. While it is a skill most commonly associated with barristers, effective advocacy skills are equally relevant to solicitors. Advocacy is however a subject on which there are few dedicated courses available. To achieve the goal of effective lawyer education, the Lawyer Education Advisory Committee will examine initiatives relating to the teaching of advocacy skills and present options to the Benchers for consideration.

Strategy 3–4

Educate the public regarding the legal system on a variety of levels.

Initiative 3–4a

The Law Society is developing an instructional video for use in high schools. This will be completed and rolled-out in 2009.

This Initiative was completed in 2009.

Initiative 3–4b

The President of the Law Society – Gordon Turriff, QC – will be undertaking a speaking tour across the province during 2009 to commemorate the 125th anniversary of the Law Society. He will address a variety of topics relating to the legal profession and its regulation.

This Initiative was completed in 2009.

The Law Society of British Columbia

2009 – 2011 Strategic Plan

For: The Benchers

Date: January 22, 2010

Purpose of Report: Decision

Prepared on behalf of the Executive Committee

INTRODUCTION

The principal aim of the Law Society is a public well-served by a competent, honourable and independent legal profession. The Law Society's mandate described in s. 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice.

In order to develop strategies to discharge the Law Society's mission and mandate, the Benchers have created a process to plan for and prioritize strategic policy development. This process was created to enhance the ability of the Benchers to focus on policy development that would best ensure proper fulfillment of the mandate of the Society, and to optimize staff resources in the development of those policies and strategies.

Through this process, the Benchers have identified three principal goals, and a number of policy initiatives that will achieve those goals. In identifying these goals and strategies, the Benchers have been mindful not only of what the role of the Law Society is in relation to its mandate, but also of what may be achievable within that mandate.

This Strategic Plan is aimed at achieving concrete results that will improve the public interest in the administration of justice. The process has tried to avoid simply identifying issues on which the only action would be to make general comments on matters within the mandate of the Society.

The strategic policy setting process is also to be distinguished from the operation of the Law Society's core regulatory programs, such as discipline, credentials, and practice standards. These programs are fundamental to fulfilling the Law Society's mandate and will always be priorities for the Law Society. The Benchers have established a set of Key Performance Measures against which the performance of the core regulatory programs will continue to be measured on an annual basis.

PRINCIPAL GOALS

The three principal goals of this Strategic Plan are:

1. Enhancing access to legal services.
2. Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.
3. Effective education, both of legal professionals and those wishing to become legal professionals, and of the public.

These goals are set out below, together with a description of the strategies to pursue the goals and the initiatives being undertaken to implement each one. Collectively, these goals, strategies and initiatives constitute the Law Society's Strategic Plan for 2009 – 2011.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 1: Enhancing access to legal services

Protecting the public interest in the administration of justice requires the Law Society to work toward improving the public's access to legal services. Providing assurance about the competence and conduct of lawyers, who are able to advise clients independently of other interests, is a hollow goal if people cannot afford to retain such lawyers. Developing strategies to improve the public's ability to obtain affordable legal advice is a priority item. The following items were identified as desired outcomes through which the goal of enhancing access to legal services may be achieved.

Strategy 1–1

Increase the public's access to legal services by developing a new regulatory paradigm that may broaden the range of persons permitted to provide certain legal services.

Initiative 1–1

The Delivery of Legal Services Task Force has been created to identify the existing knowledge base and gaps in information that would be required for the Benchers to discuss the substantive policy issues around the scope of practice, develop a plan for acquiring the information that is missing, through (for example) consultations, surveys or other studies. The Task Force reported on the information identification issues to the Benchers in 2009.

After engaging in additional consultation as may be required, the Task Force will work in 2010 toward making recommendations about whether and how the delivery of competent legal services might be improved in a number of ways. This might be done through increasing public awareness of available legal resources and information or providing greater certainty and reliability regarding the cost of legal services. It might also involve increasing the availability of effective and affordable legal services in areas of greatest public need, including determining under what circumstances people other than lawyers might be allowed to provide legal services in circumstances that are not currently permitted.

Strategy 1–2

Find ways to reduce the impact of financial barriers to accessing justice.

Initiative 1–2

The justice system and lawyers' services are cost-based services. A variety of factors contribute to a high cost for these services, making them relatively inaccessible to many British Columbians. Evidence suggests, however, that a high proportion of low and middle income British Columbians will face a serious legal problem in the next three year period. Determining ways to reduce the impact of financial barriers to accessing legal advice will provide a significant benefit, and ought to increase public confidence in the legal system.

The Access to Legal Services Advisory Committee is currently analysing issues relating to costs in the legal system. The deliberations of that Committee and their research and findings will be passed on to the Delivery of Legal Services Task Force for consideration when addressing the substantive mandate of that Task Force.

Strategy 1–3

Improve the retention rate of lawyers in the legal profession including, in particular, Aboriginal lawyers.

A high attrition rate combined with a growing population and the continued complexity of legislation, regulation, and common law demonstrates a need to ensure that legally trained professionals will continue to be available to provide legal advice. Moreover, business models that do not encourage segments of the lawyer population, including women lawyers and Aboriginal lawyers, to remain in practice not only discourage some lawyers from practising law, but cause law firms to lose legal talent, reducing their own effectiveness and further diminishing access to justice. Public confidence in the justice system is enhanced by ensuring that the profession does what it can to retain a diversity of lawyers. The Benchers identified the following two initiatives to accomplish the desired outcome.

Initiative 1–3a

Preparing a business case for the retention of female lawyers in private practice.

Following up on a recommendation of the Women in the Legal Profession Task Force, a task force has been created to prepare a business case for the retention of women in private practice. That work is underway, including the preparation of a business case, and a report will be delivered to the Benchers by June 30, 2009.

This Initiative was completed in 2009.

Initiative 1–3b

Developing a plan to deal with the aging of the legal profession and the potential regulatory and access to legal services issues that might result.

Aging in the profession is already an issue in many rural communities in the province, and barring unforeseen events, is expected to continue or worsen. It is of less concern at present in larger centres, but this may be expected to change in coming years.

The Equity and Diversity Advisory Committee will review and work to define issues arising in connection with the aging of the legal profession, including the identification of what information on the subject currently exists as well as what information may need to be obtained through external consultation and research, and will make recommendations in 2010 concerning how the issue may be advanced as a strategic priority in the future.

Initiative 1-3c

Prepare a business case for enhancing diversity in the legal profession and retaining Aboriginal lawyers in particular.

The Equity and Diversity Advisory Committee will review recent research regarding retention of lawyers from diverse communities, and Aboriginal lawyers in particular, and develop a business case for diversity and the retention of Aboriginal lawyers in British Columbia.

Strategy 1-4

Developing in collaboration with interested parties a research project, through a suitable agency, of an economic analysis of the justice system in British Columbia in order to better understand in empirical terms the economic benefit of funding justice and the systems that support the rule of law.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 2: Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.

Public confidence in the ability of the Law Society to effectively regulate the competence and conduct of lawyers is critical in order for the Society to fulfill its mandate. It is also of critical importance in order to maintain the public's right to retain independent lawyers. The Benchers identified several desirable outcomes through which the goal of enhancing public confidence may be achieved.

Strategy 2–1

Effectively regulate those lawyers who have received or who receive a significant number of complaints, but which complaints, individually, are not sufficiently serious to result in formal disciplinary action or referral to the Practice Standards Committee.

Initiative 2–1

Through the Discipline Committee, a staff group has been created to examine a series of projects to reduce the number of complaints that complaints-prone lawyers receive. It is currently anticipated that options will be presented to the Benchers for consideration in early 2009, and if approved, necessary rule changes would be prepared implementation would take place soon after.

Strategy 2–2

Assess possible roles of an oversight or review board for Law Society core functions.

Initiative 2–2

Regulatory oversight or review boards exist in British Columbia in connection with the health professions, and have been created in some foreign jurisdictions in connection with the legal profession. Whether such boards improve public confidence is under debate. Is there a method to enhance the public confidence in the Law Society's decision making processes that does not run contrary to the fundamental constitutional principle of, and public right to, lawyer independence?

This issue formed the substantive policy program at the Benchers' June 2009 retreat. The Executive Committee discussed this topic at its September 2009 meeting and determined that the Law Society would best focus on regulatory oversight models that incorporated voluntary external review or review incorporating the Ombudsman's processes. The Committee instructed staff to develop this topic further for presentation to the Benchers at a later date, expected in the spring of 2010.

Strategy 2–3

Enhance public confidence in hearing panels by examining the separation of adjudicative and investigative functions of the Law Society.

Initiative 2–3

Effective self-regulation requires the Law Society to fulfill its mandate first and foremost in the public interest, and requires public confidence. Recognizing that other lawyer regulatory bodies in Canada and elsewhere address this issue differently than in British Columbia, options for the creation or appointment of hearing panels can be developed for the Benchers to allow for a consideration of whether there are ways to enhance confidence in the processes and decisions of hearing panels.

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The Law Society must understand and address systemic barriers faced by members of the public needing legal services and members of the profession on the basis of gender, ethnicity, race, disability and sexual orientation in order to demonstrate leadership in building a more representative profession. However, it is unwise to develop initiatives in the absence of relevant data. Through the Equity and Diversity Advisory Committee, the Law Society will develop strategies for gathering appropriate demographic data on the profession and assess such data to inform the development of initiatives to promote equity and diversity.

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Memo

The Law Society of British Columbia

800

To The Benchers

From Jeff Hoskins Q.C., Michael Lucas and Jackie Drozdowski

Date January 14, 2010

Subject **Statutory Review of the Freedom of Information and Protection of Privacy Act**

An all-party committee ("Special Committee") of the Legislative Assembly is currently reviewing the provisions of the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Special Committee has issued a call for submissions to provide an opportunity for public bodies, stakeholders and members of the public to participate in the review process. The deadline for submissions is February 28, 2010.

The Law Society participated in the statutory reviews in 1999–1999 and again in 2000–2004. Some of the recommendations the Law Society has made in the past that have not been adopted remain relevant.

We have reviewed the Law Society's past submissions and considered some of the decisions of the Privacy Commissioner and the Courts that have been made since the last statutory review. We outlined some possible recommendations to the Executive Committee, which were approved by that Committee. From that outline, we have prepared draft submissions which are attached for review and, if appropriate, approval by the benchers.

MDL/al
Attachment

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The Law Society
of British Columbia

Submission to the Special Committee of the Legislative Assembly of British Columbia on the Review of the *Freedom of Information and Protection of Privacy Act*

January 22, 2010

The Law Society of British Columbia
8th Floor, 845 Cambie Street, Vancouver, British Columbia V6B 4Z9
Tel: (604) 669-2533 · Toll-free in BC 1-800-903-5300 · Fax: (604) 669-5232

INTRODUCTION

The Law Society of British Columbia is the governing body of the legal profession in British Columbia. It was recognized and given statutory authority in legislation enacted in 1884. Today, the Law Society continues under the authority of the *Legal Profession Act*, which was adopted in 1998. The object and duty of the Law Society, as stated in s. 3 of the *Legal Profession Act*, is to uphold and protect the public interest in the administration of justice by, amongst other things, preserving and protecting the rights and freedoms of all persons.

The Law Society supports the principles of openness and accountability that the Freedom of Information and Protection of Privacy Act (the "*FOI Act*") is intended to promote. However, there are some concerns in connection with how the public interest in the administration of justice is affected by the *FOI Act* as well as about its application to a professional governing body such as the Law Society that we wish the Special Committee of the Legislative Assembly to consider. We have focused our attention on four points that we consider to be particularly important. The four points are set out in some detail below; however, they are best understood in the context of the Law Society's statutory mandate.

We start from the premise that both the *FOI Act* and the *Legal Profession Act* are intended to protect the public interest. The purposes of the *FOI Act* as set out in section 2(1) are to make public bodies more accountable to the public and to protect personal privacy by

- giving the public a right of access to records,
- giving individuals a right of access to, and a right to request,
- correction of, personal information about themselves,

- specifying limited exceptions to the rights of access,

- preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

- providing for an independent review of decisions made under the Act.

The paramount duty of the Law Society under section 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice by

- preserving and protecting the rights and freedoms of all persons,

- ensuring the independence, integrity and honour of its members, and

- establishing standards for the education, professional responsibility and competence of its members and applicants for membership.

In many respects the requirements of both Acts are congruent and the public is well served. However, in some respects the public interests served by the Acts are at crossed purposes. The Law Society's concerns arise from these points of tension. Dealing with information that is subject to solicitor-client privilege (a civil right of supreme importance in Canadian law) of is one place where such tension can arise; investigating allegations of lawyer misconduct or incompetence is another.

Some of the recommendations submitted by the Law Society in these submissions mirror recommendations made in 2004 (see recommendations 1 and 3 below). The balance of the recommendations are made as the result further developments in the law that we

consider affect the premises underlying the statute and therefore need to be addressed in the legislation.

I. SOLICITOR-CLIENT PRIVILEGE

1. Legal Advice

Section 14 of the *FOI Act* provides:

Legal Advice

> **14** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

In the *Lavallee* case (*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209, 2002 SCC 61) Madam Justice Arbour described solicitor-client privilege as a "*principle of fundamental justice and civil right of supreme importance in Canadian law*". The paramount duty to protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons means the Law Society's duty to protect the privilege of clients applies in all cases, not only in those where the Law Society is the custodian of the privilege as a result of its involvement with its members. The confidential relationship takes precedence over the rights of third parties to information, and only the client has the option of releasing privileged information arising from that relationship.

The Law Society's concern with section 14 of the *FOI Act* is that, by giving the head of a public body the discretion to refuse to disclose information that is subject to solicitor client privilege, it appears by implication to give discretion to disclose privileged information. In the *Lavallee* case Madam Justice Arbour concluded "*solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does*

not involve a balancing of interests on a case-by-case basis." In our view, there is no basis for a discretion to release privileged information. Disclosure must be refused.

RECOMMENDATION #1

The Law Society recommends that section 14 be made mandatory except when the public body is the client and can choose to waive privilege or, if the client is a third party, the client agrees to waive privilege.

2. Production to the Commissioner of information subject to solicitor-client privilege

Sections 44(1) and 44(3) of the *FOI Act* require production of any record to the Commissioner during an investigation or an inquiry under the *FOI Act*, and permit the Commissioner to examine such records, despite any privilege of the law of evidence. Subsection 44(2.1) provides that disclosure of a privileged document to the Commissioner at the Commissioner's request under subsection (1) does not affect the privilege. Although subsection 44(2.1) goes some way to limit the potential harm done by disclosure, in our respectful opinion, it does not go far enough.

The Law Society has a statutory obligation to investigate complaints made against lawyers, and in so doing may obtain privileged or confidential information of a lawyer's client. The Law Society can also be a party to litigation itself and, like other entities from time to time is required to seek advice and instruct counsel in connection with matters affecting its legal rights and obligations.

In the *Cypress Bowl* case (*B.C. Minister of Environment, Lands & Parks v. B.C. Information & Privacy Commissioner*, (1995) 16 B.C.L.R. (3d 64)), Mr. Justice Thackray confirmed that solicitor-client privilege is a principle that cannot be abridged by interpreting it narrowly, as the Commissioner had attempted to do by ordering the severance of certain documents related to giving legal advice. The Court held that s.4(2)

of the *FOI Act* (the "severance" provision) does not modify the common law principle of solicitor-client privilege which is incorporated into the *FOI Act* by s.14. Mr. Justice Thackray went on to say that the Commissioner does not need to look at documents that are subject to solicitor-client privilege in order to determine if they should be disclosed:

"*I have not seen Documents 254 and 311 and have no reason to do so. Neither, in my opinion, did the Commissioner. I am not suggesting that there are not cases wherein the Commissioner should not peruse the questioned documents. However, when a question of solicitor-client privilege is the issue that step should be taken only if necessary. It should never become routine."*

Since the *Cypress Bowl* case, the Supreme Court of Canada has had occasion to review in a significant manner, in a number of cases, the law concerning privilege, and has further and more firmly articulated the limits on disclosure of privileged documents. In the *Lavallee* case, the Supreme Court of Canada stated that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, and that the Court must therefore adopt stringent norms to ensure its protection. In order to pass the scrutiny of the *Charter*, therefore, any statutory provision affecting the privilege must only do so as minimally as possible.

In *Lavallee*, the Court determined that the impugned statutory provision (s. 488.1 of the *Criminal Code)* more than minimally impaired solicitor-client privilege. Three problems identified in the *Lavallee* case included:

- the naming of clients
- the fact that notice may not be given to clients
- the possibility of access by the Attorney General to the information prior to the determination of privilege.

We are concerned that all three of those failings exist in s. 44(1) and (3) of the Act at present should the Commissioner compel a public body (such as the Law Society) to produce information or documents in its possession over which a claim of solicitor-client privilege of a lawyer's client may be made. Production of such information would, at the very least, name clients. There is no statutory provision for notifying the clients that their privileged information is being required to be produced. Should the privileged information disclosed amount to evidence of an offence, the Commissioner by virtue of s. 47(4) may disclose that information to the Attorney General. This provision constitutes a *substantial*, not a minimal impairment of privilege.

Moreover, the Supreme Court of Canada has made clear in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* [2008] 2 S.C.R. 574 that an adjudication of privilege by the Federal Privacy Commissioner (or presumably anyone delegated by the Commissioner to make the decision), who is an administrative investigator and not an adjudicator, would be an infringement of privilege. While there are some differences between the federal *Personal Information and Protection and Electronic Documents Act* and the provincial Act that is the subject of these submissions, in our opinion the decision of the Supreme Court of Canada on this point is apposite. Consequently, the purpose for which s. 44(3) contemplates the production of documents over which a claim of privilege is made would itself be an infringement of the privilege and would apply equally whether the documents were third-party documents in the hands of the public body or of the public body itself.

The Supreme Court of Canada's decisions in *Goodis v. Ontario (Ministry of Correctional Services)* [2006] 2 S.C.R. 32 and in the *Lavallee* case state that any statutory provision permitting access to privileged documents must, in order to pass constitutional scrutiny, be "absolutely necessary" and "no more than minimally impair the privilege." In our submission, access to privileged documents by the Commissioner is not "absolutely necessary" in these cases. Nor would such access no more than "minimally impair privilege". If the Commissioner were, in error, to determine that the documents were not privileged, that privilege would be absolutely impaired as the documents would

ultimately be disclosed to the party seeking them, and the privilege would be lost. This outcome is not "absolutely necessary", as a process that allows the court to make a determination, in a manner that we have in the past suggested, is available. The Law Society therefore urges that a process be developed through which contested claims of privilege can be decided by the Courts, which is the ultimate and proper arbiter of privilege.

RECOMMENDATION #2

We recommend that section 44(3) be amended to exclude from disclosure to the Commissioner all records that are subject to solicitor-client privilege. We recommend that where an issue arises about the validity of a claim of privilege, a process be devised that would permit the Court to rule on the issue, on notice to all persons whose privilege may be affected by the order.

II. DISCLOSURE HARMFUL TO LAW ENFORCEMENT – Section 15(1) and Schedule 1: Definition of "law enforcement."

Section 15(1)(a) of the *FOI Act* applies to Law Society investigations leading to disciplinary proceedings involving a penalty or sanction. The Information and Privacy Commissioner confirmed this in Order 163-1997. However, there are several other methods by which the Law Society protects the public that require investigations to which section 15(1)(a) might not apply.

Under Part 2 of the *Legal Profession Act,* the Benchers and the Credentials Committee are responsible for ensuring that no person becomes a lawyer in B.C. who is not of good character and repute or is otherwise unfit. It is common for an extensive Credentials investigation of an applicant to take place when there is a question of character or fitness. Preventing unfit persons from becoming lawyers is obviously a more effective way of

protecting the public than attempting to discipline them for transgressions affecting memebers of the public after they become lawyers.

Credentials investigations should have the same protection as investigations related to disciplinary functions performed by the Law Society. In the course of Credentials investigations, the Law Society frequently receives confidential information, often from confidential sources. Section 15(1) might not apply to protect that confidential information because the investigation does not or might not lead to the imposition of a penalty or sanction, and therefore, does not fall within the definition of "law enforcement" in Schedule 1 of the *FOI Act*.

Similarly, the Law Society maintains programs to determine competence of individual members and, when they are found wanting, to assist them to achieve a higher level of competence. Again, investigations leading to voluntary remediation are arguably not included in the definition of "law enforcement" because the do not or might not lead to the imposition of a penalty or sanction.

The Law Society is authorized by section 33 of the *Legal Profession Act* to conduct audits to ensure that lawyers are maintaining proper records and following the requirements of the Act and the Law Society Rules concerning accounting for money held in trust. Audits may be initiated on the basis of confidential information, and confidential information is very often obtained during the audit. The purpose of the audit is to enforce the law with respect to lawyers' trust accounts, but it is not always clear that the audit could lead to the imposition of a penalty or sanction. We are concerned that other provisions of the *FOI Act* might not be able to prevent the disclosure of audit reports obtained through section 33 of the *Legal Profession Act* if they could be termed "routine inspections".

Our third recommendation reflects our view that the ability of the Law Society to conduct investigations in order to fulfill its statutory obligations should be the same whether the

issue is punishment and possible exclusion from practice of a current member, or preventing an applicant from becoming a member, or some other regulatory function.

RECOMMENDATION #3

We recommend that the definition of "law enforcement" in Schedule 1 be expanded to include:

> (d) proceedings or investigations authorized by an Act to be conducted by a professional governing body in furtherance of its duties and obligations in the public interest.

Alternatively, we recommend using more specific and restrictive language to define "law enforcement" as it applies to professional governing bodies:

> (d) proceedings or investigations conducted by a professional governing body in furtherance of its duties and obligations in the public interest, including but not limited to investigations or audits regarding
>
> (i) the qualification, character and fitness of an individual to become a member of the professional governing body or to be enrolled as a student under the authority of the professional governing body,
>
> (ii) the ability of a member of a professional governing body to practice and continue to practice a profession,
>
> (iii) a complaint, allegation or other information concerning the conduct of a member or former member of a professional governing body or a student under the authority of the professional governing body, and

compliance with rules or regulations governing the profession.

III. FEES – SECTION 75 AND REGULATIONS

The cost burden that has to be assumed by public bodies, and including in particular professional governing bodies, in complying with the provisions of the *FOI Act* remains of concern to the Law Society. Professional governing bodies receive no public funds. While the provincial government relies on a sizable tax base of over 3.7 million people, professional governing bodies are financed through assessments on relatively small groups of private individuals. Moreover, most of the applications under the *Act* made to governing bodies, such as the Law Society as an example, are made by persons who are not members of the governing body.

While it is, of course, appropriate for government to make the policy decision to provide certain services to members of the public at little or no cost and finance the cost of providing the services from general revenue, it is another thing to impose this requirement on relatively small organizations such as the professional governing bodies like the Law Society.

The *FOI Act* and the Regulations appear to contemplate that there are two types of persons who make applications under the *FOI Act*: individual applicants and commercial applicants. Policy considerations may militate in favour of ensuring that individuals who want to make applications are not precluded from doing so by reason of the risk of having to bear the costs of the public body in processing the request. Different policy considerations have been expressed, however, where the applicant is a commercial applicant. In such circumstances, where the application is made for information in connection with a business or venture for profit, the "actual cost" of the processing services is more justifiable, and this has been recognized in Reg 323/93.

In light of the Commissioner's Order F09-05, however, the Law Society submits that some statutory clarification is warranted. In that order, fees for certain services that the Law Society undertook in the course of processing an application under the *Act* were disallowed, including

- the cost of making working copies;
- staff time spent making working copies;
- staff time spent severing records;
- staff time spent drafting lists of records.

In many, and perhaps even all, circumstances, these sorts of services are inherent in or ancillary to the nature of activities listed in s. 75(1) of the *FOI Act.* Disallowing a fee for these services means, by necessity, that the public body cannot recover the actual cost of processing a request under the *Act* because some necessary services are, by virtue of the Commissioner's decision, apparently excluded by the *FOI Act*. Applicants, particularly commercial applicants, therefore are *not* having to pay the reasonable cost of their requests, and the public body is having to subsidize the cost of the service. It is not that the Commissioner considers these sorts of services to be necessarily *unreasonable*, just that it is not a s. 75(1)(a) "service."

In the past, a practice appears to have developed whereby a charge of 25¢ per photocopy (the "maximum fee" for photocopying) has been applied by public bodies through which, we expect, public bodies have attempted to recoup some of the ancillary or "overhead" services that may not be specifically provided for in the legislation. The charge of 25¢ per photocopy is the general charge allowed for photocopying services by the courts on costs matters and is generally approved by Registrars in reviews of lawyers' accounts. In Order F09-05, the Commissioner permits only the "actual cost" of photocopying. If this is to be the case, then the Law Society submits that the

ancillary costs must be recoverable at their actual cost. Otherwise, applicants, particularly commercial applicants, will receive a benefit at the cost of the public body. If the service is useful or reasonable in processing the application or is necessarily inherent in or ancillary to a service required to process a request, then the Law Society submits that it is reasonable to charge a commercial applicant the actual cost of that service. Statutory instruments should not place limits on the services that can be charged, at least to commercial applicants, provided they are reasonable services that aid in properly responding to the request.

RECOMMENDATION #4

We recommend that s. 75 and Regulation 323/93 be amended or clarified, in light of the Commissioner's Order F09-05 and particulary with respect to the cost of photocopying and ancillary services related to processing application. We recommend that public bodies be permitted to charge for *all* services that are useful or reasonable in the processing of a request made under the *FOI Act* by a commercial applicant.

Policy/Anna-ML/2010/Memos/0111foippa(subs)

Memo

The Law Society of British Columbia

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To Benchers

From Credentials Committee

Date January 11, 2010

Subject **Final Report of the Federation of Law Societies of Canada Task Force on Accreditation of the Common Law Degree**

Background

The Federation of Law Societies appointed the Task Force on the Canadian Common Law Degree (the "Federation Task Force") in June 2007, chaired by John J.L. Hunter, QC, to review the existing academic requirements for entry to bar admission programs and to recommend any changes. Unlike other common law jurisdictions, Canada has never had a national standard for academic requirements of a Canadian law degree.

In September 2008, the Federation Task Force sought input from all Canadian law societies on its Consultation Paper. The Benchers of the Law Society of British Columbia asked the Credentials Committee to review and consider the Task Force Report and advise the Benchers concerning a response. The Consultation Paper asked 16 specific questions, and the Benchers reviewed and approved the Committee's response and recommendations to these questions at their December 12, 2008 meeting. A copy of that response is attached.

The Federation Task Force submitted its Final Report in October 2009 (a copy of the Executive Summary and the Task Force's Recommendations are attached). Both the Consultation Paper and the Final Report recommend that the Federation adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions. A national requirement would apply equally to bar admission program applicants educated in Canada and abroad, thereby ensuring that all those seeking to enter bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and predefined competencies in the academic portion of their legal education.

The Credentials Committee, at the request of the Executive Committee, was asked to review the Final Report. To accomplish this task, the Chair of the Committee, Richard Stewart, QC, appointed a subcommittee comprising Bruce LeRose, QC, Anna K. Fung, QC and himself.

Consideration of Final Report

Members of the subcommittee met with the deans of the law schools at the University of British Columbia and the University of Victoria. The deans had much of interest to say in connection with the Federation Task Force's Final Report. The deans noted, in particular, that a letter had been sent to the law societies by Dean Brent Cotter, President, Council of Canadian Law Deans, recommending that law societies either defer any decisions in relation to the Report and its recommendations or, alternatively, that any adoption of the Report and its recommendations be "in principle" only. A copy of Dean Cotter's correspondence is attached. The deans advised that they supported the approach outlined by Dean Cotter and recommended that the Law Society of BC adopt recommendations 1 through 3 of the Report "in principle" on the agreement that a joint committee of the legal profession and the Council of Law Deans, co-chaired, with equal Federation and law school representation, be struck to consider the remaining recommendations contained in the Report. The deans noted that they were generally supportive of the "competencies" approach contemplated by the Task Force, which is consistent with much modern thinking about legal education, but noted their concerns about specifics of the competencies and a mandatory stand-alone Legal Ethics and Professionalism course.

In response to Dean Cotter's correspondence, the Chair of the Federation Task Force on the Canadian Common Law Degree provided his comments for clarification. A copy of the Chair's correspondence is also attached. Members of the subcommittee also met with the Chair to hear his views and ask questions. The Chair agreed that an Implementation Committee should be formed to consider issues of implementation, which could include the Council of Law Deans' concerns surrounding compliance structures for law schools. However, he suggested the Implementation Committee mandate ought not to include a reassessment of the Final Report's recommended competencies or the stand-alone Legal Ethics and Professionalism course.

Discussion and Recommendation

The subcommittee carefully reviewed the Final Report in comparison to the Recommendations previously provided by the Benchers in relation to the Consultation Paper. While the subcommittee noted some minor differences between the two, it was satisfied that these differences were not critical in consideration of its recommendation to approve the Final Report. After hearing the views from both the deans and the Task Force Chair, the subcommittee is of the view that the Benchers should not deviate from the responses they previously provided. It did however note the suggestion (made by both the deans and Mr. Hunter) that an Implementation Committee ought to be given a clear mandate and that that mandate ought to be able to address any concerns surrounding compliance structures for law schools. The subcommittee was also of the view that the participation and support of the law schools is crucial to the success of any implementation of the recommendations set out in the Final Report.

As a result, at a special meeting of the Credentials Committee on December 17, 2009, the subcommittee recommended, and the Credentials Committee accepted, to approve the Final Report and refer this matter to the Benchers with the following proposed resolution for adoption by the Benchers:

Be it resolved that:

1. *The Law Society of British Columbia approves the Final Report of the Federation of Law Societies Task Force on Accreditation of the Canadian Common Law Degree issued October, 2009, and,*

2. *The implementation issues arising from the recommendations in the report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.*

The Law Society
of British Columbia

December 12, 2008

PERSONAL & CONFIDENTIAL

John J.L. Hunter, Q.C.
Federation of Law Societies of Canada
Task Force on the Canadian Common Law Degree
c/o Sophia Sperdakos, Policy Counsel
Law Society of Upper Canada
130 Queen Street West
Toronto, Ontario M5H 2N6

Re: Canadian Common Law Degree

Dear Mr. Hunter:

Thank you for your letter of September 12, 2008 in which you sought the input of the Law Society of British Columbia to the Consultation Paper of the Federation of Law Societies Task Force on the Canadian Common Law Degree. The Benchers of the Law Society of British Columbia (the Law Society) asked the Credentials Committee to review and consider the Task Force's Report and advise the Benchers concerning a response. The Benchers reviewed the Committee's recommendations at their December 12, 2008 meeting, and our response follows.

PREFACE

By way of introduction, the Law Society believes that law schools play a crucial role in laying the foundation for the legal knowledge required to be a good lawyer. The bachelor of laws degree (or the equivalent degree) from a common law faculty of law in a Canadian university provides the necessary "academic qualification" for entry into the admission program of the Law Society. Students entering into the admission program are therefore presumed to have acquired the necessary legal knowledge to be able to pass the Professional Legal Training Course and the qualification examinations, as well as to be able to discharge responsibilities, under supervision of a principal, as an articled student. This is similar to the expectations of other law societies in Canada. What knowledge is taught, in law school, and how this is accomplished, ought to be of considerable interest and importance to the law societies, because it forms the foundation for everything else necessary to become a lawyer.

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As it would appear that a description of what the standard of the bachelor of laws degree should be for the purpose of meeting the "academic qualification" for entry to the admission program has not been stated for many years, the Law Society agrees that it is past time to state the standard in a manner that is fair and supportable. This will benefit law students by permitting them to be assured that their academic degree will qualify them for entry to law society admission programs. It will also benefit any new law programs by clearly stating what the program will need to offer to qualify its graduates for admission to law societies' admissions programs. Finally, it will benefit the National Committee on Accreditation by clearly stating what the standards for a Canadian common law degree are.

QUESTIONS RAISED IN THE CONSULTATION

The consultation paper asks 16 specific questions. The Law Society has considered these questions and responds as follows:

1. Does the suggested list of foundational competencies encompass those that candidates for entry to bar admission programs should possess?

   Our answer to this question addresses only the accreditation of a bachelor of laws degree (or equivalent) from a Canadian university. If accreditation of degrees from a foreign university is under contemplation, then the Law Society believes further consideration to the question will be needed.

   The idea of listing foundational competencies as opposed to prescribing core courses is to be preferred, provided they are expressed in relation to Canadian law. The only exception to a list of foundational competencies is in connection with the need for a required course in professional responsibility, as described in our answer to question 3 below. It was also agreed that the suggested list of foundational competencies encompasses those that candidates for entry to bar admission programs should possess. We might suggest, as described in the answer to the next question, that other foundational competencies be considered.

2. Is it over or under-inclusive?

   A lively debate will always be expected to ensue where one questions whether any particular list of competencies suffices. The list as proposed is an adequate basis of foundational competencies. Some might consider that it is under inclusive, and that other legal foundations, for example family relationships and debtor/creditor rights, could be added. The Law Society believes that including legal analysis (beyond statutory analysis) as a foundational competency is important, however. Perhaps it is presumed that legal analysis will be addressed in the teaching of the other competencies. If so, it might be wise to expressly state that to be the case.

3. Is a stand-alone course on professional responsibility an appropriate requirement for candidates seeking entry to bar admission programs?

The Law Society is strongly in favour of a stand-alone course on professional responsibility. In fact, as an exception to the "core competency" approach, the Law Society believes that a professional responsibility course should be a credit course required toward an accredited bachelor of laws.

4. Should the existing prerequisite for entry into Canadian common law faculties of two years of post-secondary education in a university setting be maintained or should it be changed to reflect the *de facto* requirement of an undergraduate university degree?

The Law Society believes that, in today's world, an undergraduate degree should be the *de facto* pre-requisite for entry into a Canadian common law faculty of law, but noted that exceptions and discretionary categories should be maintained by the law schools. The Law Society suggests, however, that the exceptions and discretionary categories be standardized among the law schools.

5. If so, should McGill's tradition of admitting students following completion of a two-year CEGEP program be accommodated as an exception to the general prerequisite?

The Law Society sees no reason to make any exceptions to the general prerequisite as stated in the answer to question 4 above.

6. Are there other exceptions that should be recognized and accommodated?

As noted above, discretionary categories should be determined by the law schools and standardized.

7. Should the standard length for the common law degree be expressed in terms of credit hours rather than years of study?

The Law Society is of the opinion that the standard length for the common law degree should be expressed in terms of credit hours rather than years of study. This would allow greater flexibility for those with other commitments. However, it was also noted that a maximum length of time be placed on obtaining a law degree.

8. If so, is 90 credit hours the appropriate standard?

If 90 credit hours is the equivalent to the current 3 year law degree program then the Law Society believes that 90 credit hours is the appropriate standard.

9. Should in person learning be required for all or part of the law school program?

The Law Society expresses the view that first year studies require in person attendance. Second and third year could have some flexibility but in-person attendance should be required for most of those two years. The Law Society notes the comments contained in the Task Force report that certain courses do not lend themselves to on-line learning and that the increased attention to skills training makes personal attendance essential.

In addition, in-person attendance also fosters ongoing collegiality but this should also be balanced with the needs of the individual students and their own personal circumstances.

While the Law Society supports in-person learning as the primary method of teaching, it would encourage the universities to explore other modes of learning. Advances in technology mean that changes to course delivery can improve through on-line environments, and this may invite reconsideration of this question in future years.

10. Are there other delivery systems that should be taken into account?

The Law Society was unsure what other types of delivery systems should be taken into account. Foreign based "co-op" programs can be valuable delivery systems for legal education and skills development, but care must be taken to ensure that no student takes so many of these programs that they leave little room for substantive law courses in Canadian law in upper years.

11. How should joint degree programs be treated for the recognition of the common law degree?

Joint degree programs should be treated the same as a regular degree, provided that the foundational competencies have been met and accredited.

12. Should a national body monitor joint degree programs?

The Law Society firmly believes that a national body should be established to monitor any degree programs that issue a bachelor of laws or equivalent degree. This approach seems to be the norm amongst many other professions in Canada.

13. Should a national body be established to develop the components for recognition of law degrees from new law school programs?

The Law Society believes that a national body should be established to develop the components for recognition of all law degrees, not just those being developed by newly created law schools. A national accreditation body should also be used to assess joint degrees and foreign degrees as well.

14. Are there alternatives to this approach?

The Law Society considers that a self-reporting approach, subject to audit, could be a viable alternative. Through this method, law schools would self-report that the criteria set out in the foundational competencies are being met. However, a national body would be necessary to audit compliance as necessary.

The Law Society believes that any accreditation model would have to look beyond foundational competencies, however. Other criteria are important, including faculty, admissions standards, quality of library facilities, as well as the physical space, and should be considered in the accreditation of bachelor of laws programs. We note that some or all of these criteria are assessed for accreditation purposes by other professions.

15. The Task Force has identified three possible compliance models. Please provide comments on these models.

A. Status quo

The Law Society believes that the status quo is no longer acceptable given the necessity for transparency for those with foreign law degrees dealing with the National Committee on Accreditation as well as the development of any new law schools.

B. Examination Option

The Law Society believes that this option adds another layer of examinations that should not be necessary, provided agreement can be reached on the foundational competencies contained in a bachelor of laws program.

Moreover, the Law Society would be concerned that this option could lead to applicants wishing to simply challenge the examinations without the necessity of obtaining a law degree.

C. Approved Law Degree Option

The Law Society believes that this option makes the most sense, provided that some consensus can be reached governing the standards of the degree to be offered.

16. Are there other models that should be considered and if so, what are they?

The Law Society does not believe that any other models of education should be raised or considered at this time.

CONCLUSION

The Law Society thanks the Federation's Task Force for the thoroughness of its Report and for the opportunity to provide its input for consideration for the Task Force's final Report. Should the Task Force have any questions arising from this response, or if the Task Force would like to discuss anything further in connection with this important issue, the Law Society would be pleased to accommodate.

Yours truly,

Gordon Turriff, Q.C.
Chair, Credentials Committee

GT/dm

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

TASK FORCE ON THE CANADIAN COMMON LAW DEGREE

FINAL REPORT

October 2009

The Task Force presents this report and recommendations for consideration and discussion. The report and recommendations have not been endorsed by the governing body of the Federation and do not represent the official position of the Federation or its member law societies.

EXECUTIVE SUMMARY

The provincial and territorial law societies of Canada have the statutory responsibility to regulate the legal profession in the public interest. This responsibility includes the task of admitting lawyers to the profession. In all common law provinces and territories there are three requirements for admission to the bar: a Canadian law degree or its equivalent, successful completion of a bar admission or licensing program and completion of an apprenticeship known as articling. For applicants who receive their legal training outside Canada the determination of what constitutes qualifications "equivalent to" a Canadian law degree is made by the National Committee on Accreditation ("NCA"), a committee of the Federation of Law Societies of Canada ("the Federation").

Unlike other common law jurisdictions, Canada has never had a national standard for academic requirements of a Canadian law degree. The closest *de facto* standard has been a set of requirements the Law Society of Upper Canada approved in 1957 and revised in 1969. These have not been reviewed in 40 years and in any event have never been explicitly accepted by other law societies.

The regulatory landscape has changed greatly since 1969. Public scrutiny of regulated professions has increased. Recent events have converged to focus particular attention on the need for transparent regulatory processes and on the implications of government initiatives to harmonize regulatory requirements across the country:

- Three provinces have enacted legislation respecting access to regulated professions that require regulators to ensure that admission processes for domestic and internationally trained applicants are transparent, objective, impartial and fair.

- The number of internationally trained applicants for entry to bar admission programs has greatly increased and the requirement for equivalency has created a need to articulate what law societies regard as the essential features of a lawyer's academic preparation.

- New law schools are being proposed for the first time in more than 25 years and recognition of their degrees as meeting the academic requirements for entry to bar admission programs requires a more explicit statement of what is required.

- Federal and provincial governments have made clear their commitment to national labour mobility and harmonized standards. A 2007 Canadian Competition Bureau ("CCB") Study on regulated professions questioned the rationale behind the different admissions requirements of various law societies. Recent amendments to the Agreement on Internal Trade ("AIT") have made it clear that all levels of government view professions as national entities that must have the same admission standards. Anyone certified for an occupation by a regulator in one province or territory must be recognized to practise that occupation in all other provinces and territories. The legal profession has had national mobility for a number of years, beginning with the negotiation of the

National Mobility Agreement in 2002. A national academic requirement would further enhance national mobility by providing a common, transparent method for entry to any of the common law bar admission programs in Canada.

The Federation appointed this Task Force in June 2007 to review the existing academic requirements for entry to bar admission programs and to recommend any modifications that might be necessary.

The Task Force's recommendations follow this Executive Summary. The Task Force recommends that the Federation adopt a national academic requirement for entry to the bar admission programs of the common law jurisdictions. The intent behind developing a requirement that applies equally to applicants educated in Canada and internationally is to ensure that all those seeking to enter bar admission programs in Canadian common law jurisdictions have demonstrated certain essential and predefined competencies in the academic portion of their legal education.

In developing the recommended content of this national requirement the Task Force has had the benefit of input from the legal academy, the profession and other interested parties. In particular, the Council of Canadian Law Deans has been of considerable assistance as the Task Force has addressed the difficult challenge of creating a national requirement while at the same time preserving the flexibility Canadian law schools require to continue the innovation in legal education that positions graduates for valuable and diverse roles in society.

Accrediting bodies in jurisdictions similar to Canada commonly use one of two approaches to determine that an applicant for admission meets the necessary academic requirements: successful completion of specified courses or passage of a substantive law bar examination. In recent years, however, there has been increasing focus on learning outcomes, rather than prescriptive input requirements. The Task Force is of the view that this focus represents the appropriate regulatory approach.

Accordingly, the Task Force proposes a national requirement expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education.

The skills competencies the Task Force recommends are in problem solving, legal research and oral and written communication skills. These skills are fundamental to any work a lawyer undertakes in the profession.

In general the Task Force recommends that the Federation leave it to law schools to determine how their graduates accomplish the required competencies. It has concluded, however, that the Federation should require applicants seeking entry to bar admission programs to demonstrate that they have had specific instruction in ethics and professionalism, in a stand-alone course dedicated to the subject. Ethics and professionalism lie at the core of the legal profession. It is important that students begin to appreciate this early in their legal education.

In determining the required substantive legal knowledge, the Task Force considered the continued relevance of the current first-year curriculum of the 16 law schools offering a common law degree, the importance of students having foundational knowledge in both public and private law, the competency research undertaken by various law societies in Canada, the regulatory approach in other comparable common law jurisdictions and the importance of ensuring that the requirements do not interfere with the flexibility and innovation in current law school education.

The Task Force's recommendations reflect its view that every Canadian law school graduate entering a bar admission program or a recipient of an NCA Certificate of Qualification should understand,

- the foundations of law, including principles of common law and equity, the process of statutory construction and analysis and the administration of the law in Canada;
- the constitutional law of Canada that frames the legal system; and
- the principles of criminal, contract, tort, property and Canadian administrative law and legal and fiduciary principles in commercial relationships.

In addition to the competencies set out in the national requirement the Task Force recommends that law schools meet certain institutional requirements, as follows:

- The prerequisite for entry to law school must at a minimum include successful completion of two years of postsecondary education at a recognized university or CEGEP, subject to special circumstances.
- The law school's program for the study of law must consist of three academic years or its equivalent in course credits.
- The program of study must consist primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.
- The law school must be adequately resourced to meet its objectives.
- The law school must have appropriate numbers of qualified academic staff to meet the needs of the academic program.
- The law school must have adequate physical resources for both faculty and students to permit effective student learning.
- The law school must have adequate information and communication technology to support its academic program.
- The law school must maintain a law library in electronic and/or paper form that permits it to foster and attain its teaching, learning and research objectives.

The national requirement will be applied to all applicants for entry to bar admission programs whether educated in Canada or internationally.

Where a Canadian law school offers an academic and professional legal education that meets the national requirement, its graduates will have met the requirements for entry to bar admission programs.

For applicants trained outside Canada the Task Force recommends that the NCA continue to assess them individually. The national requirement will provide appropriate guidance and result in NCA applicants being assessed in a manner consistent with the requirements for graduates from Canadian law schools.

The Task Force also recommends that the Federation apply the national requirement when considering proposals for new Canadian law schools.

The Task Force recommends that Canadian law school compliance with the national requirement, including the competencies, be determined by a standardized annual report. Each law school Dean will complete the report confirming that the law school has conformed to the academic program and learning resources requirements and explaining how the program of study ensures that each graduate of the law school has met the competency requirements.

If the law societies of Canada approve these recommendations, the Task Force recommends that the Federation establish a committee to implement them.

The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking to enter a bar admission program must meet the national requirement. This transition period accommodates students who have already begun their studies, applicants currently in the NCA process and law schools that will require modifications to their programs.

The proposed national requirements and the Task Force's more detailed discussion of the issues follow this Executive Summary.

THE TASK FORCE'S RECOMMENDATIONS

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").

2. The Task Force recommends that the National Committee on Accreditation ("NCA") apply this national requirement in assessing the credentials of applicants educated outside Canada.

3. The Task Force recommends that this national requirement be applied in considering applications for new Canadian law schools.

4. The Task Force recommends that the following constitute the national requirement:

   A. Statement of Standard

   1. Definitions

   In this standard,

   a. "bar admission program" refers to any bar admission program or licensing process operated under the auspices of a provincial or territorial law society leading to admission as a lawyer in a Canadian common law jurisdiction;

   b. "competency requirements" refers to the competency requirements, more fully described in section B, that each student must possess for entry to a bar admission program; and

   c. "law school" refers to any educational institution in Canada that has been granted the power to award an LLB. or J.D. degree by the appropriate provincial or territorial educational authority.

   2. General Standard

   An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,

   a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or

b. *possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.*

B. Competency Requirements

1. Skills Competencies

The applicant must have demonstrated the following competencies:

1.1 Problem-Solving

In solving legal problems, the applicant must have demonstrated the ability to,

a. *identify relevant facts;*

b. *identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*

c. *analyze the results of research;*

d. *apply the law to the facts; and*

e. *identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

1.2 Legal Research

The applicant must have demonstrated the ability to,

a. *identify legal issues;*

b. *select sources and methods and conduct legal research relevant to Canadian law;*

c. *use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*

d. *identify, interpret and apply results of research; and*

e. *effectively communicate the results of research.*

1.3 Oral and Written Legal Communication

The applicant must have demonstrated the ability to,

a. *communicate clearly in the English or French language;*

b. *identify the purpose of the proposed communication;*

c. *use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*

d. *effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

2. *Ethics and Professionalism*

The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,

a. *the duty to communicate with civility;*

b. *the ability to identify and address ethical dilemmas in a legal context;*

c. *familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*

i. *circumstances that give rise to ethical problems;*

ii. *the fiduciary nature of the lawyer's relationship with the client;*

iii. *conflicts of interest;*

iv. *duties to the administration of justice;*

v. *duties relating to confidentiality and disclosure;*

vi. *an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*

vii. *the importance and value of serving and promoting the public interest in the administration of justice.*

3. *Substantive Legal Knowledge*

The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of

the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:

3.1 Foundations of Law

The applicant must have an understanding of the foundations of law, including,

a. principles of common law and equity;

b. the process of statutory construction and analysis; and

c. the administration of the law in Canada.

3.2 Public Law of Canada

The applicant must have an understanding of the core principles of public law in Canada, including,

a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;

b. Canadian criminal law; and

c. the principles of Canadian administrative law.

3.3 Private Law Principles

The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,

a. contracts, torts and property law; and

b. legal and fiduciary concepts in commercial relationships.

C. Approved Canadian Law Degree

The Federation will accept an LL.B. or J.D. degree from a Canadian law school as meeting the competency requirements if the law school offers an academic

and professional legal education that will prepare the student for entry to a bar admission program and the law school meets the following criteria:

1. Academic Program:

1.1 The law school's academic program for the study of law consists of three academic years or its equivalent in course credits.

1.2 The course of study consists primarily of in-person instruction and learning and/or instruction and learning that involves direct interaction between instructor and students.

1.3 Holders of the degree have met the competency requirements.

1.4 The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.

1.5 Subject to special circumstances, the admission requirements for the law school include, at a minimum, successful completion of two years of postsecondary education at a recognized university or CEGEP.

2. Learning Resources:

2.1 The law school is adequately resourced to enable it to meet its objectives, and in particular, has appropriate numbers of properly qualified academic staff to meet the needs of the academic program.

2.2 The law school has adequate physical resources for both faculty and students to permit effective student learning.

2.3 The law school has adequate information and communication technology to support its academic program.

2.4 The law school maintains a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.

5. The Task Force recommends that the compliance mechanism for law schools be a standardized annual report that each law school Dean completes and submits to the

Federation or the body it designates to perform this function. In the annual report the Dean will confirm that the law school has conformed to the academic program and learning resources requirements and will explain how the program of study ensures that each graduate of the law school has met the competency requirements.

6. The Task Force recommends that the Federation, or the body it designates to consider proposals for new Canadian law schools, be entitled to approve a proposal with such conditions as it thinks appropriate, relevant to the national requirement.

7. The Task Force recommends that by no later than 2015, and thereafter, all applicants seeking entry to a bar admission program must meet the national requirement.

8. The Task Force recommends that the Federation establish a committee to implement the Task Force's recommendations.

Council of Canadian Law Deans
Conseil des doyens et des doyennes des facultés de droit du Canada

57 Louis Pasteur
Ottawa ON K1N 5N5
www.cclc-cdfdc.ca

November 20th, 2009

By e-mail and ordinary mail: gturriff@stikeman.com

Mr. Gordon Turriff, President
The Law Society of British Columbia
845 Cambie Street
Vancouver, BC
V6B 4Z9

Dear Mr. Turriff:

Re: Final Report of the Federation of Law Societies of Canada
Task Force on Accreditation of the Common Law Degree

I am writing on behalf of the Council of Canadian Law Deans with regard to the Federation of Law Societies of Canada's Task Force Report on the Common Law Degree. It is our understanding that the Report and its Recommendations have been referred to the provincial and territorial Law Societies for consideration and potential adoption. In view of the implications of the Report and its Recommendations for Canada's law schools, we believe it is important for the CCLD to share our perspective and our concerns with you.

OUR INVOLVEMENT WITH THE TASK FORCE AND ITS WORK

It would be helpful to begin by describing the process followed by the Federation of Law Societies in undertaking this work and the relationship that the Canadian Law Deans have had with this process. As you will know, the Task Force was established in the fall of 2007 to address two significant issues: i) the criteria to be applied in the consideration of applications to establish new law schools in Canada; and ii) the criteria to be applied by the National Committee on Accreditation in the consideration of the qualifications of foreign trained lawyers, the latter within the context of provincial legislation in some provinces mandating fair processes for the consideration of such applications.

Since both of these issues necessarily involved a consideration of the existing understanding of a common law degree in Canada, it was natural that these issues would engage the interest and attention of legal academia and in particular the interests and expertise of the Canadian Law Deans.

The Task Force that was established by the Federation of Law Societies of Canada had an appreciation of the CCLD's unique role and expertise. In November of 2007 the Chair of the Task

Force, John Hunter, Q.C., met with the CCLD to inform the Law Deans of the Task Force of its composition, its mandate, its contemplated processes and its interest in a degree of engagement with the Law Deans. I think it is fair to say that the Deans were surprised to learn of the establishment of the Task Force, its plans and its composition. Given the issues to be addressed, we were also surprised to learn that there was no interest on the part of the Federation in including representatives of the Canadian Law Deans or legal academia on the Task Force. This was all the more surprising given the active and constructive contribution that the Canadian Law Deans have made to the work of the National Committee on Accreditation, one of the central subjects for Task Force consideration. Notwithstanding this, the CCLD agreed in November of 2007 that it would offer to work constructively with the Task Force. We established a Working Group of Law Deans, composed of Dean Nicholas Kasirer of McGill Law School, Dean Patrick Monahan of Osgoode Hall Law School and myself to provide information, assistance and advice to the Task Force. We were, at our own expense, essentially at the disposal of the Force whenever it felt the need of our involvement. Consistent with this commitment, we met whenever the Task Force requested us to do so, and provided the collective perspective on the CCLD through various reports and letters from the CCLD to the Task Force. While we were not always in agreement with the need for this project or with Task Force thinking, I believe that our engagement was undertaken in a spirit of respect for the members of the Task Force and their assignment. We believe that the Task Force engaged with us in a similar spirit of mutual respect. The Task Force made it clear that it had complete confidence in the state of legal education in Canada, and in the quality of the existing law schools, and that there was no plan to 'remake' law schools in a new image. This expression of confidence in our law schools inspired a genuine commitment on the part of the CCLD to assist the Task Force with its work. In this spirit we did our best to provide a clear understanding of the state of legal education in Canada and the implications of the various options that we understood to be under consideration by the Task Force.

This is particularly evident in our submissions to the Task Force in response to its October 2008 Consultation Paper. In a series of communications throughout the process, including two lengthy submissions to the Task Force in June of this year, (the latter two are attached for your consideration), we shared our perspective on matters of critical importance to legal education and to the Task Force. Concurrent with these submissions we communicated a willingness to continue to be engaged with the Task Force. We heard nothing further until the Task Force had completed its work and submitted its Report.

While some of the perspectives provided by us to the Task Force were incorporated in its final Report, one critical concern of the Canadian Law Deans was ignored and some matters of concern were introduced in the final Report without any request for input from the CCLD or any other group. I will make further reference to these matters later in the letter.

OUR PERSPECIVE IN RELATION TO THE REPORT AND ITS RECOMMENDATIONS

As you will know, the Task Force has produced a series of recommendations that seek to establish a new set of standards for an 'approved common law degree' in Canada. While we have offered suggestions to the Task Force on alternatives to this approach, we acknowledged the Task Force's commitment to this objective in our June 1, 2009 letter to the Task Force. Indeed, in that letter we signaled support for the 'competencies' approach being contemplated by the Task Force. Such an approach is consistent with much modern thinking about legal education, and is being incorporated into the curricula of a number of our law schools in Canada. We urged the Task Force to follow this 'competencies' approach comprehensively, as had been recommended by the Law Society of Upper Canada in its own submission to the Task Force in 2008. We would have welcomed such an approach. For reasons that are not clear to us, the Task Force elected not to do so, and in particular in relation to its recommendations regarding a mandatory, stand-alone Legal Ethics and Professionalism, has recommended an approach that is contrary to its own previously stated approach to competencies. This deviation in approach is more than a matter of pedagogical debate or semantics. While the

Canadian law Deans generally have little objection to a competencies-based approach, a requirement related to a specific new mandatory course is more problematic. A 'competencies' approach confirms the legal profession's confidence in our law schools, and in our ability to fashion programs that can meet our educational objective of delivering a rigorous academic education for our students while at the same time providing us with the flexibility and imagination to design a curriculum that will ensure that the legal profession's expected competencies are learned by our students. The dictate of any specific 'course' requirement makes the opposite statement. It 'directs' legal education, and prevents law schools from achieving 'competency' in our students through flexibility, imagination and innovation, the specific responsibilities of legal educators, the specific prerogative of legal education and the very work that the Task Force signaled was being well done in our law school. In addition, we are surprised and concerned that the Task Force has gone further, identifying what it expects – perhaps requires – to be the content of this mandatory course. Regardless of the course under consideration in this regard, we see this whole approach as unprecedented and inappropriate.

Second, to our surprise, the Task Force elected to include in its final Report a recommendation that establishes a compliance requirement for a law school to be 'approved'. This was a surprise to us for two reasons. First, while there was a passing reference to 'compliance' in the Task Force's 2008 Consultation Paper, the Task Force did not set out any questions in relation to compliance or compliance mechanisms and did not invite any feedback on this issue. Second, and perhaps more important from the perspective of the Canadian law Deans, we were advised that the Task Force intended to leave this issue to another day and another body. We are troubled that a recommendation of this sort, on a matter of critical importance to legal education in general and to the Canadian Law Deans in particular, would be included in the final Report with no dialogue with us.

The Canadian Law Deans have concerns with additional aspects of the Report. These include the adoption of some 'legal knowledge' competencies whose meaning we have struggled to understand, as well as a variety of technical, or 'institutional' matters that, unresolved, where implementation could jeopardize various aspects of our existing programs. In our view these are also matters of sufficient importance that any approval of the Report and Recommendations should await their clarification and resolution.

THE APPROACH WE RECOMMEND

The decisions your law society will be making in relation to the Report and its Recommendations will necessarily be undertaken within the context of your responsibility to regulate in the public interest. In our view, this responsibility can best and only be achieved through a process of engagement with legal education, and in particular with the Canadian Law Deans, in advance of making any decisions regarding the Task force Report and its Recommendations. The work of the Task Force is important to the legal profession and to Canada's law schools. It is the most significant examination of the nexus between our law schools and the legal profession in over 40 years. The Task Force has done much good work, but in our opinion it has not gotten all of the questions right. And it is important, with a project of this significance, that both law societies and the legal education community make every effort to make the best decisions possible. We believe that it is possible to develop, together, a set of recommendations that can strengthen the Report that is before you for consideration. There is ample time to do this. We note that, even within the context of the Report's own recommended timetable, implementation would not take place until 2015.

For these reasons, we recommend that you defer any decisions in relation to the Report and its Recommendations. We recommend that a dialogue be undertaken between the law societies and the Law Deans to work out the difficulties presented by the Task Force's Report and Recommendations and to put in place the necessary refinements and clarifications to optimize the Task Force's work and make it meaningful, effective and beneficial for legal education, for the legal profession and for the public interest. We are prepared to make a commitment to such a project. It would be a signal that

those who are privileged to be charged with the regulation of the legal profession in the public interest wish to strive for the 'best' in this aspect of their regulatory responsibilities. It would also honour the work of the Task Force, whose members have made a genuine and heartfelt effort to solve some seemingly intractable problems facing the legal profession of today.

Failing this, we urge that any adoption of the Report and its Recommendations be 'in principle' only. There are many unresolved issues related to the Report, and we believe that these must be resolved before law societies give their imprimatur to the features of any new regulatory regime. This is again a responsibility to ensure that the model you approve best serves the public interest. In our view the best process to address the unresolved issues would be a joint committee of the legal profession and the Council of Canadian Law Deans, co-chaired, and with equal representation from these two communities of interest. We are committed to undertaking this work in a principled and timely way, with a view to developing – together - the best model we possibly can.

At the present time, some Canadian Law Deans are unable to support the Report and its Recommendations in their current form. We believe that with good will from the Deans and from the leaders of the legal profession, differences can be bridged and a suitable model can be developed. Such a model can meet the immediate challenges faced by the legal profession in ways that will build upon the continuing evolution and strengthening of legal education in Canada. It can also reinforce the strong and positive relationship between our profession and our law schools.

Sincerely,

W Brent Cotter
President
Council of Canadian Law Deans

Hunter Litigation Chambers
HUNTER / BERARDINO / HARRIS / McEWAN

November 25, 2009

BY EMAIL

Mr. John A. Campion, President
Federation of Law Societies of Canada
World Exchange Plaza
1810 - 45, rue O'Connor Street
Ottawa, ON K1P 1A4

Dear Mr. Campion:

Re: November 20, 2009 letter from the Council of Canadian Law Deans

I am in receipt of your letter dated November 24, 2009, in which you provided me with a copy of the November 20, 2009 letter from the Council of Canadian Law Deans ("the Council") and requested my comments on it. As Chair of the Federation Task Force on the Canadian Common Law Degree, I agree that it is important to clarify some of the points made in the letter so that law societies will be able to fully assess the recommendations before them in the Task Force's final report dated October 2009 ("the Task Force Report").

Task Force's Mandate

The Deans' letter states that the decisions law societies will make in relation to the Task Force Report "will necessarily be undertaken within in the context of [law societies'] responsibility to regulate in the public interest." As Chair of the Federation Task Force I also took it as a given that the Task Force's mandate flowed from this responsibility. The Federation Task Force was established in June 2007 to,

a) review the criteria currently in place establishing the approved LL.B/ J.D. law degree for the purposes of entrance to law societies' bar admission/licensing programs ("the approved LL.B./J.D. degree") and determine whether modifications are recommended;

b) if modifications are recommended, to propose a national standard for the approved LL.B./J.D. degree; and

c) consider the matters in (a) and (b) in relation to the National Committee on Accreditation requirements for granting a certificate of qualification and determine what changes if any should be made to those requirements. By articulating standards for the approved LL.B./J.D. law degree the Federation can more clearly identify for

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internationally trained candidates and those with civil law degrees from Quebec the meaning of "equivalent to a Canadian LL.B./J.D. degree."

While the Council letter is correct that issues related to the NCA and new law school proposals were part of the Task Force's analysis the mandate was primarily to consider the appropriate criteria for entry to bar admission programs. Once these were determined they could be applied as well to the NCA and new law school context.

Involvement of CCLD with the Task Force

The Council's letter accurately comments on the Task Force's appreciation of the CCLD's unique role and expertise. As the letter confirms it and the Task Force engaged with each other in a spirit of mutual respect.

While it is correct that the Task Force membership consisted only of law society representatives the Law Deans' input was sought immediately and continued throughout the process. Among other steps the Task Force took to address the Council's submissions and views, it postponed its final report, originally intended for March 2009, to obtain further input from the Council. The Task Force paid particular attention to the views the working group of the Council expressed to it in January 2009 and to the letters the Council wrote to the Task Force on June 1, 2009 and June 29, 2009, both of which are included in the Task Force's Report and are referred to in the Council's November 20, 2009 letter.

While the Task Force did not accept all of the Council's submissions, it is not accurate to say that the Task Force 'ignored' them. Quite the contrary is the case. I remain convinced that the Task Force Report and the views the Council has expressed are significantly more similar than the November 20, 2009 letter suggests.

Consultation Process and Task Force Recommendations

The Council's November 20, 2009 letter expresses a concern that the Task Force did not consult with it on a number of issues on which it made recommendations in the final report. I am not sure on what basis the Council raises this concern as the Task Force's consultation process was public and detailed.

In its September 2008 Consultation Paper the Task Force stated its preliminary view that there should be a required standard for entry to bar admission courses and that the standard "should address competencies in fundamental areas of substantive knowledge, legal skills and professional responsibility." It then outlined its proposed competencies and stated that the one exception to relying on competencies should be a stand-alone course in professional responsibility (renamed ethics and professionalism in its final report). It then discussed compliance, identifying three possible approaches (the status quo, the examination model, and the approved law degree.) The approved law degree option was described as follows:

> Under this option a required standard would be established...and law faculties would demonstrate what they are doing to ensure that their graduates have achieved the required competencies.

The consultation paper also discussed a number of possible institutional requirements that could be part of the approved law degree. It did so in direct response to the Council of Canadian Law Deans' persuasive submissions that if the Task Force did no more than articulate a list of competencies without discussing institutional requirements, it would undermine the quality legal educational standard that exists in today's law faculties.

Since the Task Force sought input on all these issues in the consultation paper, it is somewhat surprising to see in the Council's November 20, 2009 letter that no such input was sought. Moreover, the Council's June 1, 2009 and June 29, 2009 letters, referred to earlier, provide input on many of the issues, including the competencies, a compliance mechanism and institutional requirements.

In making its recommendation on a compliance mechanism, the Task Force paid particular attention to the Council's submission in its June 1, 2009 letter that " the Task Force should recommend only those requirements for law school compliance that are necessary for fulfillment of law societies' mandated public interest responsibilities." Moreover, the Task Force made it clear that the details of the approach should be left to the implementation committee.

I hope this letter clarifies some of the issues raised in the Council's November 20, 2009 letter.

Yours truly,

John J.L. Hunter, Chair
Task Force on the Canadian Common Law Degree

JJLH/smr
cc: Dean Brent Cotter, President
Council of Canadian Law Deans

The Law Society of British Columbia

Federation of Law Societies Model Code of Conduct

January 5, 2010

Purpose of Report:	**Report to Benchers on Proposed Ethics Committee Consideration of Issues**
Prepared by:	**Ethics Committee**

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date January 5, 2009

Subject **Federation of Law Societies Model Code of Conduct**

The purpose of this memo is to give you background about the Federation of Law Societies' Model Code, outline a process for considering the Model Code as a replacement for our current *Professional Conduct Handbook* and advise you of our provisional views about adoption of the Model Code. We are not asking for any direction from you concerning the Model Code at this time, but welcome any questions or views you have about the Code or the proposed process for considering it.

Background

At the end of October 2009 the Federation of Law Societies adopted a Model Code of Conduct, based on the work that two Federation committees have done since 2005. David Zacks and Jack Olsen were appointed by the LSBC to work on the Model Code initially, and Jack Olsen was part of a subsequent group appointed to review and implement the Model Code. Since the beginning of 2009, Anne Stewart of the Ethics Committee has been part of a Federation special advisory committee to review the Canadian Bar Association report on conflicts with a view to proposing new conflicts rules for the Model Code.

Although Anne Stewart's group has not been able to complete its work due to the illness of one of its members, the Federation has nevertheless adopted the remaining portion of the Code as the Federation Model Code. The conflicts provisions will be added later when the work of Anne's committee has been completed. Also incomplete is the Code section involving the future harm/public safety exception rule.

The Federation's intention in adopting the Model Code is to encourage more uniform Codes of Professional Conduct among Canadian Law Societies. Although the Federation recognizes that each jurisdiction is solely responsible for its own Code, Law Societies hope that the availability of a Model Code that has been compiled with the assistance of all jurisdictions, together with a process for reconsidering and revising the Model Code, will lead to substantial congruence among rules of conduct in the various jurisdictions. This should assist lawyers who work in multiple jurisdictions in understanding professional rules from jurisdiction to jurisdiction.

If we were to adopt the Model Code, or a version of it, the Code would replace our current *Professional Conduct Handbook* as the Code of Professional Conduct for British Columbia.

Review of the Model Code by the Law Society to this time

In 2007 the Benchers accepted the Ethics Committee's recommendation that the Law Society seek changes to the 2007 draft of the Model Code. In a letter of January 10, 2008 then President John Hunter advised the Federation of the LSBC's position on thirty three aspects of the draft Code, five of which were expressed to be matters where the LSBC would feel obliged to enact provisions which diverged from the then draft, and the remainder where the LSBC thought changes would improve the Code. That letter is attached.

Law Society Executive Instructions to Ethics Committee

In October 2009 the Law Society Executive us to review the Model Code and make recommendations to the Benchers concerning its adoption by the LSBC in place of our current *Professional Conduct Handbook*. Although that process cannot be completed until the conflicts and future harm/public safety portions of the Code are finished and adopted by the Federation, we believe it is possible to begin a review of the Code with what has been adopted by the Federation to this point.

Ethics Committee Provisional Views

We think it is appropriate at this stage, to give you a report on our provisional views on some of the issues raised by the completion of this portion of the Model Code and the process of examination of the completed Code that should take place by us and, ultimately, by you.

It is our view that we ought to recommend adoption of the Code to you, with appropriate changes that are necessary to recognize local issues or improve the rules in some important areas. To the extent that the LSBC makes changes to the Code, we are of the view that those changes should, nevertheless, be done in the style of the Model Code and be consistent with its organization. It may be that where changes are made to the Model Code those changes should be highlighted in some way to draw attention to features that may not be common to other provinces or territories. We have not determined what changes we will recommend to the Code before it can be adopted in place of the current *Professional Conduct Handbook*, but we expect to consider carefully the views Benchers expressed in 2007 concerning various issues raised by the Code and that are set out in the attached letter from John Hunter.

We also think that it may be important to consult with the profession generally before a new Code is actually adopted, but the nature and timing of such a consultation can be considered later in the process.

Both a clean and blacklined version of the Model Code are attached. The blacklined version identifies changes made to the Code since John Hunter made submissions to the Federation on behalf of the LSBC in his letter of January 10, 2008.

Attachments:

- Letter of January 10, 2008 from John Hunter, Q.C. to the Federation of Law Societies.
- Clean and blacklined copies of the Federation Model Code.

(modelcode172benchers(2)/09)

January 10, 2008

Federation of Law Societies
Constitution Square
360 Albert Street, Suite 1700
Ottawa ON K1R 7X7

Attention: Michael Milani

Dear Sir:

Re: Federation of Law Societies Model Code

Our Ethics Committee and Benchers have now had an opportunity of considering the draft Model Code and have a number of comments on it. We have divided our comments into two parts. The comments in Part A identify Model Code provisions that we believe we would be unable to adopt in place of our current *Professional Conduct Handbook* provisions without making changes to the Code to remedy what we see as the Code's shortcomings. The comments in Part B highlight additional Code provisions which we think ought to be changed to improve the Code, although we are uncertain at this time whether we would necessarily make the Part B modifications to the Code should the Code remain unchanged in those areas.

A. Matters where LSBC would feel obliged to change the Model Code if we were to implement it in British Columbia

The following are the issues where we believe we would be unable to adopt the proposed Model Code provision in place of our current *Professional Conduct Handbook* without making changes to the Code to remedy the concerns we identify.

1. Disclosure of Privileged Information
[Model Rules 2.03(4) and 2.03(5)]

Chapter 5, Rule 12 of our *Professional Conduct Handbook* currently provides:

> 12. A lawyer may disclose information received as a result of a solicitor-client relationship if the lawyer has reasonable grounds to believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person.

Rules 2.03(4) and 2.03(5) of the Model Code contemplate either mandatory or optional disclosure of confidential client information in specified circumstances. Rule 2.03(4) would require disclosure of privileged communications to prevent a serious crime.

In our view the rule dealing with disclosure of information to prevent a crime should be discretionary rather than mandatory. A mandatory requirement does not place sufficient value on the judgment of individual lawyers and may prevent lawyers from taking other effective action to deal with threats of violence, short of disclosing the information.

Rule 2.03(5) is the optional version and in that respect is similar to our current Rule 12. Unlike Rule 12, however, it specifically contemplates that the potential for serious psychological harm that substantially interferes with health or well-being may justify disclosure. It would permit a lawyer to disclose potential crimes that do not involve violence.

We are of the view that what potentially constitutes serious psychological harm is too subjective and uncertain a standard to include in the rule. Moreover, it is contrary to the core value of solicitor-client privilege to require a lawyer to report potential criminal activity of a client except in narrow circumstances involving violence. While a lawyer may not assist a client to plan or carry out such activity, permitting a lawyer to disclose such information fails to place enough value on clients' need to be able to receive frank advice from their lawyers without fear that the lawyer will use information they disclose to their detriment.

2. <u>In criminal matter lawyer may require permission of Court to withdraw</u>
[Model Rule 2.07(6)]

Model Rule 2.07(6) requires that a lawyer obtain permission of the Court to withdraw in certain circumstances.

In British Columbia, a lawyer's decision to withdraw from a case is a matter of professional responsibility and is not reviewable by the Court: See *Leask v. Cronin*, Prov. J. (1985) 66 BCLR 187 (BCSC). In our view, Rule 2.07(6) is not appropriate. Such a rule may encourage courts to inquire about the reasons for counsel's withdrawal. In most circumstances counsel cannot give his or her reason for withdrawing because the information is privileged. The result is that counsel may be pressured to disclose information improperly, or be left defending an accused where it is unfair or inappropriate for that counsel to do so.

3. <u>Interviewing Witnesses</u> [Model Rule 4.03(3)(b)]

Under this rule a lawyer may not approach a potential witness who is an employee of an opposite party that is a corporation or organization if the employee's acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability. In our view, this is a serious contraction of a lawyer's access to witnesses and contrary to existing practice in B.C. which does not take account of the

possibility an employee's evidence may result in criminal or civil liability to the organization. Our Ethics Committee has adopted the following reasoning of Wolfram in Modern Legal Ethics, 1986, at p. 613:

> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anticontact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in the representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

We think this is a preferable statement of the principle.

We do not think Model Rule 4.03(3)(b) is intended to affect the right of the Crown to interview witnesses in criminal prosecutions, and we suggest there would be merit in the Rule saying this expressly.

4. <u>Communication with witnesses giving evidence</u> [Model Rule 4.04(2)]

Current practice in British Columbia differs from the draft model rule in two respects: First, during cross-examination of the lawyer's own witness, a lawyer must not discuss with the witness *any* evidence given by that witness, whether in chief or in cross-examination. Secondly, when a lawyer wishes to speak with the lawyer's witness prior to re-examination, the proper procedure is to seek leave of the court before speaking to the witness. This latter practice has been specifically endorsed in *R. v. Montgomery* (1998), 126 C.C.C. (3d) 251 (B.C.S.C.), where Henderson J. concluded that where counsel wishes to discuss the evidence with his or her witness after cross examination is ended, and before re-examination, the proper course of action is for counsel to seek leave of the court, which in most cases will be granted. In our view, we would need to change Rule 4.04(2) to conform to British Columbia practice.

5. <u>Conflicts</u> [Model Rule 2.04]

a) acting against current clients [Model Rule 2.04(3)]

Model Rule 2.04(3) contains different criteria than those set out by the Supreme Court of Canada in *R. v. Neil*, 2002 SCC 70 for acting against current clients in that it omits the use of the words "general," "directly" and "immediate" in *Neil's* formulation of the test (at para 29):

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

The Canadian Bar Association *Code of Professional Conduct* has seen fit in commentary 4 of Chapter V to give effect to the test set out in *Neil*. Commentary 4 states: "A lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client, even if the two matters are unrelated, unless both clients consent after receiving full disclosure and, preferably, independent legal advice."

In our view, the Federation should amend Model Rule 2.04(3) by adhering more closely to the language used by the Supreme Court of Canada in *Neil*, especially through the use of the words "directly" and "immediate" which require lawyers to engage in a balancing exercise in applying the Court's test to the unique circumstances of each case and serve to broaden the circumstances where lawyers will be able to act.

b) acting against former clients [Model Rule 2.04(4)]

Although we approve of the words "or against persons who were involved in or associated with the client in that matter," we are concerned that the addition of this language not cause undue difficulty in areas where lawyers seek the consent of a former client to act in another matter. If such consent were to require not only the consent of the former client but of a significant number of others who may have been associated with the client such a rule might be unworkable. We are of the view that Model Rule 2.04(4) should address this issue directly.

We also note that the provision in Model Rule 2.04(4) with respect to the relatedness of current and former matters and its effect on whether there must be an inquiry about whether the lawyer has relevant confidential information from a former matter is unclear and ought to be modified in a new draft. We think the rule could be improved with the following new language:

2.04(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter unless:

a) the client or other person the lawyer proposes to act against consents, or

b) the new retainer is wholly unrelated to the previous retainer and the lawyer has obtained no confidential information from the previous retainer that is relevant to the new retainer.

Commentary
It is not improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

c) partners acting against former clients [Model Rule 2.04(5)]

We are of the view that this rule ought to build in the possibility of lawyers seeking an opinion on the appropriateness of the circumstances under which the firm wishes to act, including the adequacy of measures the firm has taken to screen confidential information. The transferring lawyer rules in British Columbia (Chapter 6, Rules 7.1 to 7.9) make it clear that a firm can seek the opinion of the Law Society or an order of the Court with respect to this issue and, in our view, the Model Code should provide for similar approval to be sought. Moreover, although the Federation draft refers to the adequacy of "assurances" and "measures," it does not describe how those standards can be met. We are of the view the proposed rules ought to be expanded to address that issue.

It is also our opinion that it would be preferable to cast the rules in the negative. That is, the rules should indicate that the lawyer's partner or associate must not act unless there is consent or unless the firm can meet the required criteria. The rules also ought to indicate that where the firm seeks to act in such a matter by consent, the consent of both affected clients must be obtained.

d) joint retainers [Model Rule 2.04(6 to 10)]

In our opinion, Model Rule 2.04(6) needs to more expressly preserve the ability of clients to agree at the outset of a joint retainer that the lawyer may continue to act for one or a number of them where a conflict emerges that would ordinarily require the lawyer to withdraw from acting for both or all of them. That could be accomplished by adding a provision similar to Chapter 6, Rule 5 of the British Columbia *Professional Conduct Handbook* which states:

> 5. If a lawyer jointly represents two or more clients, and a conflict arises between any of them, the lawyer must cease representing all the clients, unless all of the clients:
>
> (a) consented, under paragraph 4(d), to the lawyer continuing to represent one of them or a group of clients that have an identity of interests, or
>
> (b) give informed consent to the lawyer assisting all of them to resolve the conflict.

e) prohibition against acting for borrower and lender [Model Rules 2.04(12 to 16])

These Model Rules appear to have wide application and may permit a lawyer to act for both borrower and lender in more circumstances than they prohibit. Moreover, in the circumstances covered by these rules, even if the documents the lawyer prepares are standard form documents, the lawyer is still required to give advice to both parties.

In our opinion it is inappropriate to have these rules in a National Code and we are of the view that they should be removed. While there may be local circumstances that justify having special rules that permit a lawyer to act for adverse parties in some limited circumstances (such as the Law Society of B.C.'s simple conveyancing rules), those

situations should be rare and should be addressed by Law Societies individually and not on a national basis.

f) conflicts from transfer between law firms [Model Rules 2.04(17 to 26)]

We understand the Federation Committee recognized that the current *Martin v. Gray* rules might benefit from a reconsideration, but decided to postpone that task to another time. It is our view that the Model Code ought to include a revision to these rules based on the decade of experience Law Societies have now had with them.

g) doing business with a client [Model Rules 2.04(27 to 39)]

It is our view that it is unclear what Model Rule 2.04(31) applies to. The preamble to the section seems to limit the independent legal advice referred to in specific circumstances where the client is involved in a transaction that requires the client to advance funds. However, the application of the section needs to be clarified. In Model Rule 2.04(33) it is unclear what the words "the nature of the case" refer to. Moreover, it is questionable whether it is appropriate to place all the responsibilities the rule contemplates on the lawyer whose spouse or corporation is borrowing the funds, since the client must be independently represented in the transaction in any case. We are of the opinion that both these sections require redrafting.

Notwithstanding the care these Model Rules take to ensure that proper procedures are followed when a lawyer is engaged in a business transaction with a client, they do not make it sufficiently clear that a lawyer may not engage in a business transaction with a client where there is an actual conflict between their interests. In our opinion, the Rules ought to be amended to make that principle more prominent.

It is not clear to us that all these rules should necessarily apply to in-house counsel in compensation matters relating to their employment. While we do not think the Model Rules should be altered at this stage to take account of in-house counsel concerns, we think the Federation ought to give consideration to this issue when considering future revisions to the Model Rules.

B. Matters where we suggest changes

The following is a further list of issues arising out of the Model Code where we believe the Code would benefit from revisions. Unlike the items listed in A, above, we do not say we would necessarily make these changes if we were to adopt the Model Code in place of our current *Professional Conduct Handbook.* However, we may want to make changes to improve the Code in these areas if the Federation does not do so.

6. Absence of the principles of Chapter 1, Rule 3(2) of the *Professional Conduct Handbook*

The British Columbia Law Society *Professional Conduct Handbook* states:

> (2) 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 controversy, if any, which might influence whether the client selects or continues to retain the lawyer.

This is a valuable statement of a lawyer's obligation to inform clients of matters that may influence whether the client retains or continues to retain the lawyer. We cannot find an equivalent provision in the Model Code and think such a rule ought to be added.

7. Definitions

The definition of "associate" does not pick up a lawyer working on contract with a firm who has an affiliation with a firm equivalent to that of an employee.

"lawyer" and "member" have the same definition. It would be preferable to use only one of these terms throughout the Model Code, preferably "lawyer."

8. Client Fraud and Dishonesty [Model Rule 2.02(9)]

The Model Code uses the term "knowingly" where we, in Chapter 4, Rule 6 of our *Professional Conduct Handbook* use "knows or ought to know," arguably a higher standard. While we are of the view that the Commentary to Rule 2.02(9) is acceptable, the rule itself is not strong enough. The Model Rule does not necessarily need to use the language of the LSBC rule, but it should nevertheless place an obligation of due diligence on a lawyer to ensure that the lawyer does not assist or encourage the proscribed conduct.

The relevant LSBC rule is Chapter 4, Rule 6 of the *Professional Conduct Handbook.* It provides:

> 6. A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.[3]

Footnote 3 of Rule 6 states:

> 3. A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

9. <u>Clients with diminished capacity</u> [Model Rule 2.02(11) and Commentary]

Model Rule 2.02(11) and the Commentary are deficient in that, unlike our *Professional Conduct Handbook*, they fail to indicate whether a lawyer may disclose confidential information to "preserve and protect the client's interests" as the Commentary requires and, if so, what the limit of that disclosure is. Moreover, Chapter 3, Rule 2.4 of our *Professional Conduct Handbook* expressly permits lawyers to provide "reasonable and necessary minimal assistance" to persons who are incapable of becoming clients, whereas the Model Code Commentary advises lawyers to decline to act for a person who is incapable of giving instructions. In our view Rule 2.4 is both more practical and more humane than the Model Code equivalent. The relevant rules from our *Professional Conduct Handbook* state:

This issue is currently dealt with in our *Professional Conduct Handbook* in Chapters 3 and 5. Relevant rules from Chapter 3 are the following:

Client capacity

2.1 If a client cannot adequately instruct counsel for any reason,[2] the lawyer must maintain a normal client-lawyer relationship with the client, to the extent reasonably possible.

2.2 A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only if the lawyer:

(a) reasonably believes that the client cannot adequately instruct counsel,

(b) reasonably believes the appointment or other protective action is necessary to protect the client's interest, and

(c) does not take any action contrary to any instructions given to the lawyer by the client when the client was capable of giving such instructions.[3]

2.3 A lawyer who reasonably believes that a client cannot adequately instruct counsel may, pending appointment of a representative of the client, continue to act for the client to the extent that instructions are implied or as otherwise permitted by law.

2.4 A lawyer who is prevented from entering into a client-lawyer relationship with a person because of the person's lack of capacity[4] may provide reasonable and necessary minimal assistance to the person and disclose confidential information provided the lawyer:

(a) is satisfied that the person cannot adequately instruct counsel generally or about possible protective action the lawyer might take,

(b) makes it clear to anyone who may be misled by the lawyer's involvement that the lawyer does not represent the person,

(c) discloses the minimum amount of information required, and

(d) does not take action contrary to any direction given to the lawyer by the person.[5]

FOOTNOTES:

2. Such as, but not limited to, minority or mental disability.

3. A lawyer may have special duties of confidentiality to a client lacking capacity. See Chapter 5, Rule 16.

4. A lawyer may not form a client-lawyer relationship with a person who has never been the lawyer's client and who lacks the capacity to instruct the lawyer, except if the lawyer is appointed to act by a court or tribunal, by operation of statute or in a proceeding in which some aspect of the client's mental capacity is in issue. However, a lawyer may act for a person of marginal capacity who is capable of giving instructions on some matters but not others.

5. For example, such assistance might consist of appearing at a scheduled court appearance to protect the person's interests or advising the Public Guardian and Trustee, family members or others of the person's need for assistance. Lawyers must act with great care in these situations since the disclosure of confidential information could open a lawyer to a claim and an accusation of acting unlawfully.

Relevant rules from Chapter 5 are:

16. A lawyer may disclose a client's confidential information for the purpose of securing the appointment of a guardian or in conjunction with other protective action taken on behalf of the client, provided:

    (a) the lawyer reasonably believes the client cannot adequately instruct counsel regarding the issue of disclosure,

    (b) the lawyer reasonably believes the disclosure is necessary to protect the client's interests,

    (c) the disclosure is not contrary to any instructions concerning disclosure given to the lawyer by the client when the client was capable of giving such instructions, and

    (d) the lawyer discloses the minimum amount of information required.[2]

FOOTNOTES:

2. A lawyer may have duties of confidentiality to a non-client lacking capacity. See Chapter 3, Rule 2.4.

10. Restricting Future Representation

Chapter 4, Rule 7 of our *Professional Conduct Handbook* states:

7. A lawyer must not participate in offering or making an agreement in which a restriction on any lawyer's right to practise is part of the settlement of a client lawsuit or other controversy.

There is no equivalent to this rule in the Model Code, although it is placed in our rules along with other matters that are covered in Rule 2.02 of the Model Code.

The American Bar Association Committee on Ethics and Professional Responsibility in Formal Opinion 93-371 made the following comments about settlement agreements that restrict the lawyer's right to take on future clients:

> Permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of these restrictive agreements creates a conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much. This is particularly so in light of the strong countervailing policy that favours the public's unfettered choice of counsel.

In our opinion the Model Code would benefit from the addition of a rule to reflect this concern.

11. **Judicial Interim Release (Bail)** [Model Rule 2.04(43)]

The Federation Rule states that a lawyer shall not "stand bail" for an accused person for whom the lawyer acts.

The section from the *Criminal Code* dealing with this issue is entitled "Judicial Interim Release." It does not mention the term "bail." Sections 515(1 & 2) state:

515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

Release on undertaking with conditions, etc.

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released

(*a*) on his giving an undertaking with such conditions as the justice directs;

(*b*) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;

(*c*) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;

(*d*) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or

(*e*) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into

> a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

Since the term "stand bail" is not used in the *Criminal Code* and has no popular usage in British Columbia, it is our view that it would be sensible to remove those words and substitute language taken from section 515 of the *Criminal Code*. Our own recent amendment to Chapter 8 of our *Professional Conduct Handbook* states:

Judicial interim release

19. A lawyer must not act as surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.[3]

FOOTNOTES:

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

12. <u>Property Relevant to a Crime</u> [Commentary following Rule 2.05(6)]

The commentary following Rule 2.05(6) gives some direction about how to deal with property that lawyers' acquire that may be evidence in criminal proceedings. The most important part of that commentary is the following:

> Generally, a lawyer in such circumstances should, as soon as reasonably possible:
>
> (a) Turn over the property to the prosecution, either directly or anonymously;
>
> (b) Deposit the property with the trial judge in the proceeding;
>
> (c) Deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or
>
> (d) Disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of retaining the property.

There are major problems with this direction that is arguably an alteration of the common law:

1) It does not permit the lawyer to return the evidence to its source (usually the client). So for example, a lawyer who interviews a client who is a suspect in a murder and who receives a bloody shirt from the client during the interview is not permitted to return the shirt to the client, even if the lawyer gives the client proper instructions about the client's obligation not to destroy the evidence.

2) It does not permit a lawyer to retain evidence temporarily for the purposes of testing.

The way in which lawyers may treat evidence in their possession continues to be a matter of controversy, particularly following the *Murray* decision in Ontario in 2000 when lawyer Kenneth Murray retained tapes containing evidence of a crime for 17 months without disclosing the existence of the tapes to the Crown. It is our view that although this is an issue worthy of consideration by the Federation, it is an issue that is extremely complicated and potentially divisive and it is unwise to attempt to resolve it as a small part of the Model Code. We urge that this part of the Code be abandoned for the present and taken up by the Federation again as a separate matter sometime in the near future.

13. Reasonable Fee [Model Rule 2.06(1)]

We are of the view that although the statement of the rule in 2.06(1) is generally acceptable, the rule could be clarified to make it clearer that the "timely fashion" stated in the rule refers to a lawyer's obligation to deliver a bill within a reasonable time after completion of the work.

The statement of the Commentary "(j) any estimate given by the lawyer, and" should be replaced by the following statement: "(j) any indication given by the lawyer that fees would fall within a certain range, and". In our opinion, it is appropriate to take account of a range in which a lawyer estimated the fee might fall, but it is not appropriate to consider that fairness and reasonableness should be determinable by reference to true estimates, because true estimates have contractual effect.

14. Contingent Fees and Contingent Fee Agreements [Model Rule 2.06(2)]

Because success can be a matter of opinion, the words "on the successful disposition or completion of the matter" should be replaced with "on the happening of the contingent event."

15. Statement of Account **[**Model Rule 2.06(3)]

The word "bill" is used in British Columbia rather than "statement of account."

16. Other Charges [Commentary to Model Rule 2.06(6)]

Although the use of the sub category "Other Charges" is a useful one, we would amend the first sentence of the Commentary by adding the words "they would not have been incurred but for the lawyer's representation of the client," so that the complete sentence would state:

> However a sub-category entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided always that they would not have been incurred but for the lawyer's representation of the client or the client has agreed, in writing, to such costs.

17. Exception for Multi-discipline Practices and Interjurisdictional Law Firms **[**Model Rule 2.06(11)]

We think Model Rule 2.06(11) should be amended to indicate that the exception it identifies applies only where the local Law Society permits multi-disciplinary practice.

18. Withdrawal where client will be seriously prejudiced [Rule 2.07(3)]

Both the LSUC Code of Conduct and the Canadian Bar Association Code have a similar provision to Model Rule 2.07(3), but our *Professional Conduct Handbook* does not. The fact that a lawyer may not withdraw if the client doesn't pay the lawyer's fee if serious prejudice to the client will result may act as a disincentive for some clients to pay the fee. While there will be circumstances where lawyers will not want to withdraw because of potential prejudice to the client, lawyers should not be forced to act without fee simply because of that potential. Moreover, the potential prejudice to the client may be the motivation for the client to fulfill a fee agreement with the lawyer.

19. Lawyer's claim of solicitor's lien [Model Rules 2.07(9) and 2.07(12)]

The Model Code makes clear that a lawyer may not assert a solicitor's lien where to do so will materially prejudice the client. Both the LSUC Code and the CBA Code have similar provisions.

In April 2004 the British Columbia Benchers removed Chapter 10, footnote 2 from the *Professional Conduct Handbook.* Prior to its removal Footnote 2 stated:

> 2. When, upon severance or withdrawal, the question of a right to a lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.
>
> Before accepting employment, the successor lawyer should be satisfied that the lawyer formerly acting for the client has withdrawn or has been discharged. It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any account owed to the lawyer formerly acting, especially if the latter withdrew for good cause or was capriciously discharged. However, if a trial or hearing is in progress or is 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.

In removing footnote 2 the Benchers were of the view that the British Columbia *Legal Profession Act* (see sections 77 and 78) permits a client to obtain a file from a lawyer on terms to be set by the court. It provides a remedy for a client who expects to be prejudiced by a lawyer's assertion of a lien on the client's file and it was not necessary and was unfair to lawyers to require them to refrain from asserting a solicitor's lien when entitled to do so.

It is our view that, given the jurisdiction of the court to require a lawyer to turn over a file to a client under the *Legal Profession Act*, Rules 2.07(9) and 2.07(12) as drafted would be unfair to lawyers in British Columbia and should be removed.

20. Permissible Firm Names [Model Rules 3.02(1) to 3.02(7)]

Some of these rules contradict current practice in British Columbia: Lawyers here are permitted to use "John Doe and Company" even if John Doe is a sole practitioner, retain the partnership name even if it includes a former partner who has been appointed a judge and use any other name that is not misleading or undignified. If we adopt the Model Code, generally, we would need to consider whether we would alter these rules to conform to our current practice or grandfather lawyers who currently comply with our rules but are offside those of the Model Code.

21. Effect of *R. v. Lyttle*

Model Rule 4.01(2) states:

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

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

We have spent considerable time determining whether to alter the *Professional Conduct Handbook* provision Chapter 8, Rule 1(e) which formerly said:

1. A lawyer must not:

   (e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,

We have added Rule 1(e.1) and footnote 1 to the *Professional Conduct Handbook*. Rule 1(e) together with Rule 1(e.1) now state:

1. A lawyer must not:

   (e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,

   (e.1) make suggestions to a witness recklessly or that the lawyer knows to be false,[1]

1. The Supreme Court of Canada in *R. v. Lyttle*, [2004] 1 S.C.R. 193 reviewed the question of what foundation counsel must have before cross-examining a witness on an issue and concluded that a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

We are of the view a similar change to the Model Code should be considered.

22. The Lawyer as Witness [Model Rule 4.02]

Unlike the Model Code provisions and the Canadian Bar Association Code, Chapter 9, Rule 9(b) of the British Columbia *Professional Conduct Handbook* contains an exception to the rule that a lawyer cannot act as counsel after giving evidence: the lawyer may do so if it is necessary in the interests of justice. In our view, it is conceivable that there could be circumstances where it would be appropriate to allow counsel to continue on this basis, and we think the Model Code provision should be altered to include it.

23. Disclosure of information re juror [Model Rule 4.05(3)]

This rule is taken directly from the Law Society of Upper Canada Code and is also similar to Canadian Bar Association *Code of Professional Conduct* provisions in Chapter 9, Commentary 21. This is a complex area and needs to be approached with care. Model Rule 4.05(3) is deficient in that it does not address a situation where a lawyer has information that a juror has misconducted himself or herself with the accused (the Gillian Guess trial). There may also be merit in defining what constitutes "information," perhaps by requiring that the information ought to be based on reasonable grounds.

24. Supervision [Rules 5.01(1) and 5.01(3)]

a) Rule 5.01(1)

In our view there is a conflict between Rule 5.01(1) and the commentary following it, with Rule 5.01 stating that the lawyer shall "directly" supervise staff and assistants but the commentary permitting a more flexible approach. A more flexible approach than the rule apparently permits is desirable. This could be accomplished by replacing the word "directly" in Rule 5.01(1) with the words "properly and effectively." The most important part of the Commentary is the last paragraph. That paragraph should be moved from the last paragraph in the Commentary to the first.

b) Rule 5.01(3)(a)

In our view, Rule 5.01(3)(a) is too restrictive and should be eliminated. A non-lawyer's ability to accept cases on behalf of a lawyer should be governed by the general supervision requirement.

c) Rule 5.01(3)(c)

This provision permits non-lawyers to give or accept undertakings in certain circumstances. In our view, it ought to be modified so that only lawyers can give or accept undertakings. The care and precision that is required in giving or accepting undertakings is such that these functions ought to be restricted to lawyers only.

d) Rule 5.01(3)(m)

We favour retaining the bolded words in this rule which state:

(m) forward to a client or third party any documents, other than routine, standard form documents, ***except with the lawyer's knowledge and direction****;*

In our view, making decisions about the forwarding of documents can be a sufficiently sensitive issue that the ability to do so should be reserved to lawyers alone.

e) General comments

In British Columbia we are currently examining the role of non-lawyers in the justice system, generally. Currently, there are some circumstances where non-lawyers are providing services without the supervision contemplated by Rules 5.01(1) and 5.01(3). These services are being provided primarily or exclusively to low income clients by community advocates who are not lawyers.

If a similar situation exists in other provinces there may be merit in the Model Code addressing these situations expressly, although it may be that this is an issue for consideration in a future Code, rather than the next draft of the Model Code.

25. Affiliations Between Lawyers and Affiliated Entities [Rule 5.01(5)]

We do not understand the purpose of this rule. If the affiliation referred to is a group of lawyers sharing space we do not think such a rule is required. If the affiliation referred to is a multi-disciplinary partnership, British Columbia does not require such a rule. We are of the view this rule should be eliminated.

26. Suspended or Disbarred Lawyers [Rule 5.01(6)]

Model Rule 5.01(6) is less complete than the equivalent British Columbia *Professional Conduct Handbook* rule which is Chapter 13, Rule 5.

We would broaden the Model Rule to encompass the additional matters covered in Chapter 13, Rule 5: failing to complete a bar admission program, being the subject of a hearing with respect to enrolment unless subsequently enrolled, or being expelled from a Bar admission program.

27. Duty to Report Misconduct [Model Rule 6.01(3)]

We are of the view that this rule fails to expressly treat breaches of undertaking with the seriousness that they deserve. Reliance on the undertakings of other lawyers is critical for efficient and safe practice of law and a lawyer's breach of undertaking that has not been consented to or waived by the recipient of the undertaking ought to be included in the matters a lawyer is obliged to report to the Law Society.

Rule 6.01(3)(f), "any other situation where a lawyer's clients are likely to be prejudiced" is too broad and ought to be removed.

28. Encouraging Client to Report Dishonest Conduct [Model Rule 6.01]

Rule 6.01(4) should be broadened to include dishonest conduct whether or not it may give rise to a claim. We do not think Rules 6.01(5 to 7) are necessary and they should be eliminated. Rule 6.01(5) relates to an Ontario client compensation program and Rules 6.01(6) and 6.01(7) are simply a restatement of the general proposition that lawyers cannot assist clients in any illegal conduct.

29. Lawyer Communications **[**Model Rules 6.02(6) and 4.03(2)]

Model Rule 6.02(6) and 4.03(2) duplicate each other. Rule 6.02(6) seems to us to be better placed than Rule 4.03(2), since it involves lawyer communications, generally, while Rule 4.03(2) is in the section dealing with interviewing witnesses—arguably a less relevant section. We suggest that Rule 4.03(2) be eliminated.

30. Receipt of Privileged Communications [Model Rule 6.02(8)]

Rule 6.02(8) is the analogue to Chapter 5, Rule 15 of the British Columbia *Professional Conduct Handbook* which states:

> 15. 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, shall:
>
> (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 contents of the document.

Rule 6.02(8) and the Commentary is taken from American Bar Association Model Rule 4.4(b).

It is our view that Rule 15 is more comprehensive than Model Rule 6.02(8) and therefore preferable to the Model Rule: the documents it covers include documents the lawyer "has access to or comes into possession of," it requires the return of the relevant documents, and it is not restricted to privileged materials. We are also of the view it would be reasonable for the Federation to consider whether the rule ought to be expanded to cover voice mail as well as documents, or whether a separate rule should be written to cover voice mail situations.

31. Undertakings [Model Rule 6.02(9)]

This rule is the equivalent the British Columbia *Professional Conduct Handbook* Chapter 11, Rules 7 to 11 which state:

7. A lawyer must

   (a) not give an undertaking that cannot be fulfilled,

   (b) fulfill every undertaking given, and

   (c) scrupulously honour any trust condition once accepted.

7.1 Undertakings and trust conditions should be

   (a) written, or confirmed in writing, and

   (b) unambiguous in their terms.

8. Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque

   (a) will be paid, and

   (b) is capable of being certified if presented for that purpose.

8.1 If a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of the purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to the vendor on completion of registration.

9. If a lawyer gives an undertaking conditional on something else happening or in respect of which the lawyer does not intend to accept personal responsibility, this must be stated clearly in the undertaking itself.

10. A lawyer must not impose on other lawyers impossible, impractical or manifestly unfair conditions of trust.

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

The Model Rule lacks some of the detail of our current rules in the *Professional Conduct Handbook*, especially the provisions of Rule 8. It is our view that, although the statement of the principle in Rule 6.02(9) is satisfactory, those items contained in our *Professional Conduct Handbook* Rules 7 to 11 and not already covered should be included as Commentary.

32. <u>The Lawyer in Public Office</u> [Model Rule 6.04]

In our opinion lawyers who hold public office should be guided by the same standards that govern other such office holders and no special provisions governing lawyers should be contained in the Model Code. Current requirements of the rules and jurisprudence on Conduct Unbecoming should be sufficient to guide and control the behaviour of lawyers in this area.

33. Errors and Omissions [Model Rule 6.08]

We have two concerns about this rule: There is no general obligation to comply with the policy and the provisions requiring lawyers to inform clients about errors may be confusing to some lawyers.

a) absence in Model Rules of general obligation to comply with policy

The *Professional Conduct Handbook* in Chapter 4, Rule 5 imposes a general obligation to comply with the terms of each professional liability policy. The Model Code does not contain such a general obligation, although Rule 6.08(2) sets out specific obligations requiring notice to an insurer of any "circumstance" that a lawyer "may reasonably expect to give rise to a claim," and Rule 6.08(3) requires a lawyer to "assist and cooperate with the insurer...to enable the claim to be dealt with promptly."

It is our view that a general obligation to comply with the terms of the professional liability policy is preferable to the specific obligations to give notice and cooperate in the Model Code. The Model Code should be changed to achieve that result, placing the specific obligations in the Commentary. The Commentary could also alert lawyers to the fact that their policies contain specific obligations to notify and to cooperate with their insurers, and could caution lawyers to refer to their own policies to ensure they comply with those obligations.

Under Rule 6.08(1) of the Model Code, a lawyer would be obligated to advise a client when the lawyer discovers an error "that cannot be rectified readily….". To the extent that this provision might tempt individual lawyers to attempt to rectify an error before contacting the Lawyers Insurance Fund, contrary to the terms of the policy, a rule requiring lawyers to comply with a general obligation to comply with the terms of the policy (and report potential claims promptly) would also be beneficial. In addition, Rule 6.08 should be clarified to make certain that the possibility the lawyer who has made the error might rectify the matter does not detract from the obligation to report it to the insurer before trying to rectify it.

b) informing clients of errors without admitting legal liability

Rule 6.08(1)(a) of the Model Code stipulates that a lawyer should inform a client of an error or omission "...being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise." Since many lawyers are unfamiliar with the type of statements or actions that might have the effect of prejudicing coverage, it is our opinion that it would be better to require a

lawyer to inform a client of the facts of an error or omission "without admitting legal liability," as Chapter 4, Rule 5.1 of the *Professional Conduct Handbook* does.

Thank you for giving us the opportunity of commenting on the Model Code. We look forward to participating in further discussions in 2008 about this important initiative.

Yours truly,

ORIGINAL SIGNED BY JOHN J.L. HUNTER, Q.C.

John J.L. Hunter, Q.C.
President
The Law Society of B.C.

cc: Jonathan G. Herman
Frederica Wilson

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

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2009

MODEL CODE OF PROFESSIONAL CONDUCT

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Contents

PREFACE

PREFACE

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

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

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

MODEL CODE OF PROFESSIONAL CONDUCT

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

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

DEFINITIONS

DEFINITIONS

In this Code, unless the context indicates otherwise,
"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law;

Commentary
A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship.

"conflict of interest" or **"conflicting interest"** means an interest likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client;

"consent" means fully informed and voluntary consent after disclosure

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

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

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

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

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

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

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of <province or territory>;

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

CHAPTER 1 – STANDARDS OF THE LEGAL PROFESSION

1.01 INTEGRITY

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

Commentary
Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be. Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety. Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

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

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

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

CHAPTER 2 - RELATIONSHIP TO CLIENTS

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

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

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

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

Commentary

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

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

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

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

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

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

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

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

(a) decline to act;

(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

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

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

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

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

In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-

discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

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

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

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

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

2.02 QUALITY OF SERVICE

Quality of Service

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

Commentary

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

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

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

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

Examples of expected practices

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

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

(c) responding to a client's telephone calls;

(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

(i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;

(j) informing a client of a proposal of settlement, and explaining the proposal properly;

(k) providing a client with complete and accurate relevant information about a matter;

(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

(m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;

(n) being civil.

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

Honesty and Candour

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

Commentary
A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer. A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results. Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

When the Client is an Organization

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

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

officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (Rule 2.04).

Encouraging Compromise or Settlement

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

Commentary

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

Threatening Criminal or Regulatory Proceedings

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

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

Commentary

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

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

Inducement for Withdrawal of Criminal or Regulatory Proceedings

2.02 (6) A lawyer must not:

(a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

"Regulatory authority" includes professional and other regulatory bodies.

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

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

When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or

improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Dishonesty, Fraud by Client

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

Commentary

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

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

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

A bona fide test case is not necessarily precluded by this subrule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Dishonesty, Fraud when Client an Organization

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

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with Rule 2.07.

Commentary

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

This subrule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

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

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

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

Clients with Diminished Capacity

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

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a

disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

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

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

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

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

2.03 CONFIDENTIALITY

Confidential Information

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

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the Law Society, or

(d) otherwise permitted by this rule.

Commentary

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

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

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

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

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

(a) retained by a person about a particular matter; or

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

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

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

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

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

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

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

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

Use of Confidential Information

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

Commentary

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

Future Harm / Public Safety Exception

To follow at a later date

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

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

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

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

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

2.04 CONFLICTS

To follow at a later date

2.05 PRESERVATION OF CLIENT'S PROPERTY

Preservation of Clients' Property

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

2.05 (1) A lawyer must:

(a) care for a client's property as a careful and prudent owner would when dealing with like property; and

(b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary
The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the [rules/regulations/by-laws of the relevant Law Society]. These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information. A lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them. Subject to any rights of lien, the lawyer should promptly return a client's property to the client on request or at the conclusion of the lawyer's retainer. If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 2.07 (Withdrawal from Representation).

Notification of Receipt of Property

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

Identifying Clients' Property

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

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

Accounting and Delivery

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

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

Commentary

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

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

(a) turn over the property to the prosecution, either directly or anonymously;

(b) deposit the property with the trial judge in the relevant proceeding;

(c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or

(d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.

When a lawyer discloses or delivers to the Crown or law enforcement authorities

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

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

2.06 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

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

Commentary

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

(a) the time and effort required and spent;

(b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

(h) any relevant agreement between the lawyer and the client;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

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

A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements,

and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

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

Contingent Fees and Contingent Fee Agreements

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

Commentary

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

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

Statement of Account

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

Commentary
The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed, in writing, to such costs. Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. While an agreement that the lawyer will be entitled to costs is not uncommon, it does not affect the lawyer's obligation to disclose the costs to the client.

Joint Retainer

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

Division of Fees and Referral Fees

2.06 (5) If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

2.06 (6) If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(b) the client is informed and consents.

2.06 (7) A lawyer must not:

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for Multi-discipline Practices and Interjurisdictional Law Firms

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

(a) multi-discipline practices of lawyer and non-lawyer partners if the partnership agreement provides for the sharing of fees, cash flows or profits among the members of the firm; and

(b) sharing of fees, cash flows or profits by lawyers who are:

(i) members of an interprovincial law firm; or

(ii) members of a law partnership of Canadian and non-Canadian lawyers who otherwise comply with this rule.

Commentary

An affiliation is different from a multi-disciplinary practice established in accordance with the rules/regulations/by-laws under the governing legislation, an interprovincial law partnership or a partnership between Canadian lawyers [1] and foreign lawyers. An affiliation is subject to rule 2.06 (7). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

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

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

Commentary

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

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

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

Prepaid Legal Services Plan

2.06 (12) A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the

1 This issue is currently specific to Ontario.

lawyer.

2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

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

Commentary

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

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

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

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

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

Optional Withdrawal

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

Commentary

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

Non-payment of Fees

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

Commentary

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

Withdrawal from Criminal Proceedings

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

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

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

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

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

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

Obligatory Withdrawal

2.07 (7) A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

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

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

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

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

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

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

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

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

Duty of Successor Lawyer

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

Commentary

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

CHAPTER 3 – MARKETING OF LEGAL SERVICES

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

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

Commentary

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

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

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

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

Restrictions

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

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

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

3.02 MARKETING

Marketing of Professional Services

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

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

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

Advertising of Fees

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

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

3.03 ADVERTISING NATURE OF PRACTICE

3.03 (1) A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

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

A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

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

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

CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

Advocacy

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

Commentary
Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures. The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case. In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client. A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal. When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent

in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

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

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

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

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

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

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

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation

(m) needlessly abuse, hector or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

Commentary

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

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

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

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

Duty as Prosecutor

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

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

Disclosure of Error or Omission

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

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

Courtesy

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

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

Undertakings

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

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

Agreement on Guilty Plea

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

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

(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

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

4.02 THE LAWYER AS WITNESS

Submission of Evidence

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

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

Appeals

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

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

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

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

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

Communication with Witnesses Giving Evidence

4.04 (2) Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination the lawyer may discuss with the witness any matter.

Commentary

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

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

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

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

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

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

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

4.05 RELATIONS WITH JURORS

Communications before Trial

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

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

Disclosure of Information

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

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness

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

Communication During Trial

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

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

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

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

4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

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

Commentary

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

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

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

A lawyer, by training, opportunity and experience, is in a position to observe the

workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

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

Commentary

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

Security of Court Facilities

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

Commentary

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

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

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

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

4.07 LAWYERS AND MEDIATORS

Role of Mediator

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

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary
In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails. Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 (Conflicts) and its commentaries and the common law authorities. If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so. If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

CHAPTER 5 - RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

5.01 SUPERVISION

Direct Supervision Required

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

Commentary

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

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

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

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

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

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

between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Application

5.01 (2) In this rule, a non-lawyer does not include a student-at-law.

Delegation

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

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(k) sign correspondence containing a legal opinion;

(l) sign correspondence, unless

  (i) it is of a routine administrative nature,

  (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,

  (iii) the fact the person is a non-lawyer is disclosed, and

  (iv) the capacity in which the person signs the correspondence is indicated;

(m) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction*;*

(n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(o) issue statements of account.

Commentary
A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision. A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment. In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-

lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

Suspended or Disbarred Lawyers

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

Electronic Registration of Documents

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

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose his or her password or access phrase or number to others.

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

(a) permit others to use such access; or

(b) disclose his or her password or access phrase or number to others.

Commentary

The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without

registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

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

5.02 STUDENTS

Recruitment and Engagement Procedures

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

Duties of Principal

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

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

Duties of Articling Student

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

5.03 HARASSMENT AND DISCRIMINATION

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

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

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

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

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

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

CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

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

Meeting Financial Obligations

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

Commentary
In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one. When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so. If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report Misconduct

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

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

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

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

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

Encouraging Client to Report Dishonest Conduct

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

6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

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

Commentary

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

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

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

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

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

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

Communications

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

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

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

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

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

Commentary

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

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

obvious.

Subrule (7) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

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

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

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

Commentary

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

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

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

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

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

Inadvertent Communications

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

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

reserved to the lawyer.

Undertakings and Trust Conditions

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

Commentary

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

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

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

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

Trust conditions can be varied with the consent of the person imposing them. Any

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

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

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

6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

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

Commentary
A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

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

Commentary
The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

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

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

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

Commentary

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

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

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

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

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

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

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

Interference with Right to Fair Trial or Hearing

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

Commentary

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

6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

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

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

6.07 RETIRED JUDGES RETURNING TO PRACTICE

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

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

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

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Notice of Claim

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

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

Co-operation

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

Responding to Client's Claim

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

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

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

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MODEL CODE OF PROFESSIONAL CONDUCT

MODEL CODE OF PROFESSIONAL CONDUCT

Contents

PREFACE

PREFACE

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

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

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

MODEL CODE OF PROFESSIONAL CONDUCT

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

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

DEFINITIONS

DEFINITIONS

In this Code, unless the context indicates otherwise,
"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law;

Commentary
A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship.

"conflict of interest" or **"conflicting interest"** means an interest likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client;

"consent" means fully informed and voluntary consent after disclosure

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

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

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

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

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

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

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of <province or territory>;

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

CHAPTER 1 – STANDARDS OF THE LEGAL PROFESSION

1.01 INTEGRITY

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

Commentary
Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be. Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety. Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

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

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

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

CHAPTER 2 - RELATIONSHIP TO CLIENTS

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

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

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

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

Commentary

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

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

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

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

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

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

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

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

(a) decline to act;

(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

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

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

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

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

In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-

discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

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

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

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

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

2.02 QUALITY OF SERVICE

Quality of Service

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

Commentary

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

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

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

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

Examples of expected practices

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

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

(c) responding to a client's telephone calls;

(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

(i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;

(j) informing a client of a proposal of settlement, and explaining the proposal properly;

(k) providing a client with complete and accurate relevant information about a matter;

(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

(m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;

(n) being civil.

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

Honesty and Candour

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

Commentary
A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer. A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results. Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

When the Client is an Organization

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

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

officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (Rule 2.04).

Encouraging Compromise or Settlement

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

Commentary

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

Threatening Criminal or Regulatory Proceedings

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

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

Commentary

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

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

Inducement for Withdrawal of Criminal or Regulatory Proceedings

2.02 (6) A lawyer must not:

(a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

"Regulatory authority" includes professional and other regulatory bodies.

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

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

When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or

improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Dishonesty, Fraud by Client

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

Commentary

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

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

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

A bona fide test case is not necessarily precluded by this subrule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Dishonesty, Fraud when Client an Organization

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

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with Rule 2.07.

Commentary

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

This subrule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

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

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

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

Clients with Diminished Capacity

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

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a

disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

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

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

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

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

2.03 CONFIDENTIALITY

Confidential Information

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

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the Law Society, or

(d) otherwise permitted by this rule.

Commentary

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

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

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

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

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

(a) retained by a person about a particular matter; or

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

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

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

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

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

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

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

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

Use of Confidential Information

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

Commentary

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

Future Harm / Public Safety Exception

To follow at a later date

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

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

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

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

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

2.04 CONFLICTS

To follow at a later date

2.05 PRESERVATION OF CLIENT'S PROPERTY

Preservation of Clients' Property

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

2.05 (1) A lawyer must:

(a) care for a client's property as a careful and prudent owner would when dealing with like property; and

(b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the [rules/regulations/by-laws of the relevant Law Society].

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

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

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

Notification of Receipt of Property

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

Identifying Clients' Property

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

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

Accounting and Delivery

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

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

Commentary

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

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

(a) turn over the property to the prosecution, either directly or anonymously;

(b) deposit the property with the trial judge in the relevant proceeding;

(c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or

(d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.

When a lawyer discloses or delivers to the Crown or law enforcement authorities

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

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

2.06 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

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

Commentary

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

(a) the time and effort required and spent;

(b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

(h) any relevant agreement between the lawyer and the client;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

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

A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements,

and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

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

Contingent Fees and Contingent Fee Agreements

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

Commentary

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

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

Statement of Account

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

Commentary
The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed, in writing, to such costs. Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. While an agreement that the lawyer will be entitled to costs is not uncommon, it does not affect the lawyer's obligation to disclose the costs to the client.

Joint Retainer

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

Division of Fees and Referral Fees

2.06 (5) If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

2.06 (6) If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(b) the client is informed and consents.

2.06 (7) A lawyer must not:

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for Multi-discipline Practices and Interjurisdictional Law Firms

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

(a) multi-discipline practices of lawyer and non-lawyer partners if the partnership agreement provides for the sharing of fees, cash flows or profits among the members of the firm; and

(b) sharing of fees, cash flows or profits by lawyers who are:

(i) members of an interprovincial law firm; or

(ii) members of a law partnership of Canadian and non-Canadian lawyers who otherwise comply with this rule.

Commentary

An affiliation is different from a multi-disciplinary practice established in accordance with the rules/regulations/by-laws under the governing legislation, an interprovincial law partnership or a partnership between Canadian lawyers [1] and foreign lawyers. An affiliation is subject to rule 2.06 (7). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

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

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

Commentary

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

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

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

Prepaid Legal Services Plan

2.06 (12) A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the

1 This issue is currently specific to Ontario.

lawyer.

2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

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

Commentary

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

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

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

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

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

Optional Withdrawal

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

Commentary

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

Non-payment of Fees

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

Commentary

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

Withdrawal from Criminal Proceedings

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

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

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

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

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

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

Obligatory Withdrawal

2.07 (7) A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

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

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

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

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

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

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

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

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

Duty of Successor Lawyer

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

Commentary

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

CHAPTER 3 – MARKETING OF LEGAL SERVICES

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

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

Commentary

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

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

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

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

Restrictions

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

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

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

3.02 MARKETING

Marketing of Professional Services

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

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

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

Advertising of Fees

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

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

3.03 ADVERTISING NATURE OF PRACTICE

3.03 (1) A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

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

A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

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

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

CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

Advocacy

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

Commentary
Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures. The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case. In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client. A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal. When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent

in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

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

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

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

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

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

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

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation

(m) needlessly abuse, hector or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

Commentary

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

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

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

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

Duty as Prosecutor

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

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

Disclosure of Error or Omission

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

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

Courtesy

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

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

Undertakings

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

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

Agreement on Guilty Plea

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

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

(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

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

4.02 THE LAWYER AS WITNESS

Submission of Evidence

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

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

Appeals

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

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

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

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

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

Communication with Witnesses Giving Evidence

4.04 (2) Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination the lawyer may discuss with the witness any matter.

Commentary

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

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

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

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

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

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

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

4.05 RELATIONS WITH JURORS

Communications before Trial

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

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

Disclosure of Information

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

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness

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

Communication During Trial

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

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

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

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

4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

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

Commentary

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

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

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

A lawyer, by training, opportunity and experience, is in a position to observe the

workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

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

Commentary

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

Security of Court Facilities

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

Commentary

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

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

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

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

4.07 LAWYERS AND MEDIATORS

Role of Mediator

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

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary
In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails. Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 (Conflicts) and its commentaries and the common law authorities. If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so. If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

CHAPTER 5 - RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

5.01 SUPERVISION

Direct Supervision Required

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

Commentary

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

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

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

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

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

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

between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Application

5.01 (2) In this rule, a non-lawyer does not include a student-at-law.

Delegation

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

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(k) sign correspondence containing a legal opinion;

(l) sign correspondence, unless

  (i) it is of a routine administrative nature,

  (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,

  (iii) the fact the person is a non-lawyer is disclosed, and

  (iv) the capacity in which the person signs the correspondence is indicated;

(m) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction*;*

(n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(o) issue statements of account.

Commentary
A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision. A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment. In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-

lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

Suspended or Disbarred Lawyers

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

Electronic Registration of Documents

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

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose his or her password or access phrase or number to others.

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

(a) permit others to use such access; or

(b) disclose his or her password or access phrase or number to others.

Commentary

The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without

registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

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

5.02 STUDENTS

Recruitment and Engagement Procedures

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

Duties of Principal

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

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

Duties of Articling Student

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

5.03 HARASSMENT AND DISCRIMINATION

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

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

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

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

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

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

CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

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

Meeting Financial Obligations

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

Commentary
In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one. When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so. If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report Misconduct

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

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

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

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

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

Encouraging Client to Report Dishonest Conduct

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

6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

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

Commentary

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

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

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

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

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

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

Communications

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

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

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

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

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

Commentary

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

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

obvious.

Subrule (7) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

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

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

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

Commentary

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

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

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

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

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

Inadvertent Communications

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

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

reserved to the lawyer.

Undertakings and Trust Conditions

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

Commentary

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

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

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

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

Trust conditions can be varied with the consent of the person imposing them. Any

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

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

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

6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

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

Commentary
A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

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

Commentary
The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

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

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

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

Commentary

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

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

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

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

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

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

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

Interference with Right to Fair Trial or Hearing

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

Commentary

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

6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

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

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

6.07 RETIRED JUDGES RETURNING TO PRACTICE

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

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

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

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Notice of Claim

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

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

Co-operation

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

Responding to Client's Claim

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

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

Memo

The Law Society of British Columbia

1400

To Benchers

From Credentials Committee

Date January 13, 2010

Subject **Québec Mobility Agreement**

There is a proposal presently before the Council of the Federation of Law Societies of Canada to vote on the Québec Mobility Agreement which would allow reciprocity with members of the Barreau du Québec. This memorandum is to assist the Benchers in deciding how to direct the Council delegate to vote on the matter.

Background

In August 2002 the Federation of Law Societies of Canada accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau du Québec ("the Barreau"), signed the National Mobility Agreement ("NMA") on December 9, 2002. The Agreement recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Québec would delay implementation of the NMA with respect to the Barreau.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement, along with the law societies of all three territories. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

Québec Mobility Agreement

The purpose of the Mobility Agreement ("QMA") is to extend the scope of the NMA in facilitating the reciprocal permanent mobility between the common law jurisdictions and the Barreau. Clause 40(b) of the NMA provides that "a signatory governing body, other than the Barreau, will admit members of the Barreau as members on one of the following bases: (b) as permitted by the Barreau in respect of members of the signatory governing body."

The Barreau has implemented a scheme under which members of the law societies of the other provinces and the territories may become members of the Barreau and practise federal law and the law of their home jurisdictions as Canadian Legal Advisors. It is the intention of the signatories to the QMA that the other provincial land territorial law societies will reciprocate with the Barreau by implementing provisions that will permit

members of the Barreau to become members of other law societies and practise federal and Québec law in other jurisdictions.

Discussion

The Law Society of BC is asked to vote on the Québec Mobility resolution by Friday, January 15, 2010 or as soon thereafter as possible. Rules will be required to implement the provisions of the QMA as it is essentially a new category of limited membership. Jeff Hoskins, QC has been the lead in developing model rules for use by the other common law jurisdictions.

Of particular note is that applicants applying to become a Québec Legal Advisor in British Columbia must maintain their membership in the Barreau and the Barreau will continue to provide liability insurance for those Québec Legal Advisors.

In addition, only those members of the Barreau educated in Canada or whose credentials have been assessed by the Barreau and recognized as equivalent, will be eligible to become Québec Legal Advisors. This is designed to alleviate any concerns relating to Québec's mobility agreements with France which permits membership without assessment of credentials.

Recommendation

The Credentials Committee considered and endorsed the Québec Mobility Agreement at its December 11, 2009 meeting for referral to the Benchers. The Credentials Committee recommends that the Benchers direct the Council delegate to vote in favour of the draft motion of the Federation Executive which provides:

> ***WHEREAS*** *the Barreau du Quebec (the "Barreau") has established a special category of membership known as the Canadian Legal Advisor to permit members of other Canadian law societies to practise law in Quebec on a restricted basis;*
>
> ***WHEREAS*** *the other Canadian law societies have indicated a desire to establish reciprocal mobility for members of the Barreau on a similar basis;*
>
> ***RESOLVED THAT*** *the Quebec Mobility Agreement attached as Appendix "A" be approved by Council for submission to member law societies for their execution.*

Attachments

- Memorandum dated November 18, 2009 to the Council of the Federation Law society CEOs from Federation Executive
- Québec Mobility Agreement, October 2009, Appendix "A"
- Memorandum dated October 5, 2009 to the Council of the Federation Law society CEO's from Federation Executive, Appendix "B"

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

MEMORANDUM

FROM: Federation Executive

TO: Council of the Federation
Law society CEOs (for information)

DATE: November 18, 2009

SUBJECT: Quebec Mobility Agreement

ACTION REQUIRED: **FOR DECISION**

DRAFT MOTION:

WHEREAS the Barreau du Québec (the "Barreau") has established a special category of membership known as the Canadian Legal Advisor to permit members of other Canadian law societies to practise law in Quebec on a restricted basis;

WHEREAS the other Canadian law societies have indicated a desire to establish reciprocal mobility for members of the Barreau on a similar basis;

RESOLVED THAT the Quebec Mobility Agreement attached as Appendix "A" be approved by Council for submission to member law societies for their execution.

ISSUE

1. Council members are requested to approve the Quebec Mobility Agreement (the "QMA") attached as Appendix "A" and to register their vote electronically by January 15, 2010 if possible.

UPDATE

2. The Quebec Mobility Agreement (the "QMA") was originally submitted to Council at the October 15, 2009 meeting. Consideration of the resolution was, however, deferred following the suggestion that it should be amended to provide access to the Canadian Legal Advisor regime for members of the Chambre des Notaires du Québec (the

"Chambre"). The memorandum provided to Council in October provides background information on the QMA; for your convenience it is attached as Appendix "B".

3. Preliminary discussions with senior law society staff point to the need for an appropriate level of consultation and reflection before an amendment of the QMA would be possible. It is evident that acceptance and implementation of the reciprocal mobility framework contemplated by the QMA might otherwise be unduly delayed or sidetracked.

4. Since the October Council meeting, we have been advised by the President of the Chambre, Maurice Piette, and by the Executive Director, Christian Tremblay, that they remain interested in pursuing this issue, but do not wish to delay adoption of the QMA while the issue is being considered. The Executive is therefore of the view that the vote on the QMA should proceed now.

5. The National Mobility Policy Committee has been asked to work with representatives of the Chambre to produce a recommendation for extending the Canadian Legal Advisor regime to members of the Chambre.

RECOMMENDATION

6. It is recommended that the resolution on page one of this memorandum be approved. Council members are requested to register their vote electronically by January 15, 2010, if possible.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Appendix "A"

Quebec Mobility Agreement

Quebec Mobility Agreement

FEDERATION OF LAW SOCIETIES OF CANADA

October 15, 2009
Winnipeg, Manitoba

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement (the "NMA") in facilitating reciprocal permanent mobility between the common law jurisdictions and the Barreau du Québec ("the Barreau"). Clause 40(b) of the NMA provides that "a signatory governing body, other than the Barreau, will admit members of the Barreau as members on one of the following bases:...(b) as permitted by the Barreau in respect of members of the signatory governing body."

The Barreau has implemented a scheme under which members of the law societies of the other provinces and the territories may become members of the Barreau and practise federal law and the law of their home jurisdictions as Canadian Legal Advisors. It is the intention of the signatories to this Agreement that the other provincial and territorial law societies will reciprocate with the Barreau by implementing provisions that will permit members of the Barreau to become members of other law societies and practise federal and Quebec law in other jurisdictions.

The signatories recognize that,

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Quebec Mobility Agreement

Background

In August 2002 the Federation of Law Societies of Canada (the "Federation") accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau, signed the NMA on December 9, 2002. The Agreement recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Quebec would delay implementation of the NMA with respect to the Barreau.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement, along with the law societies of all three territories. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

Quebec Mobility

In June 2008 Quebec enacted a "Regulation respecting the issuance of special permits of the Barreau du Québec", which is stated to be "made in order to facilitate the mobility of advocates." The Regulation provides, *inter alia*, that a member in good standing of a bar of another Canadian province or territory may apply for a "special Canadian legal advisor permit" in Quebec. A person granted such a permit may engage in the following activities on behalf of another person:

(1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;

(2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;

(3) give legal advice and consultations on legal matters involving public international law; and

(4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

Quebec Mobility Agreement

Recognizing the provisions of the Quebec Regulation, the signatories to this Agreement agree to enter into an arrangement with the Barreau to enable its members to exercise mobility in the common law jurisdictions on a reciprocal basis. It is recognized that members of other governing bodies will not be able to exercise the reciprocal right to practise public international law unless they have professional liability insurance coverage that specifically includes such practice.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

"Advisor" means a Canadian Legal Advisor;

"Barreau" means the Barreau du Québec;

"Canadian Legal Advisor" means a member of agoverning body who holds a current Canadian Legal Advisor certificate issued by another governing body;

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

"home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and **"home jurisdiction"** has a corresponding meaning;

"lawyer" means a member of a signatory governing body;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"National Mobility Agreement" or **"NMA"** means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada;

"permanent mobility provisions" means clauses 32 to 36, 39 and 40 of the NMA;

General

2. The signatory governing bodies will

   (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

   (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

   (c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

   (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this agreement alone,

   (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

   (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Canadian Legal Advisor

6. The Barreau will continue to issue Canadian Legal Advisor certificates to qualifying members of governing bodies, and the other signatories will establish and maintain an equivalent program in order to issue Canadian Legal Advisor certificates to qualifying members of the Barreau.

7. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted as equivalent by the Barreau are not qualifying members of the Barreau for the purpose of clause 6.

8. The permanent mobility provisions of the NMA apply with respect to requirements and qualifications to obtain a Canadian Legal Advisor Certificate, except that a signatory governing body must require that an Advisor continue to maintain practising membership in the home governing body.

9. A signatory governing body that has adopted regulatory provisions giving effect to the requirements of clauses 6 and 8 of this Agreement is a reciprocating governing body for the purposes of this Agreement, whether or not the signatory governing body has adopted or given effect to the NMA or any provision of the NMA.

Liability Insurance

10. A governing body will continue to make available to its members who are also Advisors in another jurisdiction ongoing liability insurance as required in the governing body's jurisdiction that provides occurrence or claim limits for indemnity of $1,000,000 and $2,000,000 annual per member aggregate.

11. If a member of more than one governing body becomes an Advisor member of a third governing body, the governing body that makes ongoing liability insurance available to the member at the time or did so most recently, will continue to do so or resume doing so, whether or not the member continues to be a resident of that jurisdiction.

12. On application, a signatory governing body will exempt an Advisor member from liability insurance requirements if the Advisor maintains, in another signatory jurisdiction, ongoing liability insurance that provides occurrence or claim limits for indemnity of $1,000,000 and $2,000,000 annual per member aggregate.

Transition Provisions

13. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

14. This Agreement is intended to implement clauses 39 and 40 of the NMA. It does not affect the obligations of any party under others provision of the NMA or other agreements in effect.

15. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect

(a) until this Agreement is implemented, and

(b) when this Agreement is implemented, except to the extent modified by this Agreement.

Dispute Resolution

16. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice protocol in respect of arbitration of disputes, specifically Clause 13 and Appendix 5 of the Protocol.

Withdrawal

17. A signatory governing body may cease to be bound by this agreement by giving each other signatory governing body written notice of at least one clear calendar year.

18. A signatory governing body that gives notice under clause 17 will immediately notify its members in writing of the effective date of withdrawal.

SIGNED as of the dates indicated below.

LAW SOCIETY OF ALBERTA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF BRITISH COLUMBIA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF MANITOBA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEW BRUNSWICK

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR

Per: _____ _____
Authorized Signatory Date

Quebec Mobility Agreement

NOVA SCOTIA BARRISTERS' SOCIETY

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF THE NORTHWEST TERRITORIES

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NUNAVUT

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF UPPER CANADA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF PRINCE EDWARD ISLAND

Per: _____ _____
Authorized Signatory Date

Quebec Mobility Agreement

BARREAU DU QUÉBEC

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF SASKATCHEWAN

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF YUKON

Per: _____ _____
Authorized Signatory Date

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

APPENDIX "B"

Model Rule To Implement the Quebec Mobility Agreement

MODEL RULE — QUEBEC MOBILITY AGREEMENT

Introduction

To assist jurisdictions to implement the provisions of the Quebec Mobility Agreement (the "QMA") the Federation of Law Societies of Canada (the "Federation") has prepared a model rule.

The QMA does not, in and of itself, confer any rights. It sets out the terms upon which the signatory jurisdictions will base mobility between the Barreau du Québec and the common law jurisdictions. A jurisdiction that signs the QMA will then be in a position to prepare and approve whatever rules, regulations or other provisions are necessary to implement the terms within that jurisdiction.

Reciprocity is an important feature of the QMA. To facilitate the effective and coherent implementation of the QMA across Canada, the model rule addresses the substantive issues arising from the QMA. Jurisdictions are not required to use the language of the model rule to implement the QMA, provided they are consistent with its substance. Its content can be adapted to accommodate specific legislative or other governance language in each jurisdiction.

It is important to remember the difference between the QMA and the model rule. The QMA articulates the commitment jurisdictions make, by signing the document, to establish a particular type of mobility regime. The model rule specifies rights, responsibilities, acceptable behaviour and penalties that govern individual lawyers who seek to avail themselves of mobility. These different purposes may have an impact on whether certain language in the QMA appears differently or in more detail in the model rule than it does in the QMA.

MODEL RULE — QUEBEC MOBILITY AGREEMENT

Categories of membership

1 The following are the categories of members of the Society:

(a) practising lawyers;

(b) retired members;

(c) non-practising members

(d) Canadian legal advisors.

Comment [JH1]: Add CLA to the list of existing membership categories.

Certificates and permits

2 The Executive Director may approve the form of

(a) practising certificate,

(b) retired membership certificate,

(c) non-practising membership certificate,

(d) Canadian legal advisor certificate,

(e) foreign legal consultant permit, and

(f) inter-jurisdictional practice permit.

Comment [JH2]: Add new certificate form to list, if applicable.

Transfer as Canadian Legal Advisor

3 (1) Subject to subrule (3), a member of the Barreau du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(a) a completed application for call and admission as a Canadian legal adviser in a form approved by the Credentials Committee, including written consent for the release of relevant information to the Society;

(b) a certificate of character;

(c) a certificate of standing from the Barreau du Québec and each other body regulating the legal profession, in any jurisdiction, in which the applicant is or as been a member of the legal profession;

(d) an errors and omissions insurance application or exemption form;

(e) the following fees:

(i) the investigation fees and call and admission fees;

(ii) a prorated practice fee;

(iii) a prorated annual insurance fee, unless exempt under Rule YY;

(iv) a prorated Special Compensation Fund assessment;

(f) any other information and documents required by the Act or these Rules that are requested by the Credentials Committee or the Benchers.

(2) Subject to subrule (1), Rules [Transfer general provision; In-house counsel rule; Transfer under NMA and TMA; Consideration of transfer application] apply, with any necessary changes, to an application for call and admission on transfer as a Canadian legal adviser.

Comment [JH3]: This is meant to import by reference procedures for transfers that apply to lawyers from other provinces and territories. For example, a hearing on character and fitness, imposition of conditions of practice where appropriate, etc.

(3) This Rule does not apply to a member of the Barreau of Québec unless he or she has earned a bachelor's degree in civil law in Canada or a foreign degree and a certificate of equivalency from the Barreau.

Canadian legal advisors

4 (1) A Canadian legal advisor may

(a) give legal advice on

(i) the law of Quebec and matters involving the law of Quebec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law,

(b) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(c) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(2) A Canadian legal advisor must not engage in the practice of law except as permitted under subrule (1).

(3) A member of the Society in good standing who is admitted as a Canadian legal advisor has all the duties and responsibilities of a practising lawyer under the Act, these Rules and the *Professional Conduct Handbook*.

(4) A Canadian legal advisor must

(a) be a member in good standing of the Barreau du Québec authorized to practise law in that Province,

(b) undertake to comply with subrule (2), and

(c) immediately notify the Executive Director in writing if he or she ceases to be authorized to practise law in Quebec.

Exemption from liability insurance

5 (1) A Canadian legal advisor may apply to the Executive Director for exemption from the requirement to maintain professional liability insurance and pay the insurance fee

(2) On an application under subrule (1), the Executive Director must grant the exemption, provided the Canadian legal advisor maintains the full mandatory professional liability insurance coverage required by the Barreau that extends to the lawyer's practice in [this province/territory].

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

APPENDIX "B"

MEMORANDUM

FROM: Federation Executive

TO: Council of the Federation
Law society CEOs (for information)

DATE: October 5, 2009

SUBJECT: Quebec Mobility

ACTION REQUIRED: **FOR DECISION**

DRAFT MOTION:

WHEREAS the Barreau du Québec (the "Barreau") has established a special category of membership known as the Canadian Legal Advisor to permit members of other Canadian law societies to practise law in Quebec on a restricted basis;

WHEREAS the other Canadian law societies have indicated a desire to establish reciprocal mobility for members of the Barreau on a similar basis;

RESOLVED THAT the Quebec Mobility Agreement attached as Appendix "A" be approved by Council for submission to member law societies for their execution.

ISSUE

1. The Council is requested to approve the Quebec Mobility Agreement (the "QMA") attached as Appendix "A".

BACKGROUND

2. The National Mobility Agreement (the "NMA") contemplates that a special form of mobility between the Barreau and the other signatory jurisdictions might be required in light of the different legal systems in Quebec and the other provinces and territories.

3. Paragraph 40(b) of the NMA provides, in part, that "a signatory governing body, other

than the Barreau, will admit members of the Barreau as members . . . as permitted by the Barreau in respect of members of the signatory governing body."

4. With the introduction of the Canadian Legal Advisor, the Barreau has created a category of membership that permits members from any of the common law jurisdictions in Canada to practise law in Quebec on a restricted basis. The Canadian Legal Advisor regime has been in place since June 2008.

5. A person granted membership in the Barreau as a Canadian Legal Advisor may

a) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;

b) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;

c) give legal advice and consultations on legal matters involving public international law; and

d) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

6. A survey of the law societies indicated support for establishing a reciprocal form of mobility for members of the Barreau.

QUEBEC MOBILITY AGREEMENT

7. The QMA would extend the scope of the NMA by facilitating the establishment of reciprocal mobility between Canadian common law jurisdictions and the Barreau.

8. The QMA provides for the creation of the Canadian Legal Advisor in common law jurisdictions and its continuation by the Barreau. The agreement provides that signatory jurisdictions will use their best efforts to obtain any legislative amendments necessary for the establishment of the Canadian Legal Advisor category of membership and will also make necessary changes to their rules and regulations.

9. Other key features of the QMA include:

a) Members applying to become a Canadian Legal Advisor must be a member in good standing in their home jurisdiction and must maintain that membership;

b) The home governing body will continue to provide liability insurance for Canadian Legal Advisors;

c) Only those members whose liability insurance specifically covers the practise of public international law will be permitted to practise in this area as Canadian Legal Advisors;

d) To address the situation of members of one of the law societies of France who become members of the Barreau without having their credentials assessed, only those members of the Barreau educated in Canada or whose credentials have been assessed by the Barreau and recognized as equivalent will be eligible to become Canadian Legal Advisors.

10. The structure of the QMA recognizes that some jurisdictions will be able to move quickly to implement the agreement while others may first have to seek legislative changes to permit the establishment of a restricted category of membership.

MODEL RULE

11. To assist law societies in making the changes to their rules and regulations necessary to implement the reciprocal mobility regime a Model Rule has been prepared. It is attached as Appendix "B" to this memorandum. As the structure of the regulations in the individual jurisdictions varies considerably, the Model Rule is not contemplated as a "one size fits all" document. Rather, it is intended to help law societies identify the elements of their regulations that will need to be addressed.

RECOMMENDATION

12. It is recommended that the resolution set forth on page one of this memorandum be adopted and that members of Council request that their law societies execute the agreement.

Memo

The Law Society of British Columbia

1500

To Benchers

From Bill McIntosh

Date January 13, 2010

Subject **Nominations to the 2010 Finance Committee**

At the January 22/10 Benchers meeting, two Benchers-at-large (at least one of whom is not a member of the Executive Committee) and one appointed Bencher are to be nominated to the 2010 Finance Committee. If more than two Benchers or more than one appointed Bencher are nominated, the vote must be by secret ballot (Rule 1-39(11)(a)).

Article F-9 (b) of the BENCHERS GOVERNANCE POLICIES sets out the mandate and composition of the Finance Committee:

(b) The Committee is composed of the following Benchers: the First Vice-president and Second Vice-president, and

- two Benchers nominated by the Benchers, at least one of whom is not a member of the Executive Committee
- the Chair of the Audit Committee
- an appointed Bencher nominated by the appointed Benchers.

(Authority: Bencher resolution, December, 2007)

The Finance Committee normally meets three or four times during the fee and budget preparation process (late May/first three weeks of June), and holds quarterly investment review meetings.

Memo

The Law Society of British Columbia

1600

To Benchers

From Bill McIntosh

Date January 13, 2010

Subject **Election of an Appointed Bencher to the 2010 Executive Committee**

At the December 11, 2009 Benchers meeting, Barbara Levesque was elected as the appointed Bencher member of the 2010 Executive Committee. Ms. Levesque has since submitted her resignation as a member of the Executive Committee, following the provincial government's announcement that she would not be re-appointed as an appointed Bencher for 2010-2011.

Rule 1-39(12) provides that if a vacancy occurs for any Bencher elected to the Executive Committee, "…the Benchers or the appointed Benchers, as the case may be, must hold an election to fill the vacancy at the next regular meeting of the Benchers." Accordingly, at the January 22, 2010 Benchers meeting an appointed Bencher will be elected to the 2010 Executive Committee. If more than one appointed Bencher is nominated, the vote must be by secret ballot (Rule 1-39(11)(a)).

The Law Society of British Columbia

MEETING SCHEDULE FOR 2010
Benchers and Executive Committee

2010	Benchers	Executive Committee	Other Dates
January	Friday, January 22	Thursday, January 14	
February	—	Thursday, February 18	Olympics – February 12-28
March	Friday, March 5	—	Paralympics – March 12-21 Federation – March 18-20
April	Friday, April 23	Thursday, April 8	Easter – April 2-5 Gala Dinner for 100th Anniversary of BC Court of Appeal – April 23
May	—	Thursday, May 27	
June	Saturday, June 12	Thursday, June 24	LSBC Retreat – June 10-13
July	Friday, July 9	—	
August	—	Thursday, August 19	
September	Friday, September 3	Thursday, September 16	Federation – September 23-25 LSBC AGM – September 28
October	Friday, October 1	Thursday, October 21	
November	Friday, November 5	Thursday, November 25	
December	Friday, December 10	Thursday, December 16	

LAST UPDATED: December 9, 2009

The Law Society of British Columbia

DISCUSSION OF COSTS AWARDED BY HEARING PANELS

January 2010

Purpose of Report: **Bencher Discussion and Decision (*in camera*)**

Submitted by: **Policy and Legal Services Department**

Responsible Staff: **Carmel Wiseman, Staff Lawyer**
Eric Wredenhagen, Discipline Counsel
Maureen Boyd, Senior Discipline Counsel

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Attachments:

- Memorandum June 24, 2008
- Opinion from Brian J. Wallace, Q.C. April 28, 2008
- Memorandum from Ms. Whittow to the Executive Committee May 18, 1999
- Opinion from Kimberley S. Campbell April 26, 1999
- *Roberts v. The College of Dental Surgeons* 1999 BCCA 0103
- Minute Executive Committee May 20, 1999
- *Law Society of British Columbia v. Taschuk* [1999] LSBC 04
- *Shpak v. The Institute of Chartered Accountants* 2003 BCCA 149

EXECUTIVE SUMMARY

This paper examines costs frameworks and the policies that underlie costs awards. The paper presents three options for consideration by the Benchers:

- a no costs model;
- a partial indemnity costs model; and
- a full indemnity costs model.

If the Benchers decide that the Law Society should seek to recover costs on a no costs basis, the Law Society Rules will have to be revised.

If the Benchers decide that the Law Society should continue with the present partial indemnity costs model, then the Rules should be reviewed to ensure that the current rules with respect to costs are consistent with that model. If the Benchers decide on this option, they should also consider whether the Law Society should develop a tariff rather than the current system of claiming for only a portion of counsel fees.

If the Benchers opt for a full indemnity model, then it will be necessary for the Law Society to seek a legislative amendment.

Finally, this paper identifies the anomalous situation arising from the fact that no costs are payable when admissions in serious discipline matters proceed by way of Rule 4-21 whereas less serious matters that proceed by way of a Rule 4-22 admission attract costs.

1. INTRODUCTION

At the *in camera* portion of their meeting of July 4, 2008, the Benchers considered a memorandum discussing costs awarded by hearing panels that attached an opinion dated April 28, 2008 from Brian Wallace, Q.C. His opinion is that the decisions in *Roberts v. College of Dental Surgeons* (1999), 63 B.C.L.R. (3d) 116 and *Shpak v. Institute of Chartered Accountants of British Columbia* 2003 BCCA 149 apply to the Law Society so that the Law Society, if successful at a hearing, is only entitled to costs on a party and party or partial indemnity basis in accordance with Rule 57 of the Supreme Court Rules (for simplicity referred to as "costs on a partial indemnity basis") rather than on a full indemnity basis. Prior to that decision, the Law Society generally sought costs on a full indemnity basis, the Benchers having held on review in *LSBC v. Taschuk*, [1999] LSBC 4 that the *Roberts* decision did not apply to the assessment of costs in Law Society discipline hearings. A copy of the memorandum that was before the Benchers is attached.

The Benchers instructed staff that, on an interim basis pending further consideration of the issue, the Law Society should only seek costs, when successful, on a partial rather than on a full indemnity basis. The Benchers also asked staff to prepare a discussion paper on various costs models to assist in their consideration of whether the Law Society should seek an amendment to the *Legal Profession Act* to allow the Law Society to

recover costs on a full indemnity basis or whether another costs model should be adopted by the Law Society.

This paper discusses the history and policy considerations that underlie cost awards and considers three different costs models. The paper also identifies further costs issues for consideration by the Benchers.

2. LEGISLATIVE FRAMEWORK

Section 46 of the *Legal Profession Act* allows the Benchers to make rules respecting costs of a hearing:

> **Costs**
>
> **46** (1) The benchers may make rules governing the assessment of costs by a panel, the benchers or a committee under this Act including
>
> (a) the time allowed for payment of costs, and
>
> (b) the extension of time for payment of costs.
>
> (2) If legal assistance employed by the benchers is provided by an employee of the society, the amount of costs that may be awarded under the rules in respect of that legal assistance may be the same as though the society had retained outside counsel.
>
> (3) The amount of costs ordered to be paid by a respondent or applicant under the rules may be recovered as a debt owing to the society and, when collected, the amount is the property of the society.

Pursuant to the *Act*, the Benchers have adopted a number of Rules that deal with costs, the chief of which is Rule 5-9:

> **Costs of hearings**
>
> **5-9** (0.1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1, and may set a time for payment.
>
> (0.2) The Benchers may order that an applicant or respondent pay the costs of a review under section 47 of the Act, and may set a time for payment.
>
> (1) In calculating the costs payable by an applicant or respondent, the panel or the Benchers may include part or all of one or more of the following:

(a) the cost of any investigation undertaken in relation to the applicant's application for enrolment, call and admission or reinstatement;

(b) the cost of an accounting, investigation or inspection of the respondent's practice, undertaken as part of the inquiry;

(c) a fee of $25 per witness, multiplied by the number of days the witness was required to remain in attendance at the hearing;

(d) reasonable travel and living expenses of a witness;

(e) the court reporter's fee for attendance at the hearing;

(f) the cost of a transcript of a hearing held under Part 2 or 4, if the Society would otherwise be liable for its cost;

(g) a fee of $750 for each part or full day of hearing;

(h) reasonable fees and disbursements of counsel appointed under Rule 2-63 or 4-20;

(i) any other amount, arising out of the investigation and hearing, for which the Society would otherwise be liable.

(2) If the legal assistance used by the Society is provided by an employee of the Society, costs may be awarded for that legal assistance in the amount that would have been payable if the Society had retained outside counsel.

(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(a) no adverse finding is made against the applicant;

(b) the citation is dismissed;

(c) the citation is rescinded after the hearing has commenced.

(4) Costs deposited under Rule 2-62 must be applied to costs ordered under this Rule.

(5) An applicant must not be enrolled, called and admitted or reinstated until the costs ordered under this Rule or the Act are paid in full.

> (6) As an exception to subrule (5), the Credentials Committee may direct that an applicant be enrolled, called and admitted or reinstated even though costs ordered under this Rule have not been paid in full and may make the direction subject to any conditions that the Committee finds appropriate.

Most of the items listed in Rule 5-9(1) are recoverable as disbursements in an assessment of costs on a partial indemnity basis. However, the Law Society's ability to recover for the items listed in subparagraphs (1) (a), (b), (g), (h) and (i) and subrule (2) is or may be impacted at least in some circumstances if the Law Society may only recover costs calculated on a partial indemnity basis.

3. CURRENT SITUATION

Since the Benchers' decision in July 2008 that the Law Society should only seek costs on a partial indemnity basis, only disbursements (which include in-house audit costs, calculated at the same rate and on the same basis as external audit costs) are claimed on a full indemnity basis. Recovery for counsel fees is sought (at $175 per hour for both staff and outside counsel) pursuant to subparagraph (1)(h) and subrule (2) in the range of 30-40% of the amount expended or estimated. This is estimated to be the approximate amount of costs recoverable on a party and party basis. Since July 2008, panels have not raised issues in relation to costs of any hearing and have awarded costs on a partial indemnity basis largely as sought by counsel. Even when the amount sought is reduced, the reduction has been small. It is worth noting that when the Law Society claimed costs on a full indemnity basis, as it did regularly before July 2008, the costs claimed were substantially reduced by hearing panels about 1/3 of the time. In reducing the amount of costs claimed by the Law Society, hearing panels would take into account: the seriousness of the offence; the financial situation of the respondent or applicant; the total effect of the penalty on the respondent including the amount of a fine or suspension; and the extent to which the conduct of the parties contributed to the accumulation or reduction of costs (See e.g. *LSBC v. Racette* 2006 LSBC 29 at para. 13).

If the Benchers decide that the Law Society should be able to recover costs on a full indemnity basis then it will be necessary to seek an amendment to the *Legal Profession Act*. Seeking such an amendment is timely given that the Act and Rules Subcommittee is currently working on possible amendments, and perhaps a wholesale revision, to the *Act*. The Rules may also need to be revised to reflect the costs model the Benchers decide to adopt.

4. COSTS: A BRIEF HISTORY AND THE UNDERLYING POLICIES

The power of the courts to award costs to a party has a long history both in the common law and in equity. The English common law courts were granted the power to award costs pursuant to the Statute of Gloucester, 6 Edw 1, c1 which allowed a successful plaintiff to recover the costs of the "writ purchased." Prior to that, common law courts had no power to make awards of costs so both parties bore their own costs. That system remains the norm in much of the world today and in certain kinds of litigation in Canada.

In England, Courts of equity could award costs according to equitable principles. In both courts, the theory behind a costs award, at least originally, was to indemnify the successful party from the expense to which he was put by the litigation. It was recognized, however, from an early date, that not all costs were recoverable by the successful party but only the minimum costs necessarily incurred. The general rule that was applied and prevails to this day is that "costs follow the event"; that is, the successful party is entitled to costs.

> "The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have an inherent jurisdiction over costs, but beginning in the late 13th century, they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M.M. Orkin, *The Law of Costs* (2nd Ed. Looseleaf), at p.1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.
>
> In the usual case, costs are awarded to the prevailing party after judgment has been given. . ." [*HMTQ v. Okanagan Indian Band et al.* [2003] 3 S.C.R. 371, 2003 S.C.C. 71(the *Okanagan Indian Band* case), at para. 19-20]

Courts have long recognized policy considerations in costs awards and have exercised their discretion to award costs to meet certain objectives. For example, Courts regularly exercise their discretion over costs to award, increase, reduce or withhold costs to punish the conduct of a party.

In the *Okanagan Indian Band* case, the majority of the Supreme Court of Canada, after noting that the power to order costs is a discretionary one that must be exercised judicially, recognized that indemnification was not the sole purpose or perhaps even the primary purpose of a costs award. The Court referred, with approval, to the British Columbia Court of Appeal's statement in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated." The Court noted:

> "modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces. . .Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.
>
> Indeed, the traditional approach to costs can be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These

> effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense, it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs." (at para. 25 - 26)

The policy goals behind costs awards include:

- indemnifying the successful party;
- encouraging both parties to settle issues;
- penalizing unreasonable behavior;
- penalizing behavior that increases costs;
- discouraging meritless claims; and
- increasing accessibility to the legal system.

The Manitoba Law Reform Commission in *Costs Awards in Civil Litigation* (September 2005) adds to those goals (somewhat differently expressed) the following objectives for a costs regime:

- simplicity and clarity; and
- flexibility.

We suggest that these goals should be kept in mind in considering the different costs models.

5. THE LAW SOCIETY: A SPECIAL LITIGANT

In British Columbia, courts have not distinguished between regulatory bodies and other civil litigants when it comes to awards of costs. It is clear from the caselaw that costs on a full indemnity basis are not available to a regulatory body in a usual regulatory proceeding (i.e. where the unsuccessful party has not shown reprehensible or vexatious behaviour) unless the legislation that establishes the body specifically allows for increased costs to be recovered. Absent legislation that provides for such increased costs, costs will only be recoverable and payable by a regulatory body on a party and party basis.

There are good reasons to consider regulatory bodies to be different from other civil litigants. The English case of *Baxendale-Walker v. the Law Society*, [2007] 3 L.R. 475, dealt with the appropriateness of a costs award against the Law Society. In that case, the English Court of Appeal decided that costs should not necessarily "follow the event" in relation to an unsuccessful allegation brought by the Law Society. Of interest, is the Court's recognition that the Law Society is not like other litigants:

> "…it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings….The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation – dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party- would appear to have no direct application to disciplinary proceedings against a solicitor." [*para. 35*]

The Court of Appeal concluded:

> "Unless the complaint is improperly brought, or, for example, proceeds...as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage. Accordingly, Moses L.J.'s approach to this issue did not go further than the principle described in this judgment (para. 40)."

The English Court of Appeal dealt with the special position of the Law Society when unsuccessful on a position taken in regulatory proceedings. However, there are other characteristics of Law Society proceedings which differentiate them from usual civil proceedings.

In Law Society discipline and credentials proceedings, unlike most civil proceedings, there is no obligation on the respondent or applicant to disclose his or her case before the hearing. On occasion, this has meant that the Law Society is unaware of a defence until, or shortly before, the hearing. Thus, in *Law Society of British Columbia v. Boles*, 2007 LSBC 43, the hearing panel found the respondent responsible for costs until the Law Society was notified of her explanation in relation to counts that were dismissed:

> "The Respondent accepts that she should bear the costs to the Law Society in developing its case with respect to the two counts that were dismissed, up until the time at which she provided the Law Society with the explanation for her conduct. Counsel noted that the Respondent's explanation was ultimately accepted by this Panel. . .
>
> With respect to costs, the Panel agrees that the Respondent should pay for all of the Law Society's preparation up to the point that she provided a full explanation to the Law Society, as well as the full costs of the penalty hearing." [*at para 15 and 25*]

Another notable difference is that the Law Society is made up of members who, one could argue, agree to be regulated by the Law Society as a condition of their membership in the Society. In that way alone, they may be distinguished from other civil litigants who will rarely be related to the opposing party in a comparable way.

The costs of regulating the profession are borne by all members of the Law Society through their practising fees. An argument can be made that if a member fails to abide by the terms of membership, he or she should bear the costs of proceedings that ensue. If a respondent is found guilty of misconduct or an applicant is found unfit to become a member of the Society, is it reasonable to expect the members as a whole to bear some of the costs of the proceedings in which that determination was made? Or should the "unsuccessful" party bear the whole of the costs?

Costs awards can be significant, and can significantly impact a regulatory body, particularly a smaller body. In *Laye v. College of Psychologists of British Columbia*, (1998) 59 BCLR (3d) 349, 1998 CanLII 5623, Huddart J.A. observed:

> "[48] The evidence of the respondent's actual costs provides cogent evidence of the very high expenses members of professional bodies incur during the investigation and hearing of complaints against them by the professional body of which they are a member. The burden on the College is undoubtedly similar. That burden combined with the high standard of fairness required of a professional disciplinary body and the strict standard of proof to which a professional body is held in matters of discipline may have the practical effect of imperiling appropriate discipline procedures particularly where the number of members is small.
>
> [49] The position of the member was articulated in *Kamani v. College of Dental Surgeons (British Columbia* (13 June 1994), Vancouver A930189 (B.C.S.C.) by Mr. Justice Low at 19:
>
> > 'There is a related consideration with respect to the College's decision to bring charges. It should have to do so at some risk of not recovering its costs and at some risk of having to pay costs. If that risk did not exist, there would be a greater potential harm that dentists charged would be deterred from defending for fear of incurring substantial, even financially crippling, unrecoverable legal expenses and perhaps having to pay the College's full costs even if successful. Given the very high expenses now incurred in the investigation and hearing of complaints against members of professional bodies, successful or partially successful assertions of innocence should result in a fair and reasonably predictable full or partial recovery of costs.'
>
> [50] The Legislature must be taken to have weighed this burden with that on the College when it imposed solicitor and client costs on the College as the appropriate scale for assessment of costs at the hearing level when they are awarded. It must be taken to have recognized that the risk to the College, of

> having not only to pay its own costs but also those of the successful respondent, would be a very significant factor in the College's decision whether to bring charges."

There are no right answers to the question of where the burden for costs should lie; it is essentially a policy matter for discussion at the first instance by the Benchers and, ultimately, for decision by the legislature in the legislation it enacts.

Because of the Law Society's special position as a litigant, we suggest that two other goals of costs awards be added to the list set out in the previous section:

- encouraging proceedings that are in the public interest; and
- adopting a costs regime that balances exposure for costs between applicants/respondents and the members as a whole.

While those goals may not be specifically raised in any given proceeding, they should be recognized. The objective of encouraging proceedings in the public interest ought always to underlie the Law Society's discipline and credentials proceedings and pursuit of that goal, or departure from that goal, should have costs implications.

6. COSTS MODELS: AN OVERVIEW OF THREE MODELS

There are three costs models that the Benchers may wish to consider:

(i) No costs;

(ii) Partial indemnity or "party-party" costs; and

(iii) Full indemnity or special costs.

(i) No costs

The "no costs" model is one that Canadian lawyers are most familiar with today in the criminal context. In criminal cases, with few exceptions, the parties to the proceedings bear their own costs. Historically in Canada, this had been the prevailing model for all litigation against the Crown. However, the rule that the Crown should neither receive nor pay costs is generally seen today as an anachronism (*AG Ontario v. Toronto General Trusts Co. et al.*, [1942] 1 W.W.R. 688 [1942] D.L.R. 96).

Eliminating all awards of costs by hearing panels has some advantages. A "no costs" regime is easy to administer and reduces the amount of time and work involved in the hearing process by eliminating the need to track costs, prepare bills and submissions on costs, argue costs before hearing panels, invoice the applicant or respondent (where costs are awarded in favour of the Law Society) and take steps to recover costs. It eliminates the potential for inconsistency in the costs awarded.

The "no costs" model also eliminates any potential "chilling effect" (as referred to by the Court of Appeal in *Shpak*) on applicants or respondents who might be deterred from mounting an application or a defence because of the "spectre of prohibitive costs."

However, there are disadvantages to doing away with costs entirely. The primary concern is that this model removes the incentive for applicants or respondents to participate reasonably in the credentials and discipline processes by making appropriate admissions and coming to appropriate agreements. This might lead to an increase in the number of contested hearings, and the length of those hearings resulting in:

- higher administrative costs to the Law Society to carry out these functions;
- an increased requirement for witnesses to attend hearings, with the resultant strain and disruption on other Law Society operations in respect of staff witnesses and strain and disruption for "outside" witnesses, many of whom will lose income by the requirement to attend as a witness;
- an increased percentage of unsuccessful hearings when a respondent puts the Law Society to the strict proof of the case, knowing that witnesses are not always available to attend or inclined to be co-operative; and
- a greater strain on Bencher resources.

In addition, under the no costs model, the membership as a whole would be required to bear the full costs associated with the discipline and credentials processes rather than have the unsuccessful applicant or respondent bear a portion (in the case of partial indemnity) or all (in the case of full indemnity) of the costs. It should also be noted that the no costs model might encourage applicants for admission to bring applications that have no prospect of success and respondents to raise meritless defences without fear of a costs award against them and the Law Society would have no choice but to respond.

(ii) Partial indemnity model

The partial indemnity costs model is the one that the Law Society currently employs and one that is certainly familiar to most lawyers. Rule 57 of the B.C. Supreme Court Rules sets out rules that are typical for this costs model: recovery in a "reasonable amount" for those "expenses and disbursements [that] have been necessarily and properly incurred in the conduct of the proceeding" [Rule 57 (4) (a), (b)]; and an amount in respect of fees in accordance with a tariff or schedule that typically allows only a portion of the actual fees incurred by the successful party. Appendix B to the Supreme Court Rules provides for a variable rate scale (currently ranging from $60.00 to $170.00) depending on the difficulty or importance of the matters at issue in the proceedings.

The partial indemnity costs model often allows the adjudicator discretion to award increased costs against a party for vexatious or reprehensible behavior. Rule 57(3), for example, allows the Court to order and the registrar to assess costs as "special costs."

The Court of Appeal in *Shpak v. Institute of Chartered Accountants of British Columbia* 2003 BCCA 149 held that the effect of previous cases was:

> " not to incorporate Rule 57 per se into the administrative tribunal's constituent statute or Rules, but to clarify that, where the provisions for costs in the constituent statute, or Rules properly passed pursuant to the statute, do not indicate otherwise, the provisions of Rule 57 will govern the tribunal's award of costs. …[W]hen the legislature grants a general power to award costs, it is taken to intend that the power granted is the usual power exercisable by the courts with respect to costs under Rule 57." (*at para. 56*)

The Court of Appeal in that case, having found that the factual basis for special costs had been made out, held that the Institute was entitled to have an order for "special costs" against Mr. Shpak.

Under the partial indemnity model, the successful party is partially indemnified for costs incurred. In addition, the parties are encouraged to settle issues to reduce exposure to costs. Under this model, unreasonable behavior may be sanctioned (including by awards of special costs when a party's behavior is reprehensible) and meritless applications and defences are discouraged. Because applicants for admission and respondents to a citation only face liability for partial costs if unsuccessful, the "chilling" effect of the possibility of a full costs award is reduced. Similarly, the Law Society only faces liability for partial costs if it is unsuccessful so the "chilling" effect of the possibility of a full costs award against it is also reduced for the Law Society.

Under the partial indemnity model, the membership as a whole bears some of the costs of both credentials and discipline hearings even when the Law Society is successful. Similarly, successful applicants and respondents do not fully recover their costs. Under a partial indemnity model, costs claims can be complicated and may require applications to address costs. However, the complexity of costs claims can be reduced by adopting a simple model or tariff.

(iii) Full indemnity

Under a full indemnity model, a successful party can claim all costs reasonably incurred. Generally, this means that the successful party is "made whole" by the costs award, and unsuccessful parties bear not only their costs but also those of the successful party. The full indemnity costs model has many of the same advantages and disadvantages of the partial indemnity costs model; however, the stakes are much higher in the full indemnity model. Like the partial indemnity model, this model also encourages the parties to settle issues to reduce exposure to costs and discourages meritless applications and defences.

A full indemnity model may cause a chilling effect on applicants for admission pursuing their applications and respondents pursuing defences for fear of onerous costs awards. This model also limits a panel's opportunity to exercise its discretion to award costs in a manner that reflects the conduct of a party.

Full indemnity costs awards can be complicated as they typically involve lawyers' accounts and applications to address costs or issues of privilege may be necessary.

7. VIEWING THE COSTS MODELS THROUGH THE POLICY GOALS LENS

It is useful to analyze the costs awards models against the policy goals behind costs awards.

(i) The no costs model

The "no costs" model fares the worst when measured against the general policy goals. It does not:

- indemnify the successful party;
- encourage the parties to settle issues;
- penalize unreasonable behaviour;
- penalize behaviour that increases costs;
- increase access to the legal system.

Nor is it flexible although it is simple to administer.

Considering the policy goals that arise because of the Law Society's position as a special litigant, one can argue that the "no costs" model does not appropriately balance exposure for costs between the applicants/respondents and the members as a whole. Rather, both parties to a Law Society proceeding will bear their own costs. In credentials proceedings, the Law Society's members will bear the full costs of opposing an application brought by an applicant who is not a member regardless of the merits of that application.

In discipline proceedings, the "no costs" model means that the members as a whole will bear the costs of prosecuting a discipline matter and dealing with issues that the respondent raises, with no ability to recover costs against the respondent.

In both credentials and discipline proceedings, the exposure of the applicants/respondents is limited to their own costs.

The "no costs" model at least at first blush, operates in the Law Society's favour measured against the goal of encouraging proceedings that are in the public interest. With no fear of exposure for costs, the Law Society might bring many more discipline proceedings and refer many more credentials applications to hearing, even if the evidence is unlikely to result in an adverse finding (in the case of discipline hearings) or in refusal of or conditions on admission (in the case of credentials hearings). However, the Law Society has never brought proceedings or referred to matters to hearing unless there is sufficient evidence that a hearing panel is likely to make an adverse finding against a respondent or impose conditions on or refuse admission to an applicant.

If the Benchers agree that the Law Society should not be referring a matter for hearing unless there is a sufficient evidentiary basis or required by statute [s. 19(3) of the *Legal Profession Act* requires a hearing if a former member of this or of another jurisdiction ceased membership as a result of discipline proceedings], then the "no costs" model does not greatly assist in achieving the goal of encouraging proceedings that are in the public interest. Indeed, one could argue that under a "no costs" regime the Law Society might initiate proceedings that ought not to be pursued and that is not in the public interest.

(ii) The partial indemnity model

The partial indemnity model fares well when viewed through the policy goals lens:

- it indemnifies the successful party although only partially;
- it encourages parties to settle issues;
- it penalizes unreasonable behaviour;
- it penalizes behaviour that increases costs;
- it discourages meritless claims;
- it increases access to the legal system by allowing the successful party to recover at least a portion of the costs expended; and
- it is flexible.

A partial indemnity model can be structured so that the regime is simple and clear. The *Legal Profession Act* allows the Law Society to adopt a costs model that is clear and simple to administer.

The "special litigant" goal of encouraging proceedings brought in the public interest may also be met in a partial indemnity model. Hearing panels can allocate costs to recognize that proceedings have been brought in the public interest even if the Law Society is unsuccessful. (See e.g. *LSBC v. Boles*)

A partial indemnity model balances some of the exposure to costs between applicants/respondents and the members as a whole although the successful party is not awarded full indemnity. Nonetheless it goes some way to ensuring the successful party will be awarded at least some of the costs incurred.

(iii) The full indemnity model

The full indemnity costs model:

- indemnifies the successful party;
- discourages meritless claims; and, arguably

- increases accessibility to the legal system.

However, it does not meet the goals of:

- encouraging parties to settle issues;
- penalizing unreasonable behaviours; or
- penalizing behaviour that increases costs.

The full indemnity model may be flexible but can be complex to administer and may require extensive review of the legal bills.

The full indemnity model does not encourage proceedings that are in the public interest. Fear of exposure to full costs might limit either party bringing an application or raising a defence that is not clearly going to succeed.

Whether a full indemnity model properly balances exposure for costs between applicants/respondents and the members as a whole will depend upon the Benchers' view of the proper balance. Some Benchers may think that the members as a whole should bear only a minimum of the costs associated with successful proceedings with the applicants/respondents bearing the full costs. Other Benchers may consider that a partial indemnity for the successful party strikes the right balance.

8. SOME PARTICULAR COSTS SITUATIONS

There is an anomaly in the way costs are dealt with in citations that are resolved by admissions under Rules 4-21 (where there are no costs payable) and 4-22 (where there is usually an order for costs):

> **4-21** (1) A respondent may, at least 14 days before the date set for a hearing under this Part, tender to the Discipline Committee a conditional admission of a discipline violation.
>
> (2) The chair of the Discipline Committee may waive the 14-day time limit in subrule (1).
>
> (3) The Discipline Committee may, in its discretion,
>
> (a) accept the conditional admission,
>
> (b) accept the conditional admission subject to any undertaking that the Committee requires the respondent to give in order to protect the public interest, or
>
> (c) reject the conditional admission.
>
> (4) If the Discipline Committee accepts a conditional admission tendered under this Rule,
>
> (a) those parts of the citation to which the conditional admission applies are resolved,

(b) the Executive Director must

(i) record the respondent's admission on the respondent's professional conduct record, and

(ii) notify the respondent and the complainant of the disposition, and

(c) subject to solicitor and client privilege and confidentiality, the Executive Director may disclose the reasons for the Committee's decision.

(5) A respondent who undertakes under this Rule not to practise law is a person who has ceased to be a member of the Society as a result of disciplinary proceedings under section 15(3) of the Act.

Consent to disciplinary action

4-22 (1) A respondent may, at least 14 days before the date set for a hearing under this Part, tender to the Discipline Committee a conditional admission of a discipline violation and the respondent's consent to a specified disciplinary action.

(2) The chair of the Discipline Committee may waive the 14-day limit in subrule (1).

(3) The Discipline Committee may, in its discretion, accept or reject a conditional admission and proposed disciplinary action.

(4) If the Discipline Committee accepts the conditional admission and proposed disciplinary action, it must instruct discipline counsel to recommend its acceptance to the hearing panel.

(5) If the panel accepts the respondent's proposed disciplinary action it must

(a) instruct the Executive Director to record the lawyer's admission on the lawyer's professional conduct record,

(b) impose the disciplinary action that the respondent has proposed, and

(c) notify the respondent and the complainant of the disposition.

Rule 4-21 was originally used, and probably originally designed, for admissions of minor misconduct that did not require a discipline outcome. However, it is most often used today in cases of serious misconduct where the member resigns and, typically undertakes not to practise for a period of time, recognizing that any hearing is likely to result in disbarment. There is no hearing pursuant to Rule 4-21. Rather, the respondent tenders his or her admission of a disciplinary violation to the Discipline Committee who may accept or reject it.

Rule 4-22 is a hearing process used for all agreed disciplinary resolutions (i.e. reprimands, fines and suspensions) short of resignation. There is always a costs component to a Rule 4-22 resolution, even though the underlying conduct may be far less serious than in Rule 4-21 cases.

There are also cases in which the respondent has indicated from the outset a willingness to be fully co-operative, admits the applicable misconduct freely, and agrees to and proposes a reasonable penalty. Despite that, the nature of the process is such that costs are inevitably incurred, notwithstanding the respondent's full co-operation from the outset. In such a case, the imposition of costs – or anything more than nominal costs – might be considered to be unfair, as the costs are incurred simply by the nature of the process, and not because of the conduct of the respondent in the proceedings.

If the Benchers decide that the Law Society should pursue either a full or a partial costs indemnity model, they may wish to ask staff to also develop options to deal with these situations.

9. OPTIONS

The general issue for discussion by the Benchers is which costs model the Law Society should adopt or pursue. Depending on the model chosen, there are other issues or matters that arise.

The options available are:

1. No costs. If this model is chosen, the Rules will need to be revised to reflect this new regime.

2. Costs on partial indemnity basis. If this model is chosen, there is no need for a legislative amendment but

   (a) Rule 5-9 should be reviewed with a view to considering what costs can appropriately be claimed under this model and revising the language as required to conform with the decision.

   If the Benchers choose this model, they may also wish:

   (b) to have an analysis prepared on the desirability of producing some form of tariff rather than relying on the current system of counsel claiming only a portion of the fees incurred. It should be noted that preparation of a tariff could be time-consuming although it may ultimately simplify claims for costs. It should also be noted that the current system is transparent and appears to be working well.

   (c) to ask for a policy work-up and recommendations to deal with the situations described in Section 8 of this memorandum.

3. Costs on a full indemnity model. If this model is chosen it will be necessary to seek a legislative amendment. Any ancillary work should probably await the outcome of the request for an amendment.