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Practice Material

Professionalism: Ethics

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PROFESSIONALISM: ETHICS

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Chapter 1

Ethics

§1.01 Introduction

Lawyers need more than a knowledge of substantive law and a facility with skills and procedures to guide their actions when representing a client. A lawyer also contends with questions of professional responsibility, which the lawyer must consider and resolve daily.

The legal profession has codified its expectations of practitioners, to some extent. The authority commonly consulted in British Columbia to help resolve ethical dilemmas is the Code of Professional Conduct for British Columbia (the “BC Code” or “the Code”). The BC Code is published by the Law Society of British Columbia as part of the Member’s Manual.

The introduction to the BC Code makes six key points:

1. One of the hallmarks of civilized society is the rule of law. Its importance is reflected in every legal activity in which citizens engage. As participants in a justice system that advances the rule of law, lawyers hold a unique and important role in society. Self-regulatory powers have been granted to the legal profession in Canada on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers.

Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to Canada’s robust legal system. They also acknowledge the public’s reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession.

While lawyers are consulted for their knowledge and abilities, more than mere technical proficiency is expected of them. A special ethical responsibility comes with membership in the legal profession. This Code of Professional Conduct for British Columbia attempts to define and illustrate that responsibility in terms of a lawyer’s professional relationships with clients, the justice system and other members of the profession.

(2) The Legal Profession Act provides that it is the object and duty of the Law Society of British Columbia to uphold and protect the public interest in the administration of justice. A central feature of that duty is to ensure that lawyers can identify and maintain the highest standards of ethical conduct. This Code attempts to assist lawyers to achieve that goal.

While the Code should be considered a reliable and instructive guide for lawyers, the obligations it identifies are only the minimum standards of professional conduct expected of members of the profession. Lawyers are encouraged to aspire to the highest standards of competence, integrity and honour in the practice of their profession, whether or not such standards are formally addressed in the Code.

(3) The Code is published under the authority of the Benchers of the Law Society of British Columbia for the guidance of BC lawyers. It is significantly related to the Federation of Law Societies’ Model Code of Professional Conduct, though there are points of variance from the Model Code that the Benchers have considered to be appropriate for guiding practice in British Columbia. Where there is a corresponding provision in the Model Code, the numbering of the BC Code is similar to that of the Model Code.

The BC Code is not a formal part of the Law Society Rules but, rather, an expression of the views of the Benchers about standards that British Columbia lawyers must meet in fulfilling their professional obligations.

(4) The Code is divided into three components: rules, commentary and appendices. Each of these components contains some statements that are mandatory, some that are advisory and others with both mandatory and advisory elements. Some issues are dealt with in more than one place in the Code, and the Code itself is not exhaustive of lawyers’ professional conduct obligations.

In determining lawyers’ professional obligations, the Code must be consulted in its entirety and lawyers should be guided in their conduct equally by the language in the rules, commentary and appendices.

Mandatory statements have equal force wherever they appear in the Code.

1 Prepared and revised by Law Society of British Columbia staff, most recently in December 2019.
(5) A breach of a provision of the Code by a lawyer may or may not be the basis of disciplinary action against that lawyer. A decision by the Law Society to take such action will include a consideration of the language of the provision itself and the nature and seriousness of the conduct in question.

(6) The correct or best answer to ethical questions that arise in the practice or lives of lawyers may often be difficult to discern, whether or not the Code addresses the question directly. Lawyers should always be aware that discussion of such questions with Benchers, Law Society practice advisors, the Law Society’s Ethics Committee or other experienced and trusted colleagues is the approach most likely to identify a reasonable course of action consistent with lawyers’ ethical obligations. This Code is intended to be a valuable asset for lawyers in the analysis, discussion and resolution of such issues.

The Law Society practice advisors have extensive experience with ethics problems and are available to give confidential advice to lawyers, articled students, and temporary articled students on ethics and practice issues.

The BC Code provides guidance with respect to many common issues that lawyers face, by reference to lawyers’ duties to relate to clients, the courts, other lawyers and the public, generally, with the utmost probity and good faith. There is also an aspirational aspect to the BC Code: it encourages lawyers and articled students to aspire to the most honourable conduct of which they are capable. That conduct may not always be identified by specific Code rules, but awareness of it and a commitment to practice according to it is an important element of a lawyer’s calling.
Chapter 2

Competence¹

[$2.01] Role of the Law Society

The Law Society regulates lawyers and law firms in the public interest. The Law Society sets the criteria for admission into the profession, including pre-call legal education. In addition, the Law Society sets and enforces standards of competency for lawyers. The Law Society’s legislated mandate and authority comes from the Legal Profession Act, S.B.C. 1998, c. 9 (the “Act”). The Law Society Rules specify policy and procedure. In addition, the BC Code provides rules for lawyer conduct.

Past President David Crossin, QC, discussed the role of the Law Society as well as specific initiatives in a letter published in Benchers’ Bulletin (2016: No. 1 Spring):

Law Society members elected me as Bencher six years ago. Almost the first thing I heard at the Bench-er table came from my good friend Leon Getz, QC. He reminded our table of the obvious: the Law Society must always be guided by the question, “Is what we are doing important to the due administration of justice?” Since that day I have observed my colleagues at the Law Society do their very best to be guided by that principle.

The most recent example of this pursuit is reflected in the feature article in this issue of Benchers’ Bulletin, addressing what is and will remain a fundamental priority of the Law Society. Developing an action plan in response to the recommendations of the Truth and Reconciliation Commission of Canada is a priority, and the article in this issue provides important context for the work of the Law Society going forward.

Another area for concern to the Law Society is the state of legal aid in this province. A robust, sustainable legal aid system is critical to ensuring the public interest in the administration of justice is protected and advanced. We fall short in our province, and all of the stakeholders in our justice system must collaborate in pursuit of fundamental change. The Law Society has struck the Legal Aid Task Force to lend our voice to that pursuit. The Benchers have concluded it is absolutely incumbent on the Law Society to take a leadership role on this issue. Our task force, chaired by Nancy Merrill, QC and co-chaired by Richard Peck, QC, will be working toward developing a clear vision on legal aid in BC and recommending how the Law Society can participate in coordinating efforts to improve this crucial component of access to justice. A monopoly, or near monopoly, to practise law creates what the Right Honourable David Johnston, Governor General of Canada, once described as a social contract. We are duty bound to improve justice. Legal aid is an important underpinning of that social contract.


In 2012 the Justicia Project was founded with the goal of finding ways to encourage the retention and advancement of women lawyers in private practice. With the assistance of diversity officers from 17 law firms and the tremendous effort of a cohort of dedicated lawyers, the project has now published model policies and best practice guidelines in areas such as parental leave, respectful workplaces and business development for women. The model policies and guidelines are available on the Law Society’s website.

With phase one completed, our Equity and Diversity Advisory Committee has embarked on the next step. It has developed a communications strategy aimed at encouraging the implementation of the Justicia recommendations in smaller firms and in regions around the province. This is another exceedingly important endeavour to enhance our profession and better serve the public.

The Law Firm Regulation Task Force, chaired by Herman Van Ommen, QC, has also been busy in the early part of this year travelling to communities around the province to consult with the profession. In the coming months the task force will work toward recommending a regulatory framework in which firms will bear some responsibility for ensuring that the public has access to competent, ethical and independent lawyers.

In addition to these initiatives, the Law Society will continue to monitor a number of important issues throughout the year. For example, recent news stories have uncovered troubling revelations about the potential extent of government access to private communications. This has particular significance for the legal profession and, as you know, the Law Society has taken a public position, particularly in reference to Bill C-51 and the threat it poses to solicitor-client privilege. The Benchers will continue to advocate on behalf of lawyer independence, which is such a fundamental right underpinning the rule of law in Canada and around the world.

I am honoured to be the president this year and I look forward to engaging with you concerning these very important issues.

Regulating in the public interest is achieved by the Benchers serving on a number of Committees and Taskforces and through organization at the staff level.

¹ This chapter was prepared by and is regularly reviewed by staff lawyers of the Law Society of British Columbia. It was most recently updated in December 2019.
Concerning the Law Firm Regulation Task Force cited above, the Law Society Rules and *Legal Profession Act* were amended in 2018 to give the Law Society the authority to regulate law firms. The registration of law firms began in May 2018. On October 25, 2019, the Benchers approved the implementation of self-assessment for all law firms across the province. Using tools developed by the Law Society, firms will assess their own practice management systems, policies and procedures. This process will help them flag problems and issues before they affect clients or lead to complaints. Implementation will be rolled out in phases, and firms will need to fulfill their self-assessment requirements once every three years.

The Law Society’s commitment to building on the findings from the Truth and Reconciliation Commission was reinforced in 2018 when the Benchers approved a Truth and Reconciliation Action Plan to ensure the intercultural competence of all lawyers. On December 6, 2019 the Benchers approved a new training requirement for all full-time and part-time practising lawyers in BC. Beginning in 2021, all practising lawyers in BC will be required to complete a course to address core aspects of Indigenous intercultural competence and Call to Action 27 of the Truth and Reconciliation Commission (see §2.02(4)).

1. **Credentials Committee**

   The Credentials Committee of the Law Society has responsibility for all pre-call qualifications and training of lawyers. The mandate of the Credentials Committee includes enrolling articling students, supervising the articling program, screening applicants for call and admission, and reinstating lawyers. It also governs transfer from other jurisdictions. The Committee is also responsible for reviewing applications relating to a student’s failed standing in PLTC and for considering any matters arising from the articling system.

2. **Practice Standards Committee**

   The Practice Standards Committee has primary authority over competency-related matters post-call. Rule 3-16 sets out the Committee’s objectives:

   (a) to recommend standards of practice for lawyers;

   (b) to develop programs that will assist all lawyers to practise law competently; and

   (c) to identify lawyers who do not meet accepted standards in the practice of law, and recommend remedial measures to assist them to improve their legal practices.

   The function of the Practice Standards Committee is set out in s. 27 of the *Legal Profession Act* and Rules 3-15 to 3-25 of the Law Society Rules (the “Rules”). Section 27 reads:

   **Practice standards**

   27 (1) The benchers may

   (a) set standards of practice for lawyers,

   (b) establish and maintain a program to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems, and

   (c) establish and maintain a program to assist lawyers on issues arising from the practice of law.

   (2) The benchers may make rules to do any of the following:

   (a) establish a practice standards committee and delegate any or all authority and responsibility under this section, other than rule-making authority, to that committee;

   (b) permit an investigation into a lawyer’s competence to practise law if

   (i) there are reasonable grounds to believe that the lawyer is practising law in an incompetent manner, or

   (ii) the lawyer consents;

   (c) require a lawyer whose competence to practise law is under investigation to answer questions and provide access to information, files or records in the lawyer’s possession or control;

   (d) provide for a report to the benchers of the findings of an investigation into the competence of a lawyer to practise law;

   (d.1) permit the practice standards committee established under paragraph (a) to make orders imposing conditions and limitations on lawyers’ practices, and to require lawyers whose competence to practise law has been investigated to comply with those orders;

   (e) permit the benchers to order that a lawyer, a former lawyer, an articled student or a law firm pay to the society the costs of an investigation or remedial program under this Part and set and extend the time for payment;

   (f) permit the discipline committee established under s. 36(a) to consider

   (i) the findings of an investigation into a lawyer’s competence to practise law, or

   (ii) any remedial program undertaken or recommended,
(iii) any order that imposes conditions or limitations on the practice of a lawyer, and
(iv) any failure to comply with an order that imposes conditions or limitations on the practice of a lawyer.

(3) The amount of costs ordered to be paid by a person under the rules made under subsection (2)(e) may be recovered as a debt owing to the society and, when collected, the amount is the property of the society.

(3.1) For the purpose of recovering a debt under subsection (3), the executive director may
(a) issue a certificate stating that the amount of costs is due, the amount remaining unpaid, including interest, and the name of the person required to pay it, and
(b) file the certificate with the Supreme Court.

(3.2) A certificate filed under subsection (3.1) with the Supreme Court is of the same effect, and proceedings may be taken on it, as if it were a judgment of the Supreme Court for the recovery of a debt in the amount stated against the person named in it.

(4) Rules made under subsection (2)(d.1)
(a) may include rules respecting
(i) the making of orders by the practice standards committee, and
(ii) the conditions and limitations that may be imposed on the practice of a lawyer, and
(b) must not permit the imposition of conditions or limitations on the practice of a lawyer before the lawyer has been notified of the reasons for the proposed order and given a reasonable opportunity to make representations respecting those reasons.

To help lawyers deliver consistently high-quality legal services and comply with the objectives under Rule 3-16, the Practice Standards Committee has established remedial and other programs.

The Committee is responsible for dealing with competency concerns that arise with respect to particular lawyers.

Lawyers are referred to the Practice Standards Committee from a number of sources—the Professional Conduct Department staff, the Complainants’ Review Committee, or the Discipline Committee. The most common source of referral is from Professional Conduct staff after they have completed investigating a complaint.

When complaints are referred to the Practice Standards Committee, the Committee must decide whether the information indicates sufficient evidence of competency problems and, if so, what further action the Committee should take to assist the lawyer.

Once the Practice Standards Committee has identified a competency problem, the Committee has several options under the Act and Rules. For example, under Rule 3-17, the Committee has the power to make all inquiries and investigations that it considers desirable.

Sometimes the Committee orders an informal competency complaint review. For this review, the lawyer must meet and discuss the circumstances of the complaint with a lawyer or Bencher designated by the Practice Standards Committee, who must then report to the Committee.

When the Committee decides there is sufficient evidence of incompetence (see §2.02 for a discussion of the components of incompetence), the Committee orders a “practice review.” The primary purpose of the review is educational—to assist the lawyer to recognize and constructively address practice problems. The review is normally conducted by a Law Society staff lawyer and by a practising lawyer.

A practice review generally takes one day in the lawyer’s office. The lawyer is interviewed about office systems and practice. The lawyer’s files are randomly reviewed. Once the review is completed, a copy of the reviewers’ report, together with recommendations, goes to the lawyer for a response. The Committee then reviews the report and any response. The Committee may accept, reject or alter the recommendations of the reviewers. The Committee recommendations, and the reviewers’ report, form part of the lawyer’s personal record.

The remedial recommendations in practice review reports address specific problems in the practice. A Practice Standards Committee staff lawyer administers any remedial work the Committee recommends.

The Committee frequently recommends the member do one or more of the following:

(a) access support and resources to assist the member with their intellectual, emotional and physical capacity to carry out the practice of law (the Committee may require the completion of specific course work);
(b) maintain and utilize appropriate retainer letters;
(c) maintain a conflicts database containing sufficiently detailed entries, and search the database before opening any new file;

(d) complete a file-opening sheet for each new file, containing sufficient details, which include things like limitation dates and retainers funds received;

(c) maintain an electronic list of files, containing details such as the lawyer responsible and the location of stored files;

(d) create and use a task management and reminder system, for each file, on which bring-forward (BF) dates are set and carefully monitored;

(e) take detailed notes of communications on each file to ensure that there is a comprehensive record;

(f) close files systematically within six months of completing the work on any file, and use a file-closing checklist to keep track of outstanding documents, undertakings, trust monies, etc.; and

(g) arrange with another lawyer to cover your practice in case of an emergency, including preparing and signing a power of attorney for the successor lawyer to access your trust account.

In rare circumstances, the practice review reveals other difficulties, or the lawyer is unable or unwilling to respond to remedial recommendations. Under Rule 3-20(1), the Practice Standards Committee can impose conditions and limitations on a lawyer’s practice when the lawyer has refused or failed to respond to recommendations the Committee has made under Rule 3-19(2). Alternatively, these concerns may be referred to the Discipline Committee of the Law Society for sanctions pursuant to Rule 3-21 (see Chapter 3).

3. Ethics Committee

The Ethics Committee provides ethical guidance to lawyers through the interpretation of the BC Code. The Ethics Committee also identifies current professional responsibility issues and recommends changes to the BC Code to the Benchers. The Ethics Committee publishes opinions and guidelines on substantive matters of professional responsibility, and publishes special bulletins concerning matters of professional responsibility.

4. Practice Advisors

The practice advisors at the Law Society are available by phone or email to give advice to lawyers, articled students, and temporary articled students. All communications between the practice advisors and lawyers or articled students are strictly confidential, except in cases of trust fund shortages.

Practice advisors answer your questions and refer you to helpful resources. Their advice covers a variety of ethical and practice topics:

- the Law Society Rules and the BC Code;
- ethics advice (e.g. confidentiality, conflicts, undertakings and withdrawing from a file);
- practice advice (e.g. billing, client files and law-office management);
- managing client relationships and relationships with other lawyers;
- client identification and verification;
- frauds, scams, and anti-money laundering; and
- personal coping and stress management.

To contact a practice advisor, refer to the Law Society’s website for current contact information (www.lawsociety.bc.ca).

For requesting practice advice, the department offers the following suggestions (Benchers’ Bulletin 2010: No. 4 Winter):

Requesting Practice Advice? Use Practice Advisors Effectively

The Practice Advice Department fulfilled 6,122 requests for advice in 2009. It’s a busy little department. If you require advice from a practice advisor, please consider the following suggestions to help us help you:

1. Ask your question of one practice advisor only. If you have contacted more than one advisor, let the advisor know so that only one person is handling your request. If you telephone or email more than one person, it can actually take longer to receive a reply as the advisors have to sort out who will respond.

2. Ask your question at the beginning of your call. You can fill in background details as necessary.

3. Call us yourself. Too often lawyers ask an assistant or a student to call for help, and the caller does not understand the lawyer’s question or have sufficient information.

4. If a complaint has been made against you, it is too late to call a practice advisor for help. The appropriate time to call an advisor for help is before a complaint is made.

5. If you leave a voicemail message, provide the following information:

   - your full name, including the spelling of your surname;
• your phone number and local (saying it twice is helpful);
• the name of your law firm;
• the subject matter and your question; and
• whether the matter is time-sensitive.

Above all, please speak clearly and slowly. We cannot return your call if we do not understand who is calling and your telephone number. We want to hear from you and we’re here to help.

5. Counselling and Help

(a) The Law Society funds personal counselling and referral services through LifeWorks. Services are confidential and available at no cost to individual BC lawyers and articled students and their immediate families.

LifeWorks can help with life’s challenges—work stress, interpersonal conflict, career moves, parenting and childcare, managing money, caring for elders, or health issues.

For more information or assistance, contact LifeWorks 24/7 toll-free at 1.888.307.0590.

(b) The Lawyers Assistance Program (24-hour confidential line: 604.685.2171) is an independent peer-counselling program funded by the Law Society. The Program is outside of the disciplinary process. It supports lawyers and their immediate family members by providing resources and referral for financial and legal concerns, as well as professional counselling services in a wide range of areas:

(i) relationships, sexuality, family violence, and other family concerns;

(ii) alcohol and drug dependency;

(iii) life transitions, career and work-related concerns;

(iv) stress, anxiety, and anger management; and

(v) grief and bereavement, trauma response, and critical-incident stress debriefing.

6. Practice Support and Resources

The Law Society offers written resources and precedent material to lawyers and articled students on its website (www.lawsociety.bc.ca). These resources include the following:

• online educational programs, like the Practice Management Course and the Practice Refresh-er course (www.learnlsbc.ca);

• practice resources and checklists on ethics and practice issues;

• template letters;

• Practice Advisors’ Frequently Asked Questions; and

• the Practice Checklists Manual.

[§2.02] Duty to Be Competent

1. Components of Competence

The lawyer owes the client a duty to competently perform any legal services undertaken on the client’s behalf. Incompetence may involve a lack of substantive or procedural knowledge, lack of skill, inability to apply knowledge or skills, or an inability to deliver legal services in a way that is consistent with proper professional practice. In addition, lawyers must function in a practice setting that allows for the timely, organized, professional and cost-effective delivery of legal services to clients.

The Practice Standards Committee has adopted six components of competent practice. A competent lawyer will:

(1) have the intellectual, emotional and physical capacity to carry out the practice of law;

(2) demonstrate professional responsibility and ethics;

(3) set up and maintain office systems and file organization corresponding to the current or anticipated practice of the lawyer;

(4) communicate in a timely and appropriate manner with clients, counsel and others and document those communications in an appropriate manner;

(5) have an adequate knowledge of substantive and procedural law in the areas practiced, be able to relate the law to a client's affairs and determine when the problems exceed the lawyer’s ability; and

(6) develop and apply technical skills such as drafting, negotiation, advocacy, research and problem solving to appropriately carry out a client’s instructions.

The BC Code, section 3.1 sets out guidelines concerning the competence of lawyers and the quality of service to be provided by lawyers; some of these guidelines are discussed below.

2. Knowledge and Skill

Code rule 3.1-1 defines a competent lawyer as “a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each
3. Quality of Service

A lawyer must serve each client in a competent, conscientious, diligent and efficient manner, so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation: Code rule 3.1-2 and commentary [2]. Code rule 3.2-1, commentary [5] provides a list of relevant factors for measuring quality of service.

Lack of efficient law-office management prompts many complaints to the Law Society and insurance claims against lawyers. The main types of mistakes and complaints are reviewed in the Practice Material: Professionalism: Practice Management. When handling complaints caused by practice management errors, the Law Society normally distinguishes between an isolated slip and a more general problem. Several minor complaints about a lawyer might raise questions about the lawyer’s competence. The Law Society also deals seriously with the few practitioners who take chances by lowering standards of practice in order to minimize cost or effort and maximize monetary returns.

4. Cultural Competence

In our diverse society, part of a lawyer’s duty to competently serve the client’s interests is to appreciate the client’s cultural expectations and needs. The question is not whether improving cultural competence is necessary, but whether you can practice competently without it, according to the article “Working in a Diverse Society: The Need for Cultural Competency” in the Benchers’ Bulletin (2016: No. 4, Winter). The article says clearly that lawyers cannot achieve the levels of practice competence and client service that they are mandated to achieve without improving their cultural competence.

That article discusses what cultural competence is and why it is important:

- Cultural competence includes being self-aware of how one’s cultural background and privilege shapes one’s assumptions, and the limits of one’s ability to truly empathize with someone who is different.
- It also includes communicating effectively and interacting appropriately with people of different genders or different ethnic or socio-economic backgrounds.

The article quotes from Patricia Barkaskas, academic director of the Indigenous Legal Clinic in Vancouver:

Barkaskas explains that, when lawyers start to work with a client, their first inclination is to dive immediately into the legal issue, asking specific and detailed questions about the legal matter. But that line of questioning is not always effective or informative, particularly for clients who come from oral traditions. Their culture, history and knowledge is passed on through the telling of stories from generation to generation. Being asked question after question by a lawyer can feel like an interrogation or an assault.

Barkaskas explains that lawyers who lack the cultural competence to effectively communicate with clients may not get the full story in interviewing their clients, or may leap to solutions that do not serve their clients’ real interests:

Open-ended questions and discussions, on the other hand, help lawyers learn the necessary context and background, which then helps them find out what their clients desire in a legal outcome.
A client coming in to discuss a protection order might start out by saying they want their family back together. Barkaskas recommends asking for more information. “We might say, ‘Tell me more about that. How does that look?’”

“That client might tell you that they weren’t raised in a family together and how important it is for their family to stay together, that their partner is more than just a parent. They might tell you that their separation has ripple effects on the whole community.”

While the immediate and obvious answer may be a protection order, a culturally competent approach takes into account the client’s perspective. It will often take more work on the lawyer’s part to find a legal remedy that addresses the client’s needs holistically.

“For example, that might include explaining to the client that a temporary protection order is possible, which can outline specific terms that balance the client’s safety, and the safety of any children, against their instructions about wanting the family to remain intact.”

In 2015 the Truth and Reconciliation Commission released its calls to action, which included a call for increased cultural competency and for lawyers to receive appropriate cultural competency training. The Law Society struck a Truth and Reconciliation Advisory Committee in response.

In July 2018, the Benchers approved an action plan to guide the Law Society’s moral and ethical obligation to advance truth and reconciliation and its specific response to the Truth and Reconciliation Commission’s calls to action. The action plan includes commitments to the following:

- increasing the legal profession’s appreciation of Indigenous laws within the Canadian legal system; and
- cultural competence training for lawyers.

On December 6, 2019, the Benchers approved a new requirement for all full-time and part-time practising lawyers in BC to complete a course to address core aspects of Indigenous intercultural competence and Call to Action 27 of the Truth and Reconciliation Commission. The course will also include information and knowledge that prepares lawyers to participate in, and respond to, changes to provincial laws as contemplated by the recently enacted Declaration on the Rights of Indigenous Peoples Act. The six-hour online course will be available in modules and will be eligible for annual continuing professional development credit. Lawyers will have up to two years to complete all of the modules.

5. Health and Emotional Conditions

Competency may be adversely affected by factors such as stress, relationship issues, or physical or mental health issues, including addictions. These personal challenges may lead into other issues affecting competency. For example, a marriage breakdown or death in the family could cause severe emotional challenges, which might push a lawyer into unhealthy coping behaviours.

Lawyers who are overwhelmed by personal challenges or who suffer from untreated mental health problems might fail to promptly respond to telephone calls, or might even neglect their practice. It is no coincidence that, “Mental illness is disproportionately represented in disciplinary cases,” according to Megan Seto in “Killing Ourselves: Depression as an Institutional, Workplace and Professional Problem” (Western Journal of Legal Studies (2012): 2:2).

The Law Society has expressed its commitment to changing the way lawyers understand and respond to mental health and substance abuse. To that end, the Law Society formed a Mental Health Task Force in 2018. It has two key goals:

(1) reduce stigma of mental health issues, and
(2) review the Law Society’s discipline and admissions processes to consider how best to deal with mental health and substance use issues.

The Law Society’s publication Benchers’ Bulletin (2018: No. 4, Winter, pages 10–11) features an article on “Mental Health and Wellness Update: Law Society Takes Action to Reduce Stigma.” The article starts by asserting:

[M]ental health and substance use issues are serious and pervasive concerns within the legal profession. Both US and Canadian research has documented that those in the legal profession experience mental health and substance use issues at alarmingly high rates, likely due at least in part to a culture and to stressors unique to the legal profession.

Brook Greenberg, Bencher and Chair of the Law Society’s Mental Health Task Force, is quoted in Benchers’ Bulletin (p. 11) as saying that, “healthier lawyers have the potential to be better lawyers, and supporting wellness within the profession will improve lawyers’ practices, benefiting both practitioners and the public.”

In December 2018, the Mental Health Task Force made 13 recommendations in two categories:

(1) educational strategies that increase awareness and understanding of mental health issues primarily within the Law Society itself, and
(2) regulatory strategies that focus on how these issues can best be addressed by the Law Society.

For more information on the Mental Health Task Force and to read its initial recommendations, access the First Interim Report of the Mental Health Task Force: www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf.

In December 2019, the Benchers approved changes to the duty to report rule (Code rule 7.1-3) and its commentary, to remove potentially stigmatizing language and remove barriers for lawyers who may seek help for mental health issues.

6. Detecting Incompetence

In many areas of practice, it is easy to distinguish good from bad legal work. If a lawyer observes a pattern in another lawyer’s conduct or practice that raises a substantial question about that lawyer’s competency, the observing lawyer may have to consider bringing these concerns to that lawyer or that lawyer’s partners, if any. Alternatively, the lawyer may choose to discuss these concerns with a Bencher, or with a practice advisor or Practice Standards staff lawyer. As a last resort, there is the option of filing a complaint with the Law Society.

To some extent, the profession and the public depend on lawyers to identify incompetence because the public lacks the expertise.

Note that a lawyer must not threaten to report another lawyer’s past conduct to the Law Society (see BC Code, rule 3.2-5) or make a report rooted in malice or an ulterior motive: rule 7.1-3, commentary [1].

The BC Code, rule 7.8-1, commentary [1] distinguishes between the ethical and contractual obligations to report errors to one’s client and to the Lawyers Indemnity Fund, respectively (see Chapter 5).
Chapter 3

Discipline and Professional Conduct

§3.01 Introduction

This chapter provides information about the Law Society’s complaints investigation process and discipline proceedings initiated by its Discipline Committee. The Legal Profession Act, S.B.C. 1998, c. 9 (the “Act”) provides the Law Society’s statutory mandate and sets out its powers. The Law Society Rules specify policy and procedure in a number of areas, including discipline.

§3.02 The Law Society’s Role in Reviewing Conduct

1. The Law Society’s Statutory Mandate

This chapter details the role and function of the Discipline Committee, although other committees may consider matters of professional conduct from time to time. These other committees include the Practice Standards Committee, the Credentials Committee, the Ethics Committee, and the Complainants’ Review Committee. All of these committees serve the mandate of the Law Society as set out in s. 3 of the Act:

(3) It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

(d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

Thus, in investigating complaints and exercising its discipline function, the Law Society has a duty to protect the public and satisfy the public that, as a self-regulating professional body, it holds its members accountable for their actions. At the same time, the Law Society must protect lawyers from unfounded allegations, and resolve complaints fairly and as quickly as possible.

2. The Professional Conduct Department’s Approach to Complaints

The Professional Conduct Department of the Law Society consists of staff lawyers, investigators, paralegals and assistants. This team investigates and assesses complaints against lawyers and law firms in British Columbia (see §3.03).

Although complaints can be categorized or identified by a variety of features (for example, serious versus minor), each complaint is unique and must be looked at in light of “all the circumstances.” The lawyers and paralegals in the Professional Conduct Department make every effort to respond to every complaint effectively and efficiently.

In essence, the staff lawyers in the Professional Conduct Department aim to investigate and refer serious and provable instances of misconduct (about 10% of all complaints received) for disciplinary or remedial action within one year, and to resolve or close the remaining 90% of complaints as quickly as possible. A successful resolution might include a lawyer or law firm agreeing to take remedial steps:

(a) to apologize to an offended client, opposing party or lawyer;

(b) to fulfill an undertaking or other professional obligation;

(c) to pay an outstanding practice debt;

(d) to respond to a neglected communication; or

(e) to attend to a delayed or overdue task.

The Law Society considers outcomes to be positive where complainants are satisfied that their concerns have been heard and considered fairly, and lawyers gain insight into managing client expectations, improving communications, and avoiding unnecessary complaints in the future. Of course, bringing satisfaction to both sides is not always possible. Staff lawyers are skilled in dealing with conflict and will take hard positions with the lawyers or law firms involved, or the complainants, as circumstances dictate.

1 Staff lawyers of the Law Society of BC regularly review and revise this chapter. This chapter was last updated in December 2019.
3. Jurisdiction

The Law Society may inquire into the conduct or competence of a lawyer, law firm, articled student, or a visiting lawyer permitted to practise in British Columbia.

Disciplinary penalties may be imposed for conduct that amounts to professional misconduct, conduct unbecoming the profession (as defined in s. 1 of the Act), incompetent performance of duties, or contravention of the Act or a rule made under it. These penalties are detailed in s. 38(5) and include a reprimand, a fine not exceeding $50,000, conditions on the lawyer’s practice, suspension, or disbarment.

Articled students who contravene the Act or whose behaviour amounts to professional misconduct or conduct unbecoming the profession may be subject to penalties including a reprimand, a fine not exceeding $5,000, a lengthened articling period or the setting aside of their enrolment (s. 38(6)).

A law firm that contravenes the Act may be subject to penalties including a reprimand or fine not exceeding $50,000 (s. 38(6.1)).

Under the National Mobility Agreement, lawyers from reciprocating provinces generally are entitled to practise law in BC for 100 business days in each calendar year, provided they do not establish an economic nexus in the province (Rules 2-15 to 2-27). Rules 4-45 and 4-46 govern discipline of visiting lawyers and of BC lawyers practising out-of-province.

2. Lawyer-Initiated Complaints

A lawyer is required to report misconduct of other lawyers in several circumstances. Rule 7.1-3 of the BC Code states:

7.1-3 Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society:

(a) a shortage of trust monies;

(a.1) a breach of undertaking or trust condition that has not been consented to or waived;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer’s practice;

(d) [rescinded];

(e) conduct that raises a substantial question as to the honesty, trustworthiness, or competence of a lawyer; and

(f) any other situation in which a lawyer’s clients are likely to be materially prejudiced.

Rule 7.1-3 was recently amended (in December 2019) to remove potentially stigmatizing language. The commentary to this rule was also amended to remove barriers for lawyers who may seek help for mental health issues.

It is important to distinguish between a lawyer’s duty to report another lawyer’s misconduct under rule 7.1-3, and threatening to report past misconduct. Under Rule 3.2-5 of the BC Code, threatening to report another lawyer’s past illegal or unprofessional conduct is prohibited, to prevent lawyers from gaining advantage for themselves or their clients. A lawyer is also prohibited from making a report rooted in malice or an ulterior motive (rule 7.1-3, commentary [1]). There is nothing wrong, however, in forewarning another lawyer that it would be improper to act in a certain way and that the lawyer

judges, newspaper articles, and lawyers’ marketing activities.

In addition, matters are referred to the Professional Conduct Department for investigation from other departments at the Law Society. For example, the Trust Assurance Department, which is responsible for the Law Society’s compliance audit program, refers matters that raise professional conduct concerns. Some examples of such referred conduct are breaches of the cash transactions rule (Rule 3-59), misappropriation of funds, non-payment of trust administration fees, and serious accounting breaches.

[§3.03] Complaints Investigation

1. Making a Complaint

Under Rule 3-2 of the Law Society Rules, “[a]ny person may deliver a written complaint against a lawyer or law firm to the Executive Director.” Under Rule 3-4(1), the Executive Director must consider every complaint received. In addition, Rule 3-4(2) states that “[i]nformation received from any source that indicates that a lawyer’s conduct may constitute a discipline violation must be treated as a complaint under these rules.”

As provided in Rule 3-1, the Professional Conduct Department investigates complaints made about practising lawyers and former lawyers, articled students, visiting lawyers, practitioners of foreign law and law firms.

The Law Society receives complaints in a variety of ways including the Law Society website’s online form, mail, facsimile and email. Complaints come from a variety of sources including clients, opposing parties, third parties, lawyers (including self-reports), the Attorney General, court decisions,
will be reported to the Law Society if the misconduct occurs in the future.

When there are complaints or problems between two lawyers, before making a complaint to the Law Society, lawyers should consider whether it is appropriate to have a third party mediate (such as a local Bencher or a senior practitioner). Law Society staff can often assist lawyers in conflict with one another to view the problem objectively, or can recruit the assistance of a Bencher for mediation.

3. Number and Type of Complaints Received

In the last few years, the Law Society has received about 1,300 complaints each year. Despite the large number of complaints received, the majority have not revealed serious lawyer misconduct. In 2018, 83% of the complaints were closed without further action. This includes complaints that fell outside the Law Society’s jurisdiction (fee disputes, for example), complaints that were withdrawn, and complaints that were determined to be invalid or unprovable. About 26% of the complaints that were closed at the staff level involved some minor error or misconduct that was resolved without referral to the Discipline Committee or the Practice Standards Committee. The remaining 17% of complaints resulted in a referral to either the Practice Standards Committee or the Discipline Committee.

Complaints by non-clients—such as other lawyers, judges, opposing parties in litigation, creditors, regulatory agencies, witnesses, doctors, and other professionals—make up many of the complaints. A significant number of complaints received are about lawyers who have already been the subject of previous complaints.

There are common themes in complaints:

(a) inadequate or poor communication with clients, other lawyers, or the Law Society (this is the most frequent complaint made by clients against lawyers);
(b) delay in taking action on a file;
(c) breaches of professional responsibility, such as breach of an undertaking, rudeness, etc.;
(d) disputes over fees and accounts;
(e) conflicts of interest; and
(f) failure to pay practice debts.

Staff advise complainants that fee disputes are outside of the Law Society’s jurisdiction, encourage clients to discuss fee disputes with their lawyers, and inform them of fee reviews conducted by the Supreme Court registrar. Staff also inform complainants of the fee mediation program offered by the Law Society.

The fact that many complaints concern breaches of professional responsibility demonstrates the need for lawyers to review the rules of professional responsibility found in the BC Code on a regular basis, not just in law school and at PLTC.

Lawyers need to be aware of the red-flag areas (most of which are reviewed in Chapter 6), and to seek advice if there is a problem or potential problem. The Lawyers Assistance Program (“LAP”) provides confidential outreach, support, education and referrals to members of the legal community, including lawyers and their families, articled students, and support staff. In addition, advice may be available from senior practitioners or Law Society staff including the practice advisors, the Benchers and the CBA Practice Advisory Panels.

Family and civil litigation (excluding motor vehicle) consistently attract the greatest number of complaints. Real estate, wills and estates, criminal and administrative law represent a smaller, but significant, source of complaints. In 2018, complaints in these areas, expressed as a percentage of total complaints, were as follows:

(i) family law 28%
(ii) civil litigation (no motor vehicle) 13%
(iii) real estate 10%
(iv) wills and estates 7%
(v) criminal law 7%
(vi) administrative 5%

Regardless of the area of law, however, the majority of complaints had a communication or quality of service root to the complaint.

In the following article, Christopher E. Hinkson (now the Honourable Chief Justice Hinkson, as he was appointed Chief Justice of the Supreme Court of British Columbia in November 2013) provides very useful advice about what a lawyer should do after receiving a letter from the Law Society of British Columbia.
A Letter From the Law Society?

This time it's serious

A letter from the Law Society evokes a variety of reactions by members of our profession. Some of the material emanating from the Law Society is informational and thus welcomed by the recipients. Some of the correspondence requires the completion of forms or the provision of a cheque; an inevitable event that most of us accept with resignation, and some with grace.

Then there are the letters to advise of a complaint received by the Law Society or a concern that might lead to credentialling or disciplinary action on the part of the Law Society. Such letters raise annoyance, indignation, fear and even paralysis in their recipients but cannot and should not be ignored.

Given the volume of complaints reviewed each year by the Law Society, there exists a reasonable prospect that an early response to the Law Society may result in something far less unpleasant than a citation. Clearly the letter should be carefully reviewed to determine the nature and extent of the complaint. Often a response is requested within a specific timeframe, and while most of the staff lawyers are prepared to provide extensions of time for a response, it should not be universally assumed that they will do so.

Chapter 13(3) of the Professional Conduct Handbook obliges members of the Law Society of BC to reply promptly to any communication from the Law Society. In determining whether or how to do so, consideration should be given to consulting with a colleague or retaining counsel to assist in the response. There are any number of good reasons why you should not reply without objective advice, and little to be lost in seeking such advice. There are, in BC, a number of senior counsel who are experienced in dealing with the Law Society and who provide assistance and counsel to members of the Society for reduced, nominal, or even pro bono rates. Where your professional livelihood is at stake, one is hard pressed to justify economization as a reason for acting without counsel.

It has been my experience that where the Law Society lawyer handling a complaint is advised that counsel are consulted, they will be accommodating in terms of extensions of time and willing to cooperate in the disclosure of information. It is my suspicion that they would sooner discuss these sometimes delicate matters with counsel rather than with the member of the Law Society directly involved.

Once the Law Society has received the member's response to a complaint, it can pursue other avenues of investigation but ultimately must decide to either take no action on the complaint, to require the lawyer to appear before a Conduct Review Subcommittee, or recommend that a citation be issued against the member. In addition to choosing one of those options the member can also be referred to the Practice Standards Committee.

From the member's standpoint, an appearance before a Conduct Review Subcommittee is a far less unpleasant experience than becoming the subject of a citation and effective counsel work on the member's behalf may be successful in persuading the Discipline Committee to refer the matter to a Conduct Review Subcommittee. This does not foreclose the possibility of a citation, but with the assistance of experienced counsel, may see the matter ended before such a Subcommittee.

Some of our members attempt to deal directly with the complaint process up to the time when a citation is issued. It is difficult as counsel for such an individual to have a
citation withdrawn, but Rule 4-13 of the Law Society Rules does provide a mechanism for so doing.

If a citation is authorized it must give the member sufficient detail of the circumstances of the alleged misconduct. As soon as the citation is served the Executive Director of the Law Society may disclose the fact of the citation to the public and the subsequent withdrawal or rescission on the citation will be of little comfort to the member if the original issuance has attracted adverse publicity.

As soon as a citation is served a demand for disclosure of evidence pursuant to Rule 4-25 of the Law Society Rules should be made. This disclosure is, in my experience, as broad as that required of any professional discipline body and should always be the subject of a demand.

In the case of a citation issued against George Thomas McNabb by the Law Society of BC (date of hearing December 12, 1998), the Hearing Panel dealt with the issue of costs and found:

"...It is our opinion that the approach of the present-day Benchers of the Law Society is towards full costs recovered, within the limits of our rules.

The costs have been incurred: it is only a question of attributing the payment to one party or the other. In this case, either Mr. McNabb must pay them or they will be borne by the lawyers of British Columbia collectively. It is plain that Mr. McNabb is at fault in causing this proceeding while other lawyers in British Columbia are blameless.

Whether one agrees or disagrees with this statement of principle, it has clearly been articulated by a panel of Benchers and remains a reality for those facing the discipline process. In the result, it is best, where possible, to work to shorten the hearing process. It has been my experience that counsel instructed by the Law Society are, in almost all cases, amenable to the preparation of an agreed statement of facts and receptive to the conditional admission process set out in Rule 4-21 of the Law Society Rules or the consent to disciplinary action process set out in Rule 4-22 of the Law Society Rules.

Jerry Ziskrout toiled for years as counsel at the Law Society and once provided me with sage advice as to how to handle a member who was unlikely to successfully navigate through the hearing of a citation. His expressed view was that one should bear in mind the three C's: Candor, Cooperation and Contrition. I commend his advice to those who face citations.

Section 3 of the Legal Profession Act places as paramount in the objects and duties of the Law Society of British Columbia the protection of the public interest. The practice of law in this province remains a privilege as opposed to a right and, as such, demands of each of us conduct which is in keeping with our legal and ethical responsibilities. The adoption of an attitude of defiance, intransigence or procrastination when dealing with the Society is unlikely to engender a spirit of compromise where a member's conduct has fallen short. None of us can expect to be proficient in all areas of practice and would do well, in my view, to consult those who are considered to be proficient in Law Society matters, if called upon to answer to a complaint, however unjustified we might feel it is.

I think that many of the unpleasant experiences that the members feel they have had with the Law Society could have been avoided or rendered less unpleasant by reasoned and objective responses to complaints, or a less antagonistic approach to those investigating the complaints, or a less adversarial stance on many of the issues, in the event a citation must be faced. The objectivity of independent counsel should assist this process and, in all likelihood, will reduce your anxiety level and the distractions that will invade the other areas of your practice if you try to handle the matter alone.

This is probably advice that you have given your own clients in one form or another and which you would do well to consider, should you get that "letter from the Law Society."
4. Investigating Complaints

Law Society Rules 3-5 to 3-7 provide the Executive Director with discretion in investigating a complaint. In practice, the investigation is delegated to the staff of the Professional Conduct Department.

After a complaint is received, the Executive Director may authorize an investigation into the validity of the complaint by seeking further information and particulars (substantiation). Rule 3-5(3) provides that the Executive Director may decline to investigate, and the complainant and the lawyer are so advised, if the complaint:

- is outside the Law Society’s jurisdiction or should have been made to some other body, (for example, the Registrar, Legal Services Society, the Ombudsperson, Executive Director (Securities Commission), Judicial Council, etc.)
- is frivolous, vexatious or an abuse of process; or
- does not allege facts that, if proven, would constitute a discipline violation.

Most complaint investigations start by providing a copy or summary of the complaint to the lawyer about whom the complaint has been made.

Sometimes, however, investigations are conducted by telephone. Either way, the lawyer is informed of the complaint and asked to respond. Then the lawyer’s response is communicated to the complainant.

A lawyer must cooperate fully in an investigation (Rule 3-5(7) of the Law Society Rules and rule 7.1-1 of the BC Code). The Law Society can require a lawyer to produce files and records, attend an interview, provide written responses, and provide access to their business premises (Rule 3-5(8)). The lawyer must provide the information sought even if it is privileged or confidential (s. 88 of the Act, Rule 3-5(11)).

At the conclusion of the investigation, Professional Conduct staff assess the complaint to determine whether further action is warranted. If the evidence gathered in the investigation supports an allegation of misconduct or incompetency, the complaint will be referred to the Discipline Committee or the Practice Standards Committee to consider what further action should be taken. The Executive Director notifies the lawyer and complainant in writing of any action taken.

It is sometimes difficult for a lawyer who is the subject of a complaint to respond objectively. Even if the complaint involves a relatively minor matter, it is often a good idea to retain another lawyer to assist in addressing the complaint.

5. The Decision to Take No Further Action and the Complainant’s Right to Review

A decision to take no further action on a complaint is based on one of the following conclusions (Rule 3-8):

(a) the complaint is not valid, or its validity cannot be proven;
(b) the complaint does not disclose conduct serious enough to warrant further action; or
(c) the matter giving rise to the complaint has been resolved.

A complainant who is dissatisfied with the decision to take no further action has the right to request a review of that decision by the Complainants’ Review Committee (Rule 3-14). However, if the decision was made on the basis that the complaint was outside the Law Society’s jurisdiction, was frivolous, vexatious or an abuse of process, or does not allege facts that, if proven, would constitute a discipline violation, then there is no right to review by the Complainants’ Review Committee (Rule 3-5). Complainants may apply to the Complainants’ Review Committee for a review of the decision within 30 days, subject to the discretion of the chair to extend the time limit (Rule 3-14(2) and (3)).

The Complainants’ Review Committee is appointed by the President and must have at least one Appointed (lay) Bencher (Rule 3-13). In practice, an Appointed Bencher chairs the Complainants’ Review Committee. The Committee reviews the complete complaint file and must do one of the following:

(a) confirm the decision to take no further action;
(b) refer the complaint to the Practice Standards Committee or the Discipline Committee, with or without recommendations; or
(c) direct that further investigation be conducted.

The parties and the Executive Director are notified, in writing, of the decision of the Complainants’ Review Committee. No written report is issued. The Complainants’ Review Committee usually confirms the staff decision to close the file.

Complainants who are dissatisfied with the manner in which the Law Society handles their complaint can take their concerns to the Office of the Ombudsperson. Section 10(1) of the Ombudsperson Act provides:

The Ombudsperson, with respect to a matter of administration, on a complaint or on the Ombudsperson’s own initiative, may investigate
(a) a decision or recommendation made,
(b) an act done or omitted, or
(c) a procedure used

by an authority [including the Law Society] that aggrieves or may aggrieve a person.

[§3.04] The Discipline Committee Process

1. Structure of the Discipline Committee

The Discipline Committee consists of a chair and vice chair (both of whom must be Benchers) and other individuals appointed by the President of the Law Society under Law Society Rule 4-2(1). The Discipline Committee makes decisions on what action, if any, should be taken on the complaints it considers.

Under Rule 4-17(1), the Discipline Committee or the chair of the Committee may order a hearing into the conduct or competence of a lawyer by directing that the Executive Director issue a citation against the lawyer. Under Rule 4-39 and Rule 5-2, the President must then establish a hearing panel to adjudicate the matter. The hearing panel must be chaired by a lawyer and include at least one Bencher who is a lawyer.

2. Initial Consideration by the Discipline Committee

Parts 4 and 5 of the Law Society Rules contain provisions governing the Discipline Committee and disciplinary processes, including citation hearings, conduct reviews and conduct meetings. The Discipline Committee considers complaints referred by the staff, the Complainants’ Review Committee or any other committee. After consideration of the complaint, which may involve further enquiries and investigations, the Discipline Committee must do one of the following (Rule 4-4(1)):

- decide that no further action be taken on the complaint;
- authorize the chair or other Bencher member of the Discipline Committee to send a letter to the lawyer concerning the lawyer’s conduct (“Conduct Letter”);
- require the lawyer or law firm to attend a meeting with one or more Benchers or lawyers to discuss the lawyer’s conduct (“Conduct Meeting”);
- require the lawyer to appear before the Conduct Review Subcommittee; or
- direct that a citation be issued against the lawyer.

The Discipline Committee also has the power to order investigations into the books, records, and accounts of lawyers or former lawyers who appear to have committed discipline violations (Rule 4-55).

3. Conduct Letter and Conduct Meeting

When the Discipline Committee authorizes a Conduct Letter to be sent to the lawyer under Rule 4-4(1)(b) of the Law Society Rules, a copy of the letter or, if directed by the Discipline Committee, a summary of the letter, is provided to the complainant. The Conduct Letter does not form part of the lawyer’s professional conduct record and it is not admissible in the hearing of a citation (Rule 4-9(2)).

Under Rule 4-10, when the Discipline Committee orders a Conduct Meeting, the meeting must be held in private and neither the record of the order under Rule 4-4(1)(c) nor the record of the conduct meeting forms part of the lawyer’s professional conduct record. In addition, a Bencher or other lawyer who has participated in the Conduct Meeting is not permitted to testify in the hearing of a citation as to any statement made by the lawyer during the Conduct Meeting, unless the lawyer puts the matter in issue.

4. Conduct Review Subcommittee

Rules 4-11 to 4-16 of the Law Society Rules deal with conduct reviews. The conduct review process responds to complaints that, while troubling, do not warrant issuing a citation. The Conduct Review Subcommittee (the “Subcommittee”), appointed by the Discipline Committee or its chair, consists of one or more lawyers, at least one of whom is a Bencher (to act as chair). When a conduct review is ordered, the meeting is informal (although counsel may be present) and without court reporters or sworn evidence. The meeting is private, but the Subcommittee may permit the complainant to attend and state the complaint at the outset of the meeting, before being excused.

Following a conduct review, the Subcommittee prepares a written report of its findings, conclusions and recommendations. The lawyer has 30 days to dispute the report (Rule 4-13(1)). The Subcommittee may order a further meeting (which follows the procedure of the first meeting) and may amend its report as a result of that second meeting. The (amended) report is then presented to the Discipline Committee.

Upon reviewing the report, the Discipline Committee must do one or more of the following:

- decide to take no further action;
(b) refer the lawyer to the Practice Standards Committee;
(c) substitute another decision under Rule 4-4; or
(d) direct that a citation be issued against the lawyer (Rule 4-13(6)).

Pursuant to Rule 4-4(4), at any time before the Discipline Committee makes a decision under Rule 4-13(6), the Discipline Committee may rescind its decision requiring the lawyer to appear before the Subcommittee, and may substitute another decision under Rule 4-4(1).

If a citation is issued and a hearing is held, the conduct review report is not admissible at the hearing (Rule 4-16). Members of the Subcommittee cannot testify as to any statements made by the respondent during the conduct review, unless asked to by the respondent. In most cases, the Subcommittee resolves the matter and recommends to the Discipline Committee that no further action be taken.

5. Practice Standards Committee
The aim of the Practice Standards Committee is to assist lawyers to improve their knowledge or skills in carrying on the practice of law. The relevant provisions are found in Rules 3-15 through 3-25. The Practice Standards Committee also deals with complaints where a competency problem plays a role in conduct that could warrant disciplinary proceedings. In general, the Practice Standards Committee procedures are less formal than discipline proceedings.

If it appears the lawyer has a competency problem, the matter may be referred to the Practice Standards Committee either before or after a conduct review or the hearing of a citation.

6. The Citation
The Discipline Committee or the Chair of the Committee may order a hearing into the conduct or competence of a lawyer by directing the Executive Director to issue a citation against the lawyer (Rule 4-17(1)).

When a citation is issued, it must be served on the respondent within 45 days, unless the Discipline Committee or its chair gives other direction (Rule 4-19). Service is described in Rule 10-1. The citation must be sufficiently clear and specific to give the respondent notice of the alleged misconduct and reasonable information so as to identify the transaction in question (Rule 4-18).

Under Rule 4-20, once the respondent has been notified of the direction to issue a citation, the Executive Director may disclose the existence of the citation and its status to the public, and may disclose the outcome in due course.

The citation contains allegations of misconduct against the lawyer. The Law Society bears the onus of proving these allegations. If it cannot prove the allegations, then the citation is dismissed.

Rules 4-21 and 4-22 contain provisions related to the procedure for amending a citation, joining two or more citations in a hearing and severing allegations in a citation.

7. Interim Suspension/Conditions
Under Rule 4-23, when there has been a direction to issue a citation, any three (or more) Benchers may suspend the lawyer (pending the actual hearing of the citation), if they consider that lawyer’s continued practice to be dangerous or harmful to the public or to the lawyer’s clients. The suspension may be with or without notice to the lawyer. The Benchers may also impose conditions on the lawyer’s practice or suspend the enrolment of a cited articled student, pending the outcome of the hearing. Similar interim measures may be taken under Rule 3-10 before a direction is made to issue a citation, and the Law Society may publish limitations and conditions placed on a lawyer who is subject to such an interim order. Under Rule 3-11, a lawyer or articled student who is under investigation or has been cited may be required to submit to a medical examination concerning the ability of the lawyer to practise law or the articled student to complete articles.

A lawyer or student who is the subject of an order for interim measures may apply to have the order rescinded or varied. The procedure to be followed is set out in Rules 3-12 and 4-26. When an order has been made under Rule 4-23(2) with notice, the onus is on the lawyer to show cause why the order should be rescinded or varied. If the order was made without notice, the onus is on the Discipline Committee.

Separately, under Rule 3-6, a lawyer who is required to produce records in an investigation and fails to do so may be administratively suspended until they comply with the requirement.

8. Summary Hearing Process
Pursuant to Rule 4-33, the summary hearing process may be used to seek a citation and bring an aspect of a lawyer’s conduct before a hearing panel for quick disposition. This may occur before the lawyer’s conduct is fully investigated. A summary hearing may be suitable, for example, when a member has refused to respond to correspondence from the Law Society regarding a complaint investigation.
In these circumstances, the failure to respond to the Law Society is a discrete issue apart from the underlying complaint. A hearing panel can consider the conduct and then make an order that is appropriate in the circumstances, perhaps ordering an interim suspension or ordering the lawyer to respond within a specified timeframe, pursuant to Law Society Rule 3-6.

In addition to failures to respond to the Law Society, Rule 4-33 permits proceeding by way of a summary hearing when the citation alleges only a breach of a Rule, a breach of an undertaking given to the Law Society, or a breach of a hearing panel’s order.

[§3.05] Hearing Procedure

1. Consent Dispositions of Citations
   At least 14 days before the hearing of a citation commences, the lawyer may tender a conditional admission of a discipline violation to the Discipline Committee (Rule 4-29). If the Discipline Committee accepts the admission, those parts of the citation to which the conditional admission applies are resolved, the admission is recorded on the lawyer’s professional conduct record, and both the lawyer and the complainant are notified of the disposition.

   Under Rule 4-48, notice to the profession is circulated in various situations, including when the lawyer’s admission is accepted or when action is taken at the conclusion of a hearing.

   A lawyer might also rely on Rule 4-30 to make a conditional admission and consent to a specified disciplinary action at least 14 days before the scheduled hearing. The Discipline Committee will consider the matter and may reject or accept the admission and proposed action. If they accept the admission and proposed action, they will instruct Law Society counsel to recommend the proposed action to the hearing panel. If the hearing panel accepts the recommended action, the admission is recorded on the lawyer’s professional conduct record, the disciplinary action is imposed, and the decision as to publication is made. If the hearing panel rejects the proposed action, a new panel will hear the citation under Rule 4-31. Rejected admissions are not admissible against the respondent in the citation hearing.

2. Pre-Hearing Procedure
   Rules 4-32 to 4-38 provide procedural rules for setting hearing dates and for obtaining disclosure of the Law Society’s evidence or of the circumstances of misconduct alleged in the citation. A pre-hearing conference (Rule 4-38) may be held at any time before the commencement of the hearing, either at the request of Law Society counsel or the respondent, or by order of the President. The President sets the date, notifies the parties, and designates a Bencher to preside. The lawyer may be represented by counsel. Rule 4-38 was recently expanded to facilitate more effective case management. The conference may be used for many purposes: to simplify issues, to amend the citation, to obtain admissions, to obtain discovery of documents, to deal with privilege or confidentiality issues, to consider allowing all or part of the hearing to be conducted in written form, or to consider any other matter that may aid in the fair and expeditious disposition of the issue (Rule 4-38(8)). The presiding Bencher may make orders on application or on the Bencher’s own motion to aid in the fair and expeditious disposition of the citation, including orders setting hearing dates, establishing a hearing plan and a timeline for the completion of procedures, directing parties to provide witness lists and summaries of witness evidence, setting rules respecting expert witnesses, and allowing submissions in writing (Rule 4-38(10)).

   Rule 4-28 describes the procedure for a notice to admit. Law Society counsel or the respondent may ask the other party to admit the truth of specified facts or the authenticity of specified documents. A party who is served with a request and fails to respond in accordance with the Rule is deemed, for the purposes of the hearing only, to have admitted the truth of the fact described in the request or the authenticity of the document attached.

3. The Hearing
   The hearing procedures are set out in Rules 4-39 to 4-43 and 5-1 to 5-11. All proceedings before a hearing panel are recorded by a court reporter. A transcript may be prepared at the expense of anyone entitled to attend the hearing. The hearing is open to the public unless the hearing panel orders otherwise under Rule 5-8.

   The lawyer has a right to appear personally or with counsel. It is important for a lawyer to have counsel since any matter that proceeds to a hearing is a matter that the Discipline Committee has determined to be of a serious nature. The inquiry starts with opening statements by counsel, followed by Law Society evidence, followed by the lawyer’s evidence, if any, and ending with submissions as to facts. If the hearing panel makes an adverse determination, the disciplinary action phase follows.

   Evidence may be led by way of a written statement of agreed facts, oral testimony, affidavit evidence, evidence tendered in a form agreed to by Law Society counsel and the lawyer or the lawyer’s counsel, an admission or deemed admission made under Rule 4-28, or in any other manner the panel considers appropriate. Under Rule 5-6(4), every witness
who testifies must take an oath or make a solemn affirmation and is subject to cross-examination. Under s. 41(2)(a) of the Legal Profession Act, the lawyer or a representative of the law firm is considered a compellable witness.

After hearing evidence, the panel will make findings of facts and rule on each allegation (Rule 4-43). If an adverse determination is made against the lawyer, the panel will then hear submissions on disciplinary action. The parties are entitled to make submissions at each stage before the panel advances to considering the next stage (Rule 4-44).

The panel, by majority decision, must impose one or more of the sanctions set out in s. 38(5) of the Act. The sanctions include reprimand, fine, conditions or limitations on the lawyer’s practice, suspension or disbarment. The respondent may be ordered to pay costs, which are calculated pursuant to Rule 5-11 and the Tariff set out in Schedule 4 of the Law Society Rules.

Rules 4-47 to 4-48 outline the extent to which the action taken by the hearing panel is published. Public notice is required of an interim suspension, suspension or disbarment. Decision summaries are published and circulated to the profession, although the Executive Director retains some discretion with respect to conditional admissions or interim suspension and practice conditions.

Rule 4-49 permits a hearing panel to withhold the identity of the lawyer if the panel imposed a sanction that does not include a suspension or disbarment, and publication could reasonably be expected to identify an individual other than the respondent and that individual would suffer serious prejudice as a result. The same rule also directs that if all of the allegations in the citation are dismissed, the publication must not identify the respondent lawyer, unless the respondent consents in writing.

§3.06 Appeal From the Hearing Panel Decision

The lawyer may apply, in writing, for a review on the record by a review board (s. 47(1) of the Legal Profession Act). The lawyer must apply within 30 days after the action that is being appealed from was taken. The lawyer may apply for an extension of time to initiate a review, if necessary (Rule 5-19.1). After hearing the lawyer and the counsel for the Law Society, the review board may confirm the decision of the hearing panel or substitute a decision that the panel could have made.

Within 30 days after a decision of a hearing panel, the Discipline Committee may refer a decision of a hearing panel under s. 38(4), (5), (6), (6.1), or (7) for a review on the record by a review board, under s. 47(3). The review board may confirm the decision or substitute a decision that the panel could have made.


Under s. 47(4), a review board has discretion to hear evidence that is not part of the record. In exercising its discretion, the review board will consider the tests for admissibility in the civil and criminal context: Law Society of BC v. Goldberg, 2007 LSBC 55.

There are also other avenues of appeal. Under s. 48 there exists a statutory right of appeal to the Court of Appeal of any decision, determination or order of a panel or review board. There may also be a remedy under the Judicial Review Procedure Act.

In Pierce v. Law Society of British Columbia, 1993 CanLII 765 (BC SC), the petitioner challenged the validity of three citations issued against him by the Law Society. The petitioner cited three grounds for the challenge:

(a) section 45(1) [now s. 38(4)] of the Legal Profession Act is too vague or overly broad and, therefore, contrary to s. 7 of the Charter of Rights and Freedoms;

(b) no reasonable and probable grounds showed that discipline violations had occurred in the case of each of the citations; and

(c) the Discipline Committee had not completed a conduct review procedure that it had initiated before one of the citations had been issued.

On the question of vague language in the case of professional discipline where criminal consequences such as imprisonment are impossible, Clancy J. was alert to the concern about a “standards sweep”:

Serious consequences flow from an adverse finding of a panel. Vagueness of language to a degree that permits a “standards sweep” is contrary to principles of fundamental justice, whether or not the statute deprives a lawyer of his physical liberty. Where, as here, the right allegedly infringed is the right to practice a profession, fundamental justice militates against a...

lack of standards against which a member of that profession may measure his conduct.

However, when considering the provision in question, the judge found that “professional misconduct” and “conduct unbecoming a member” of the Law Society, in that context, were not vague or overly broad so as to offend the Charter. “Professional misconduct” was said to be sufficiently well settled so that “no member should be in doubt as to the type of conduct proscribed.” “Conduct unbecoming” is defined in s. 1 of the Legal Profession Act in terms that, in the context of the provisions of the Act governing citations, are restricted to the conduct and competence of lawyers. As a result, the terms were held not to be pervasively vague and the section was found to be constitutionally valid.

The Court also rejected the second ground for review of the citations. The Court found that a prima facie case need not be established before a citation could be issued:

Assuming he does not abuse or exceed his authority and acts in good faith, it is sufficient if the chairman has reasonable grounds to believe the citation should issue.

In any case, the decision to authorize a citation is not reviewable under the Judicial Review Procedure Act since it is not a “statutory power of decision” as defined in s. 1 of that Act.

Finally, the court held that the Law Society did not have to complete the conduct review procedure before initiating a citation, particularly since the conduct review was abandoned after the petitioner had objected to it.


Under s. 32(1), the Benchers may make rules establishing standards of financial responsibility relating to the integrity and financial viability of a lawyer’s practice or the practice of a law firm. If these standards are not met, the Discipline Committee may suspend the lawyer or impose conditions on the practice of the lawyer under Rule 3-52(4), providing the Discipline Committee gives the lawyer notice and reasons and a reasonable opportunity to make representations respecting those reasons. A lawyer who becomes the subject of bankruptcy proceedings, in circumstances where the lawyer’s willful neglect of creditors, financial irresponsibility or personal extravagance contributed to the bankruptcy, will be deemed to have conducted himself or herself in a manner unbecoming a member (Rule 3-51(2)).

Rule 3-49 sets out the minimum standards of financial responsibility for lawyers. Instances of failing to meet the minimum standards include failing to satisfy an entered monetary judgment within seven days, becoming an “insolvent lawyer” (defined in Rule 3-47), failing to produce records on a compliance audit, failing to deliver a trust report, failing to report and pay the trust administration fee, and failing to provide electronic accounting records when required.

All lawyers are required under Rule 3-50 to notify the Executive Director of the Law Society in the event of the lawyer’s failure to satisfy a “monetary judgment”—defined in Rule 3-47 to include an order nisi of foreclosure; any certificate, final order or other requirement under a statute that requires payment of money to any party; a garnishment order under the Income Tax Act (Canada) if the lawyer is a tax debtor; and a judgement of any kind against a multi-disciplinary practice in which the lawyer has an ownership interest.

Regardless of whether an appeal respecting the judgment has been commenced, notification to the Executive Director must include the following:

(a) the circumstances of the judgment, including whether the creditor is a client or a former client; and

(b) the lawyer’s proposal for satisfying the judgment.

Lawyers who become insolvent must also notify the Executive Director and provide further information, as set out in Rule 3-51(1).

A lawyer or student becomes insolvent under the Rules if certain specified proceedings are commenced under the Bankruptcy and Insolvency Act. The proceedings consist of an application for a bankruptcy order under s. 43; an assignment of property for the benefit of creditors under s. 49; a proposal under s. 50 or s. 66.12; a notice of intention to make a proposal under s. 50.4; and an application for a consolidation order under s. 219.

An insolvent lawyer is prohibited from operating a trust account, except with the permission of the Executive Director and with a second signatory who is a member of the Law Society (Rule 3-51(3)).

Rule 3-51(4) requires undischarged bankrupts to resign corporate directorships, in accordance with s. 124 of the Business Corporations Act. This applies to law corporations as well as other corporations.

Rule 3-59 (the cash transactions rule) prohibits lawyers from accepting an aggregate amount of more than $7,500 in cash in respect of any one client matter, subject to limited exceptions. The $7,500 limit does not apply when a lawyer receives cash to pay for professional fees, disbursements, or expenses in connection with the lawyer’s provision of legal services (Rule 3-59(4)). The limit also does not apply in the circumstances described in Rule 3-59(2), for instance, when the cash is to pay a fine, penalty, or bail. See Practice Material: Professionalism: Practice Management, Chapter 6.

Rule 7.1-2 of the BC Code provides that a lawyer has a professional duty, quite apart from any legal liability, to meet financial obligations incurred, assumed or under-
taken in the course of practice. Such obligations might include agency accounts or obligations to other lawyers, amounts ordered payable by registrars or public officials, or fees payable to witnesses, sheriffs, court reporters or experts.

The Law Society regularly receives complaints from physicians because lawyers have not paid them for medical-legal reports that they have prepared at the lawyer’s request. In the absence of an agreement that specifies otherwise, the lawyer is liable to pay the fees of such expert witnesses.

The Executive Director may refer any matter concerning a lawyer’s failure to meet the minimum standards of financial responsibility to the Discipline Committee, which may make or authorize further investigations, and which may suspend the lawyer or impose conditions and limitations on his or her practice (Rule 3-52).

[§3.08] Convictions

Subject to certain exceptions, Rule 3-97 requires lawyers and articled students who have been charged with an offence under federal or provincial law, or an equivalent offence in another jurisdiction, to self-report to the Executive Director and provide “written notice of the charge.” No notification is required if the lawyer or articled student is issued or served with a ticket as defined in the Contraventions Act (Canada) or a violation ticket as defined in the Offence Act.

Rule 4-52 provides that, on proof that a lawyer or former lawyer has been convicted of an offence that was proceeded with by way of indictment, or an equivalent offence in another jurisdiction, the Benchers may, without following the procedures provided for in the Act or the Rules, summarily suspend or disbar the lawyer or former lawyer. Rule 4-53 requires that the lawyer be notified and given the opportunity to make written submissions before the Benchers make a final decision, except in extraordinary circumstances.

Section 15(3) of the Legal Profession Act prohibits lawyers who are suspended or disbarred, or who otherwise lose their Law Society membership as a result of disciplinary proceedings, from practising law as defined in s. 1 of the Act. This prohibition applies whether or not they are paid or expect payment for their services.

[§3.09] Appointment of a Custodian

Under s. 50 of the Act, the Law Society may apply to the BC Supreme Court for appointment of a custodian of a lawyer’s property and to manage or, where appropriate, wind up the legal business of the lawyer. The Law Society applies to intervene in a lawyer’s practice only when it is judged necessary in the public interest. Grounds for appointment of a custodian include where a lawyer consents to the appointment of a custodian, abandons the practice of law or dies, is unable to practise by reason of physical or mental incapacity, or is disbarred or suspended from practice in British Columbia or any other jurisdiction.

Before applying for a custodianship order, the Custodianship Department will consider whether measures short of a custodianship, such as a locum arrangement, are available and appropriate.

[§3.10] Adverse Determinations Under the Legal Profession Act

Decisions of hearing panels since September 2003 are available on the Law Society’s website (www.law.society.bc.ca) and on CanLII. Older reports of Law Society discipline cases can be located in the LSDD database of Quicklaw.

The following are the adverse determinations available to the Law Society hearing panel pursuant to s. 38(4)(b) of the Act:

(i) professional misconduct;
(ii) conduct unbecoming the profession;
(iii) a breach of the Legal Profession Act or the Law Society Rules;
(iv) incompetent performance of duties undertaken in the capacity of a lawyer; or
(v) if the respondent is not a member of the Law Society, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming the profession, or a breach of the Act or the rules.

1. Professional Misconduct

Professional misconduct is not a defined term in the Legal Profession Act, the Law Society Rules or the BC Code, but it has been considered by hearing panels in several cases and has been defined as a “marked departure from that conduct the Law Society expects of its members” (Law Society of BC v. Martin, 2005 LSBC 16 and Re: Lawyer 12, 2011 LSBC 35).

The Supreme Court of Canada approved the approach taken by the Law Society of Upper Canada (LSUC) to assessing professional misconduct in Groia v. LSUC, 2018 SCC 27. The SCC said that the LSUC’s determination of professional misconduct was entitled to deference. The LSUC applied a contextual approach to assessing when resolute advocacy crosses the line into professional misconduct. Factors include what the lawyer says and the manner and frequency in which it is said. The LSUC decided that Groia had misconducted himself. The SCC allowed the appeal, since the LSUC had found that his allegations and behaviour had been rooted in honest mistakes.
Some examples of the types of conduct that have qualified as professional misconduct are summarized below.

(a) Misappropriation of Client Trust Funds

In Law Society of BC v. Ali, 2007 LSBC 18 and 2007 LSBC 57, a lawyer was cited for misappropriation for a number of transactions in which she transferred trust money to her personal account, without explanation and without rendering bills to the clients. The panel considered the mental element for misappropriation. Deviating from Ontario case law, the panel held that intention to steal is not required for a finding of misappropriation. It held that the lawyer’s conduct, “whether deliberate or a matter of incompetence or negligence, [was] so gross as to prove a sufficient mental element of wrongdoing.” Despite having no prior conduct record, the member was disbarred.

In Law Society of BC v. Blinkhorn, 2009 LSBC 24 and 2010 LSBC 8, a lawyer was disbarred for misappropriating trust funds in seven separate client matters. The panel emphasized the seriousness of misappropriation, stating that “the use in the citation of decorous language such as ‘misappropriated’ and ‘misled,’ rather than the more plain-speaking ‘stole’ and ‘lied,’ cannot obscure the fact that stealing and lying is exactly what he did, repetitively, for an extended period of time.” The panel confirmed that the appropriate sanction for misappropriation will always be disbarment unless the member can point to extraordinary mitigating circumstances that satisfy the panel that disbarment is not necessary to protect the public interest and preserve the reputation of the legal profession.

In Law Society of BC v. Gellert, 2005 LSBC 15, a lawyer’s mitigating circumstances were sufficient to avoid disbarment. The panel held that the misconduct stemmed from untreated depression, and that there was a real possibility of rehabilitation. The lawyer was suspended for 18 months and required to undergo a psychological evaluation prior to returning to practice.

In Law Society of BC v. Tak, 2014 LSBC 57, a lawyer was disbarred for misappropriating trust funds from eight clients. “Misappropriation of client trust funds is perhaps the most egregious misconduct a lawyer can commit,” the panel said. “Wrongly taking clients’ money is the plainest form of betrayal of a client’s trust.”

In Law Society of BC v. Sas, 2015 LSBC 19 and 2016 BCCA 341, a lawyer was suspended for billing improper disbursements to clients, and failing to deliver the bills to clients, for the purposes of cleaning up or “zeroing out” residual trust balances. The panel concluded that some of the misconduct amounted to misappropriation, based on wilful blindness.

(b) Fraudulent Activity

In Law Society of BC v. McCandless, 2010 LSBC 9, a lawyer continued to act for a company investing pooled funds into a scheme, after he became aware that the BC Securities Commission had alleged that the scheme was fraudulent. The panel held that the lawyer did not have to know that the scheme was fraudulent; it was enough that he was alerted to the possibility of a fraud. He had a professional obligation to advise his clients of the possible fraud. The situation was exacerbated by the fact that the lawyer was making dividend payments to the client company’s shareholders using his own company’s money when the scheme’s assets were frozen, giving them the mistaken impression that their investment was secure. When considering sanction, the panel considered the gravity of the misconduct and that it put the public and reputation of the profession in jeopardy, as well as the lawyer’s professional conduct history. He was disbarred.

In Law Society of BC v. Rai, 2011 LSBC 2; and Law Society of BC v. Nielsen, 2009 LSBC 8, lawyers were suspended for their role in mortgage frauds. Neither of them were knowing participants; rather, they allowed themselves to be duped by fraudsters.

In Law Society of BC v. Bauder, 2012 LSBC 13 and 2013 LSBC 7, a lawyer was sanctioned for fraudulent conduct in his personal life. The lawyer attempted to fraudulently obtain mortgage financing for his home by falsifying documents and misrepresenting both the purchase price and the down payment. While both the Law Society and the member submitted that the conduct constituted conduct unbecoming, the panel held that it was professional misconduct. It held that by drafting false documents and using his position as a lawyer to have the vendor initial them, the lawyer’s conduct fell within his professional sphere. He was suspended for four months.

(c) Failure to Respond

(i) To the Law Society

In Law Society of BC v. Chambers, [1992] L.S.D.D. No. 19, a lawyer failed to respond promptly to Law Society correspondence in relation to two different complaints, and in one instance he failed, over several months,
to return telephone calls to a client and to take steps in the client’s custody application. The lawyer made an admission that the delay on his client’s custody application and his failure to respond promptly to Law Society correspondence constituted professional misconduct. Among the measures ordered by the Discipline Hearing Committee were the following: a fine of $1,500; costs of two hearings; a condition that he complete a program of psychiatric counseling for procrastination at his own expense; and another condition that he submit to a Practice Review and any remedial program recommended by the Practice Standards Committee.

In Law Society of BC v. Hall, 2003 LSBC 34 and 2004 LSBC 1, the lawyer failed to provide a substantive response to the Law Society respecting a complaint against him, despite repeated requests from the Society. The hearing panel found that the lawyer’s conduct constituted professional misconduct. In the circumstances and taking into consideration a previous finding against the lawyer for failing to respond to Law Society communications (see Law Society of BC v. Hall, 2003 LSBC 11), the hearing panel ordered that he be suspended for one month, provide a response, provide his undertaking to respond to all correspondence from the Law Society’s Professional Conduct Department within 14 days and pay costs of the discipline proceedings.

This particular case emphasizes two important aspects:

1. the consequences of failing to respond to communications from the Law Society, and

2. the effect of an earlier finding of professional misconduct for similar conduct.

The lawyer involved here was suspended for one week for the first citation involving failures to respond to the Law Society, and on a subsequent citation he was suspended for one month. Therefore, the lawyer’s professional conduct record (as defined in s. 1 of the Law Society Rules) was an aggravating circumstance when determining the appropriate sanction.

In Law Society of BC v. Tak, 2009 LSBC 25, a citation was authorized against a lawyer in May of 2009 for his failure to respond to communications from the Law Society’s Professional Conduct Department dated March 19, 2009. A summary hearing was held in July of 2009. The lawyer failed to comply with Chapter 13, Rule 3 of the Professional Conduct Handbook (now rule 7.1-1 of the BC Code) which requires lawyers to reply promptly to any communication from the Law Society. In finding that the lawyer’s conduct amounted to professional misconduct, the hearing panel noted that a lawyer’s failure to respond impairs the Law Society’s ability to govern its members effectively. As such, failing to respond is a grave matter. The hearing panel also noted that “persistent, intransigent failure to respond to the Law Society communications brings the legal profession into disrepute.” The lawyer was ordered to pay a fine of $2,000 and costs of a further $2,000 within four month of the date of the hearing; to provide a substantive response to the letter from the Law Society within 21 days of the hearing; and to provide a substantive response to any further communications with the Law Society arising out of the March 19, 2009 letter within 21 days of receiving them.

On two further occasions, this same lawyer was cited for failing to respond to the Law Society. He was under a 45-day suspension for failing to respond while many of the events were unfolding that gave rise to the third citation for failing to respond. Since the pattern of misconduct persisted after the 45-day suspension for previous failures to respond, a substantially longer suspension of four months was ordered (Law Society of BC v. Tak, 2011 LSBC 1 and 2011 LSBC 5).


(ii) To a Non-Lawyer

In Law Society of BC v. Smith, 2005 LSBC 27, in the course of representing a client in a personal injury action, the lawyer failed to respond to communications from a non-lawyer at an insurance company between April of 2001 and November of 2002. The insurance company was asserting a subrogated claim in the matter and was seeking information from the lawyer about the client’s personal injury case. The hearing panel held that the lawyer’s conduct amounted to professional misconduct.
The panel emphasized that the “duty for all members to respond promptly is a duty that is owed not only to fellow members and to the Law Society but also to lay persons with whom the member may be dealing in the course of acting for a client.”

In Law Society of BC v. Niemela, 2013 LSBC 15, a lawyer failed to respond to opposing counsel in a builders’ lien action for a 13-month period. The matter was subsequently resolved and the lawyer apologized to opposing counsel. The panel considered previous findings of professional misconduct against the lawyer for failure to respond to opposing counsel and to the Law Society, and noted that two psychological reports indicated that the lawyer was resistant to change. The panel ordered a $15,000 fine and $6,424 in costs, as well as making an order that he enter into a practice supervision arrangement. The panel expressed concern that it may be wrong in its decision not to suspend the lawyer, but noted that if he is cited again for similar misconduct, a future hearing panel should consider a lengthy suspension.

(d) Misleading Conduct

(i) Misrepresentations to a Court

In Law Society of BC v. Samuels, 1999 LSBC 36, while defending two youths on criminal charges, the lawyer implied to the court that he had recently contacted the mothers of his clients when, in fact, he had not. The lawyer later wrote to apologize for his inaccurate statement to the judge who had presided in the matter, and the judge accepted his apology. The lawyer admitted to the Discipline Committee and to a discipline hearing panel that his conduct in misleading the court constituted professional misconduct. The panel accepted the lawyer’s admission and proposed disciplinary action and accordingly ordered that he be suspended for 90 days and pay $1,000 costs.

In Law Society of BC v. Ahuja, 2017 LSBC 26, a lawyer had slept through his alarm on the morning of a flight to a trial in Kelowna, then made false or misleading representations to his client and to the court that he had missed his flight due to overbooking. A day after the incident, he admitted his mistake to his firm’s partners. He also sent letters of apology to the court and to the client, and self-reported the matter to the Law Society. He was suspended for one month and ordered to pay $3,500 in costs.

(ii) Misrepresentations to Clients or the Law Society

In Law Society of BC v. Strandberg, 2001 LSBC 26, a lawyer failed to commence a Small Claims Court action in a timely way. He later advised the client and reported to the Law Society that he had commenced an action. He also fabricated documents in support of his assertion. The hearing panel found, and the lawyer admitted, that his conduct in misleading his client and the Law Society and in failing to serve his client in a diligent manner constituted professional misconduct. The panel noted that the lawyer’s misconduct was serious and worthy of significant sanction, and grappled with whether the misleading behaviour was more egregious than the fabrication of documents and ultimately commented at para. 6:

…the untruthfulness to the client stings most because it has the greatest effect upon the reputation of our profession and it affects, in essence, an ability to deal with clients and to have the trust which is necessary and absolute requisite of our profession.

However, the panel also noted that character was an important factor in determining sanction. In this instance the panel was influenced by testimonial letters from lawyers and the public to the effect that the lawyer’s misconduct was uncharacteristic, and that he ordinarily acted with integrity and honesty and served his small community well. He was suspended for one month, ordered to pay a $15,000 fine and pay $2,000 towards the costs of the proceedings.

In Law Society of BC v. Martin, 2003 LSBC 16, a lawyer lied to a client by telling her that a property in which she was claiming an interest had been sold, when it had not, and by telling her that he would receive the sale proceeds in trust, when he knew this was untrue. On the strength of this representation, the client entered into an agreement to purchase a strata property. On three occasions the member provided the client and her notary with trust cheques unsupported by deposits. He gave assurances to the client and the notary that funds
would be available to complete the strata purchase, knowing that these assurances were false. As a result of his assurances, the client’s pending property purchase was jeopardized and was only salvaged with assistance from her family. The hearing panel found that the member’s conduct constituted professional misconduct. The panel reviewed various factors affecting sanction, including the serious nature of the misconduct, the harm to the client, his previous discipline for similar conduct and his addiction to drugs (he had since sought treatment and abstained from both alcohol and drugs since September 2002). The panel concluded that the public should not continue at risk while the member dealt with his addictions, but was not convinced that disbarment was necessary for public protection. The panel ordered that the member be suspended from practice for 18 months, effective September 5, 2003, and pay costs. Before resuming practice, he will be required to satisfy a board of examiners that his competency to practise is not adversely affected by a dependence on alcohol or drugs and, if he is permitted to resume practice, he may do so only as a partner, employee or associate.

In Law Society of BC v. Smiley, 2006 LSBC 31, a lawyer was retained by a client to file a Canada Revenue Agency Form T-2062 for the client to report income of a non-resident for tax purposes after the sale of property. The lawyer misled his client by advising him he had filed tax forms on the client’s behalf with Revenue Canada when he had not done so, and further misled the same client by advising him that the further delay in filing the tax forms was because his client failed to provide sufficient documents, when he knew that was not true. The client found out that the form had not been filed six months after the sale of the property when he contacted the Canada Revenue Agency directly. The lawyer was suspended for one month and required to pay costs.

In Law Society of BC v. Liggett, 2012 LSBC 7, a lawyer misrepresented to the Law Society his availability to attend his disciplinary hearing. He maintained that he would be in trial for two days, when he knew that one day had been cancelled. His conduct was held to be reckless, rather than deliberate. The panel imposed a one-month suspension to impress upon the public and the profession the seriousness of lawyers’ obligations to their governing body.

In Law Society of BC v. Simons, 2012 LSBC 23, a lawyer failed to disclose to his client all relevant information regarding her case; namely, that he had not been advancing it according to her instructions and that the defendants were pursuing a dismissal for want of prosecution. The panel held that members of an independent bar must be forthright and honest with clients, members of the public, and other members of the profession. The panel imposed a one-month suspension.

(e) Breach of Undertaking

In Law Society of BC v. Kruse, 2001 LSBC 32 and 2002 LSBC 15, while representing the vendor in a real estate transaction, a lawyer gave his undertaking to pay all outstanding property tax arrears and penalties and all utility charges outstanding” from the sale proceeds. Following the conveyance, the lawyer advised the purchaser’s lawyer that he had completed his undertakings. It was the vendor, however, not the lawyer, who had sent a cheque for outstanding taxes to the municipality. The vendor’s cheque was returned for insufficient funds and neither the purchaser nor the purchaser’s lawyer knew that the taxes remained outstanding. The following year, the purchaser received a notice for the tax arrears and interest, which she had to borrow money to pay. The purchaser’s lawyer contacted the vendor’s lawyer about this problem. After the purchaser’s lawyer made a complaint, the Law Society sought an explanation from the vendor’s lawyer, but he refused to reply substantively to those communications. The discipline hearing panel found that his breach of undertaking to pay outstanding property taxes and arrears and his failure to reply to the Law Society constituted professional misconduct. The panel noted that the lawyer had chosen almost completely to ignore the accusations against him, which was unworthy of a professional in whom the public should be able to place trust. Noting this was a particularly egregious instance of misconduct, the panel ordered the lawyer to pay a $12,000 fine (with respect to his breach of undertaking), a $3,000 fine (with respect to his failure to respond) and $6,640.90 in costs.

In Law Society of BC v. Heringa, 2003 LSBC 10, while representing two clients in the mortgaging of their property in 1997, the lawyer breached his undertaking to the solicitor for the mortgage lender by failing to discharge an
existing first mortgage from title. The hearing panel found that the lawyer’s conduct constituted professional misconduct. The panel observed that a reliance on undertakings is fundamental to the practice of law and that serious and diligent attention by lawyers to fulfilling undertakings is essential for maintaining public trust in the profession. The panel ordered that the member arrange to discharge the mortgage before July 15, 2003, be suspended for one month beginning August 1, 2003, be referred to the Practice Standards Committee and pay costs of the discipline proceedings.

Pursuant to s. 48 of the Legal Profession Act the lawyer appealed the decision of the hearing panel to the Court of Appeal (2004 BCCA 97). The Court of Appeal rejected the appeal, referring as follows to the “heart of the panel’s decision”:

Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.

The trust and confidence vested in lawyer’s undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

In Law Society of BC v. Hammond, 2004 BCCA 560, the hearing panel found the lawyer had breached undertakings in a real estate transaction but found that the undertakings were poorly drafted and did not specifically refer to the amounts in dispute as they normally would, such that these amounts had to be implied into the undertaking. The panel found it was appropriate in the circumstances to imply a term to the undertaking and commented generally about the importance of undertakings to the profession, by saying, at para. 55:

These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.

(f) Conflict of Interest

In Law Society of BC v. Spears, 2017 LSBC 29, a lawyer admitted to professional misconduct for causing a company owned or controlled by him to borrow $69,000 from his clients. The Law Society permitted him to resign in the face of discipline and agree not to apply for reinstatement for a period of seven years. He was ordered to pay $26,539.17 in costs.

In Law Society of BC v. Jenab, 2006 LSBC 30, the lawyer was retained to do legal work on behalf of companies owned by a husband and wife. The relationship evolved over time such that the lawyer was looking after the business interests of the couples’ companies in a more general way. The lawyer acted for both the husband and wife as well as a number of companies controlled by one or both of them. While acting for the companies and both the husband and the wife, the lawyer engaged in an intimate relationship with the husband. While involved in the relationship with the husband, the lawyer assisted the wife in securing a mortgage against a property owned by a company controlled by the wife, a property in which the husband’s two companies were the principal tenants. The lawyer did not explain to the wife the significance of the mortgage or advise her to get independent legal advice or counsel. The lawyer took instructions from the husband regarding the mortgage and while the lawyer believed the husband had signing authority for the wife’s company, she was unable to find any written authority to that effect. Additionally, while acting for the couple, a company controlled by the husband arranged for a loan to it from a credit union, and the husband and wife both signed joint and several personal indemnities for all losses arising out of the company’s dealings with the credit union. The lawyer did not advise the wife to get independent legal advice or counsel with respect to the personal indemnity she signed. The lawyer admitted she: failed to advise the wife of the conflict of interest that arose out of the lawyer acting for the husband and wife while involved in an intimate relationship with the husband; and acted for the husband, the wife and the wife’s company while an actual or potential conflicted existed, without advising the parties of the conflict or advising them to seek independent legal advice. The
lawyer was suspended for one month and ordered to pay costs.

In *Law Society of BC v. Wilson*, [1993] L.S.D.D. No. 184, a lawyer acted for both the majority shareholders and the company in an action initiated by the minority shareholders who were claiming relief from oppression, despite the conflict between the personal interests of those shareholders and the interests of the company. The lawyer admitted that he professionally misconducted himself by acting in a conflict of interest.

In *Law Society of BC v. Hattori*, 2009 LSBC 9, a lawyer received an estate litigation file transferred from another lawyer in November 2004. He accepted the existing joint retainer to represent a group of three clients who were residual beneficiaries under the contested will of VM, as well as a municipality that was to receive certain real property under the will. Under the retainer, the lawyer represented both the residual beneficiaries and the municipality in two separate actions involving the VM estate. One action had been brought by JW and KW, residual beneficiaries under a previous will, naming all beneficiaries of the second will as defendants.

In June 2005, JW and KW applied for an order to sell one of the properties from the VM estate with the proceeds to be held in trust pending the outcome of the litigation. The municipality advised the lawyer it was not opposed to the sale, however, the residual beneficiaries made their opposition known to him. The lawyer responded on behalf of all the clients that the sale was unopposed and indicated that a release of a certificate of pending litigation on the property would be registered. The lawyer also executed a consent order to sell the property. The property was subsequently sold in October of 2005. The residual beneficiaries terminated their retainer with the lawyer in May of 2006. The lawyer continued to act on behalf of the municipality to receive its bequest and for JW and KW to receive the residue of the estate. The lawyer’s former clients, however, were to receive nothing and bear their own costs. The lawyer admitted that he acted in a conflict of interest by: (1) failing to explain the principle of undivided loyalty to his clients; (2) failing to secure informed consent on how to proceed in light of the conflict that developed between his two clients; and (3) continuing to act for the municipality, and not for the residual beneficiaries, after it was evident there was a conflict between them. The lawyer further admitted that, by disregarding the residual beneficiaries’ instructions, the lawyer failed to provide service in a conscientious, diligent and efficient manner at least equal to what would be expected of a competent lawyer in a similar situation. The lawyer admitted that this conduct constituted professional misconduct. The hearing panel accepted the lawyer’s admissions and ordered that he pay a $3,000 fine and $1,000 in costs. The panel emphasized the importance for all lawyers to exercise great caution from the outset in accepting and managing a joint retainer, as noted under Chapter 6, Rule 4 of the *Professional Conduct Handbook* (now rule 3.4-5 of the BC Code).

(g) Breach of Confidentiality

In *Law Society of BC v. Ewachniuk*, [1995] L.S.D.D. No. 255, a lawyer acted in a motor vehicle accident case and received a settlement offer from ICBC. Although the lawyer recommended the offer, his client did not accept it. Shortly afterwards, the client terminated the lawyer’s retainer and went to a new lawyer. The lawyer wrote to the new lawyer taking the position that he was entitled to a percentage fee based on the settlement offer because the client had unreasonably refused it. The lawyer sent a copy of his letter to the ICBC adjuster on the file. The lawyer admitted that in sending a copy of his letter to ICBC he had improperly disclosed confidential client information about the terms of the retainer and his advice to the client to accept the settlement offer. The hearing panel accepted his admission and proposed disciplinary action of a $2,500 fine plus $1,000 towards the cost of the hearing.

In *Law Society of BC v. McLeod*, 2014 LSBC 16 and 2015 LSBC 3, a lawyer had been representing clients in two civil actions and was seeking to be removed as counsel in one of the actions. The hearing panel found that the lawyer had disclosed confidential client information in a notice of application and supporting affidavit he had filed seeking to be removed as counsel. The application and supporting affidavit had been served on the opposing party. The panel ordered a one-week suspension, a fine of $2,500 and costs of $5,000.

(h) Threatening to Report to a Regulatory Body

In *Law Society of BC v. Chetty*, [1997] L.S.D.D. No. 47, a lawyer represented shareholders in a company that had been purchased by another company, R. Ltd. There was a dispute between the shareholders and R. Ltd.

One of the shareholders prepared a draft letter to R. Ltd. for the lawyer to review, in order to save some fees required for an opinion letter. The lawyer made some minor changes to the
letter, provided some general advice on defamation law, and advised the client as to the need to be factually accurate in the allegations made. The final version was sent on firm letterhead to in-house counsel at R. Ltd. This letter read, in part:

... Such admission is further proof of the fraudulent practices, deception and misrepresentations being carried out by R. Ltd. in its daily business practices. No doubt heavy fines and various other legal implications could result from these findings when presented to proper authorities...

We believe that this letter adequately states the position and demands of the former shareholders. If you wish to discuss this matter, please do not hesitate to contact the writer at your earliest convenience; however, in any event, if we have not had a positive response within five business days of this date we will, without further notice to you, take whatever steps we deem necessary to protect our clients. Please govern yourselves accordingly.

The lawyer did not have instructions from his clients to report R. Ltd. to the authorities as he suggested. The lawyer admitted that while his letter appeared to demand settlement if a complaint to an authority was to be avoided, it was never his intention to exact an advantage in the civil dispute. The lawyer’s admission of misconduct contrary to Chapter 4, Rule 2 (now rule 3.2-5 of the BC Code) was accepted and endorsed on his professional conduct record.

(i) Threatening Criminal Proceedings

In a 1990 disciplinary action (1990: No. 2), counsel admitted to the Discipline Committee that, by writing the letters she had written to opposing counsel, she had violated Chapter 4, Rule 2 (now BC Code rule 3.2-5). In this case, the Discipline Committee received a complaint from opposing counsel about two letters written by the lawyer. The lawyer represented a woman who was seeking damages against a man who she alleged had sexually assaulted her throughout her teenage years. In the first letter the lawyer wrote: “We have not as yet filed the Writ. We believe filing the Writ will attract criminal prosecution.” To which the complainant replied: “I do not follow why you fear that filing the Writ will bring about criminal proceedings. The Crown does not search the Registry looking for files to prosecute so far as I am aware. I can only assume that you are saying that your client intends to complain to the police if there is no settlement.” The lawyer, in turn, replied: “It is my client’s position that filing the Writ would expose her privacy and therefore she would have no hesitation in filing the criminal complaint should filing the Writ become necessary. In other words, my client is prepared to go the whole nine yards if we do not receive your offer to settle promptly.” The lawyer’s admission was endorsed on her professional conduct record.

(j) Quality of Service

In Law Society of BC v. McTavish, 2018 LSBC 2, a lawyer was retained to assist a client in resolving his mother’s estate. The estate was relatively simple with only one significant asset and two beneficiaries: the client and his brother. It took nearly four years to obtain probate, and throughout the retainer, there were lengthy periods of delay and inactivity. The lawyer failed to keep his client reasonably informed about the matter and failed to respond to his communications for a seven-month period. The panel found that the lawyer had failed to provide the quality of service expected of a competent lawyer, and that the conduct constituted professional misconduct. The lawyer admitted to professional misconduct and proposed a fine of $6,000, which the panel accepted.

In Law Society of BC v. Menkes, 2016 LSBC 24, a lawyer was retained to handle a personal injury claim. He filed a notice of claim in the Small Claims Registry, but did not serve
the notice of claim on the defendants. The lawyer delayed in taking steps to advance his client’s claim, failed to respond to his client’s communications and failed to take steps that he told the client he would take. The panel held that “the misconduct is serious. At the core of a lawyer’s duty to his or her client is that a lawyer provides quality and appropriate legal services.” The matter proceeded by way of a conditional admission of professional misconduct and an agreement to disciplinary action consisting of a $7,500 fine plus $1,259.39 in costs.

In Law Society of BC v. Wesley, 2015 LSBC 5 and 2016 LSBC 7, a lawyer failed to enter an order made at a Judicial Case Conference regarding child support, access and custody for approximately 20 months. The lawyer failed to inform her client of the risks of not entering the order. As a result, the client was unable to have the order enforced by the Family Maintenance Enforcement Program. The panel concluded that the lawyer’s conduct was a culpable neglect of her duties, which amounted to professional misconduct.

(k) Civility

In Law Society of BC v. Johnson, 2014 LSBC 8 and 2014 LSBC 50, the lawyer had an altercation outside a courtroom with a police officer, who was a potential witness, and made an inappropriate remark to him. While the hearing panel believed that the lawyer was provoked by the police officer, it concluded that the defence of provocation did not apply. The panel stated that the “profession must know that courtesy, civility, dignity and restraint should be the hallmarks of our profession and that lawyers must strive to achieve such.” The panel ordered a 30-day suspension and costs in the amount of $10,503.05. The decision was upheld by a review panel (2016 LSBC 20).

In Law Society of BC v. Lanning, 2009 LSBC 2, a lawyer represented the husband in a family law matter and between August and December 2006, the lawyer exchanged letters with the wife who was unrepresented. In 12 of those letters, the lawyer critiqued the wife’s correspondence and engaged in name-calling and personal criticism. By way of explanation, the lawyer asserted that the communications were a “brilliant but unorthodox strategy” to “crush”, “squelch”, or “defeat” the wife in order to advance his client’s interests. The hearing panel referred to the Canons of Legal Ethics and emphasized that a lawyer’s communications must be courteous, fair and respectful and that a lawyer is to refrain from personal remarks or references and to maintain objectivity and dignity. The lawyer’s letters to the unrepresented wife in this case were rude, deliberately provocative and belittling of an opposing party. Even if his purpose was to advance the interests of his client, this does not justify the incivility and discourtesy contained in the letters. The panel noted that lawyers face many challenges in dealing with unrepresented litigants, particularly in family matters. Parties can easily descend into name calling and uncivil language. The panel urged lawyers to rise above this behavior. The hearing panel held that the lawyer’s correspondence fell markedly below the standards expected of members of the Law Society and that it amounted to professional misconduct. The panel ordered that the lawyer be reprimanded, pay a fine in the amount of $2,500, and costs in the amount of $6,600.

In Law Society of BC v. Laarakker, 2011 LSBC 29 and 2012 LSBC 2, a lawyer responded to a demand letter sent to his client by an Ontario lawyer who represented a retailer. The demand threatened to pursue the BC client for damages incurred by the client’s minor child shoplifting. The BC lawyer responded to the demand letter making personal and discourteous remarks to the Ontario lawyer. Before sending the letter to the Ontario lawyer, the BC lawyer also posted comments online about the Ontario lawyer’s practice of sending demand letters to parents of minor children who had been caught shoplifting at the retailer’s stores. Online, the lawyer called the Ontario lawyer a “sleazy operator” and said, “This guy is the kind of lawyer that gives lawyers a bad name.” In finding the lawyer had committed professional misconduct, the hearing panel considered the Canons of Legal Ethics:

The duties described in those Canons are not restricted to situations where the lawyer agrees with the position, or the practice style, of the opposing lawyer or party. The duty of courtesy and good faith applies to all counsel, regardless of one’s feelings about them. The Canons specifically note that “personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling.

(l) Improper Commissioning of Documents

In Law Society of BC v. Wong, 2012 LSBC 15, a lawyer was ordered to pay a $3,500 fine and $3,000 in costs for instructing his associate to prepare what the lawyer called a “take-out
affidavit” and financial statement. On the lawyer’s instructions, the associate sent their client the affidavit with the jurat blank. When the financial statement was completed, the associate administered the oath over the phone. The client then returned the signature page to the associate, after which the jurat was completed with the date of swearing being the day the associate had administered the oath over the phone. The signature page was then inserted into the completed financial statement. The client was never physically present before the lawyer to allow the lawyer to see the client personally sign and be able to properly satisfy the requirements of swearing an affidavit.

In *Law Society of BC v. Grant*, 2003 LSBC 9, a lawyer was reprimanded and ordered to pay costs for improperly witnessing a client’s oath on a financial statement. The client swore the first page of a blank form of a financial statement after reviewing a pencilled copy of it. Before swearing the affidavit to which the financial statement would be appended, the client had confirmed that its contents were true and correct, and had authorized the lawyer’s staff to type up the pencilled copy of the financial statement. The statement was typed up on the executed form and not altered from the pencilled version. The panel characterized the lawyer’s professional misconduct as a “technical breach”, as the pencilled version of the document existed at the time the affiant swore the blank form. The lawyer had self-reported her conduct to the Law Society.

In *Law Society of BC v. Cranston*, 2006 LSBC 36, a lawyer signed a bill of sale as a witness of the signature of a vendor on the transfer of a boat from a father to his son. The son had been a client of the lawyer. The vendor father did not appear before the respondent to sign the bill of sale, and did not in fact sign it, which the respondent knew when he signed the document. The lawyer explained he signed the document because he believed it was part of a “family joke.” The lawyer admitted his professional misconduct, was reprimanded and ordered to pay a fine and costs.

In *Law Society of BC v. Skapski*, 2012 LSBC 8, a lawyer sought to circumvent regulations of the Department of Fisheries and Oceans. He dated and affixed his signature to a document that had been declared before him eight years earlier. Temporary transfers of vessel-based licenses are not permitted, so the lawyer arranged for his client to transfer his license to a third party in exchange for a share in the third party’s vessel. Because neither party intended to permanently execute the transaction, they also drafted a document transferring the license and share back to their original owners. This document was sworn and executed, but the jurat portion was not completed by the lawyer until eight years later, when the parties decided to transfer the items back. He was reprimanded and fined $2,000.

(m) Tampering With a Witness

In *Law Society of BC v. Ewachniuk*, 2000 LSBC 18, a lawyer intimidated two American witnesses, dissuading them from giving evidence in Canada. The witnesses’ evidence would have been damaging to the lawyer’s clients. In addition, the lawyer asked Canadian Crown Counsel to lay charges against the witnesses to prevent them from travelling to Canada to give evidence. The Committee found the lawyer guilty of professional misconduct for both actions. Because the lawyer attempted to subvert the course of justice and because his behaviour went against the very fundamental duties of a lawyer, he was found unfit to practice, disbarred, and ordered to pay costs of the disciplinary hearing.

(n) Charging Excessive Fees/Altering Time Sheets to Obtain Increased Fees

In *Law Society of BC v. Hudson*, 2014 LSBC 2, a lawyer was disbarred for knowingly submitting numerous false invoices to the Legal Services Society (LSS) on her behalf and on behalf of other lawyers employed at her firm. The invoices also included falsely billing for time spent by lawyers in order to recover time spent by legal assistants, as the LSS did not permit billing for work performed by legal assistants. The hearing panel concluded that disbarment was the only appropriate sanction as “any other sanction would compromise the public confidence in the profession’s integrity and suggest that the legal profession does not take dishonesty committed by lawyers seriously.”

In *Law Society of BC v. King*, 2007 LSBC 22 and 2007 LSBC 52; and *Law Society of BC v. Dennison*, 2007 LSBC 23 and 2007 LSBC 51, two members were lawyers associated with law firms that performed contract work for the Department of Justice. The two members had certification authority for submitting the accounts to the Department of Justice for work done. The members, in effect, subcontracted the actual work to associates in an office that was located in a different town. A forensic accountant determined that the members had altered the time sheets the subcontracting associates had submitted, thereby inflating the hours spent on the
files and submitting false accounts to the Department of Justice. Over the course of 15 months, the Department of Justice was wrongfully billed more than $277,000. The members were cited for professional conduct or conduct unbecoming.

The panel found that the members knew or ought to have known that the altered accounts would be presented for payment, although the panel did not find any evidence that the members personally benefited from the billing inflation. The panel found that the members had falsified documents for the purpose of defrauding the DOJ. The panel concluded that this behaviour (i.e. deliberate dishonesty, involving relatively large amounts of money over an extended period of time) is among the most serious types of breach that can be committed by a lawyer. The panel ordered the members be disbarred and to pay costs.

In Law Society of BC v. Ranspot, [1997] L.S.D.D. No. 52 a lawyer rendered accounts over a period of 14 months to the Legal Services Society for Legal Aid services that he had not performed prior to the date of referral and was therefore not entitled to bill for. The lawyer also deposited two trust cheques to his general law firm account, instead of to his trust account, and did not immediately discover or correct the trust shortfall. In determining the sanction, the hearing panel considered that at the time of the events in question the lawyer was experiencing depression and extreme psychological stress due to the breakdown of his marriage. The panel determined that a sanction less than disbarment would meet the best interests of the public and the profession. The panel ordered that the lawyer be suspended for 18 months and pay costs.

(o) Failure to Pay Practice Debts

In Law Society of BC v. Edwards, [1996] L.S.D.D. No. 21, a lawyer requested a medical report from a doctor and the doctor testified at the trial of a personal injury case. The doctor rendered two bills to the lawyer which remained unpaid for over a year. During that time, the lawyer rendered a bill to his client for a percentage of the amount recovered on the judgment in the client’s favour, plus disbursements and costs. The lawyer deducted the amount of his bill from the payment of the judgment and sent the balance to his client. Although the bill included the amount of the doctor’s bills as disbursements, the lawyer did not pay the doctor’s bill using the money he received. The hearing panel found that the lawyer’s failure to pay the doctor’s bill from the money he received on account of disbursements and the excessive fee represented by the addition of costs to the bill, amounted to professional misconduct and ordered that the lawyer be reprimanded and required to pay $1,000 towards the costs of the hearing.

In Law Society of BC v. Evans, 2000 LSBC 20, following a fee review, the member’s fees were reduced by the registrar and issued a certificate in favour of the clients for the amount reduced. The clients filed the certificate in the Supreme Court and it was accordingly deemed a judgment under the provisions of the Legal Profession Act. The lawyer did not pay the judgment or notify the Law Society that it remained unpaid. The lawyer admitted his actions constituted professional misconduct and he was reprimanded and ordered to pay costs.

(p) Obligations Regarding Payment of GST/PST

In Law Society of BC v. Purvin-Good, 2004 LSBC 5, a member declared bankruptcy in June 2002, and provided the Law Society with a copy of the proposal he made pursuant to the Bankruptcy and Insolvency Act, which revealed the member had failed to pay GST and PST collected in the course of his practice. The member was cited for his failure to remit funds collected for PST and GST and for failing to meet financial obligations incurred in the course of his practice. The member admitted his conduct constituted professional misconduct and was fined and ordered to pay costs.

In Law Society of BC v. Welder, 2007 LSBC 29, the member failed to hold funds collected in payment of GST and PST, as required by statute, and failed to remit these funds as required by the federal and provincial governments. In August 1999 a judgment for $14,952.40 was filed against the member for PST owed under the Social Services Tax Act. The member did not satisfy this judgment within seven days, and then failed to notify the Executive Director of the Law Society of the circumstances of the judgment and his proposal to satisfy it, in breach of Rule 3-50. He admitted, and the hearing panel found, that his conduct constituted professional misconduct. The panel ordered that the member be fined $2,500 and be reprimanded. Because of uncertainty over the member’s total indebtedness, the panel further ordered that he consult with, and present his financial position to, a licensed trustee in bankruptcy, who must then report to the Law Society within 60 days. Further, the panel ordered that the member
provide the Law Society with quarterly statutory declarations setting out his total fee billings and total GST and PST remittances for each quarter, until relieved of the condition by the Discipline Committee.

(q) Neglect of Office Systems/Clients

In Law Society of BC v. Guthrie, [1992], L.S.D.D. No. 20, the lawyer did not maintain proper office procedures or systems and he neglected client files as discovered during a Law Society Practice Review. The lawyer failed to keep notes of client instructions; to respond to correspondence from clients; to respond to correspondence from other solicitors; to report to clients; to pursue litigation or otherwise conduct client matters in a timely fashion; to maintain adequate file organization; and to use adequate systems for opening and closing files, and diarizing limitations. The Hearing Committee found that the lawyer had practised incompetently. His practice problems arose from financial difficulties, stress, family problems and an alcohol addiction. The lawyer voluntarily ceased practice, and a custodian was appointed. The Hearing Committee imposed conditions on the lawyer and his return to practice, including that he complete an extensive remedial program and bear the costs of the program, allow the custodianship of his practice to continue until his treating physician stated that his fitness to practise was not adversely affected by a mental or physical disability, and that he practise only in specified areas of law on his return to practice until relieved of this condition by the Discipline Committee.

(r) Failure to Supervise Staff

In Law Society of BC v. Morris, [1992] L.S.D.D. No. 17, the lawyer professionally misconducted himself in allowing his secretary to handle hundreds of estate files without adequate supervision. In many instances, the secretary met with clients to take instructions, prepared wills without supervision, gave legal advice, and attended on the execution of wills, all contrary to provisions of the BC Code. Following a practice review, the lawyer was cited. In late 1990, the lawyer proposed to the Discipline Committee that, as a condition of practice, he review all his estate files and that he correct all problems at his own (considerable) expense. After he had finished this process, an experienced wills practitioner retained by the Law Society reviewed the files and found that he had taken appropriate steps to correct problems on the files. The Committee ordered that the lawyer complete a wills drafting course administered by the Law Society at his own expense, and pay costs of the Law Society Practice Reviews totaling $6,130.

In Law Society of BC v. Visram, [1992] L.S.D.D. No. 22, a lawyer professionally misconducted himself by failing to properly supervise C who was employed by him as a legal assistant. After receiving complaints, the member knew that that C had misrepresented himself as a lawyer, and wrote a lengthy letter of response to the Law Society about the complaints about allowing C to run client files without supervision. After writing this letter, C misrepresented himself as an articled student. The member was subsequently willfully blind to C’s actions by failing to supervise them. The member also failed to maintain a direct relationship with some clients and to assume full professional responsibility for work done for clients. The lawyer was reprimanded; ordered to undergo a practice review at his cost and to undertake any remedial programs recommended by the Competency Committee; undertake not to act as a principal to an articled student without prior written consent of the Law Society and to pay costs.

(s) Participating in Suspicious Activity

In Law Society of BC v. Gurney, 2017 LSBC 15 and 2017 LSBC 32, a lawyer used his trust account to transfer almost $26 million in connection with four line-of-credit agreements in which his client was the sole borrower. The lawyer had not provided any legal services and was effectively acting as a bank or depository institution. The hearing panel found that the lawyer had breached his professional and ethical duties by failing to make reasonable inquiries about the transactions, and by using his trust account as a conduit for funds, notwithstanding “the series of transactions being objectively suspicious.” The lawyer was suspended for six months and ordered to pay to the Law Society $26,845, representing disgorgement of the “fee” that had been paid to him.

In Law Society of BC v. Hsu, 2019 LSBC 29, a lawyer’s client was found by the BC Securities Commission to have committed fraud by deceiving investors and misappropriating over $5 million in investor funds. The lawyer was found to have engaged in conduct she ought to have known assisted or encouraged the fraud, and of taking on a securities file when she was not competent to do so. She had prepared investment documents and assisted in the creation of the investment structure, which offered no protection to investors and left them with a
false sense of security. She did not question her client as to his authority to raise shares, whether he was registered to sell securities, whether he actually owned the shares he purported to sell, and whether he sent the investment funds to the companies for whom he was raising capital. She also permitted the use of the firm’s trust account to receive and disburse investment funds. The lawyer was suspended for three months and ordered to pay costs in the amount of $1,000. She was also restricted from practising in the area of securities law until relieved by the Discipline Committee.

2. Conduct Unbecoming

Under s. 1(1) of the Rules, “‘conduct unbecoming a lawyer’ includes any matter, conduct or thing that is considered, in the judgment of the Benchers, a panel or a review board,

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession.”

Rule 2.2-1[3] of the BC Code provides further guidance:

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.

In Law Society of BC v. Berge, 2005 LSBC 28 at para. 77 (upheld on review 2007 LSBC 7), the hearing panel cited with approval the “useful working distinction” between professional misconduct and conduct unbecoming which was set out in Law Society of BC v. Watt, 2001 LSBC 16 at para. 5:

In this case the Benchers are dealing with conduct unbecoming a member of the Law Society of British Columbia. We adopt as a useful working distinction that professional misconduct refers to conduct occurring in the course of a lawyer’s practice while conduct unbecoming refers to conduct in the lawyer’s private life.

Conduct unbecoming can encompass a range of conduct, including these examples:

(a) Criminal and other illegal conduct
   • assault (2005 LSBC 29),
   • impaired driving (2009 LSBC 35),
   • tax evasion (2006 LSBC 44, and [1971] B.C.J. No. 678 (C.A.)), and
   • drug possession (2001 LSBC 16);

(b) Misleading or dishonest conduct
   • lying to conservation officers after committing a hunting offence (1999 LSBC 24),
   • consuming mouthwash and disposing of an open beer can, to avoid a breathalyzer demand after a crash (2005 LSBC 28, aff’d 2007 LSBC 7), and
   • writing cheques back and forth on several personal accounts when the lawyer knew there were insufficient funds and that his credit line was exceeded (2015 LSBC 49);

(c) Lying on a Law Society application
   • 2009 LSBC 23 (re: criminal record and prior use of another name), and
   • 2009 LSBC 3 (re: criminal record);

(d) (d) Breach of trust, fiduciary or other obligations
   • taking unauthorized payments as director of a company (2001 LSBC 34),
   • while acting as trustee, knowingly releasing trust funds in breach of trust terms (1999 LSBC 19), and
   • as executor, failing, over a significant period, to renounce or to take steps required to administer the estate (2012 LSBC 6);

(e) Inappropriate public comments
   • unwarranted comments about a judge ([1994] L.S.D.D. No. 194);

(f) Failing to comply with a court order
   • in a custody and access dispute with a former spouse (1999 LSBC 26);

(g) Deemed conduct unbecoming
   • financial irresponsibility contributing to bankruptcy (Rule 3-51(3)(a)), and
   • failing to take reasonable steps to obtain discharge from bankruptcy (Rule 3-51(3)(b)).

3. Breach of the Act or the Rules

Discipline violations include breaches of the Act or the Rules even in the absence of professional misconduct, conduct unbecoming, and incompetence.

The distinction between an Act or rule breach and professional misconduct was considered by the
hearing panel in *Law Society of BC v. Lyons*, 2008 LSBC 9 at para. 32:

A breach of the Rules, does not, in itself, constitute professional misconduct. A breach of the Act or the Rules that constitutes a “Rules breach”, rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

The hearing panel in *Lyons* set out some facts to consider in determining whether a breach of the Act or rules would constitute professional misconduct (at para. 35):

In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of mala fides, and the harm caused by the respondent’s conduct.

Certain rule breaches are seen more frequently than others. These include:

(a) Failure to report unsatisfied judgment

Rule 3-50 requires lawyers to report judgments still unsatisfied seven days after entry. The report must include the lawyer’s proposal to satisfy the judgment.

(b) Failure to report criminal or other charge

Subject to certain exceptions, Rule 3-39 requires lawyers to report “all relevant information” when they have been charged with a federal or provincial offence.

(c) Breach of the cash transactions rules

Subject to certain exceptions, Rule 3-59 prohibits lawyers from accepting cash in an amount greater than $7,500 in respect of any one client matter or transaction. The rule also prescribes what a lawyer must do if the lawyer receives such cash.

(d) Breach of the client identification and verification rules

Rules 3-98 to 3-110 require lawyers to follow client identification and verification procedures when providing legal services. A lawyer is obligated to retain copies of documents used to verify a client’s identity. There is no exemption from these rules for a lawyer’s family and friends. Additional steps must be taken in non-face-to-face transactions.

(e) Breach of Law Society accounting rules

Division 7 of Part 3 of the Rules prescribes trust and other accounting rules with which lawyers must comply. Lawyers commonly hold large sums of money in trust. The rules cover matters including:

(i) What records must be kept,

(ii) How trust funds must be held,

(iii) What steps must precede withdrawals from trust,

(iv) What steps must follow discovery of a trust shortage, and

(v) What reports a lawyer must make to the Law Society.

It is also important to note that lawyers must not permit funds to be paid into or withdrawn from their trust accounts unless the funds are directly related to legal services provided by the lawyer or their law firm (Rule 3-58.1).

4. Incompetence

The nature of “incompetence” was considered in *Law Society of BC v. Goldberg*, 2007 LSBC 3, aff’d 2008 LSBC 13, aff’d 2009 BCCA 147. In the hearing decision, the panel commented upon competency at para. 50:

A useful discussion of competence can be found in The Regulation of Professions in Canada by James T. Casey, commencing at page 13 though to page 14. In summary, the question is whether or not a mistake or mistakes made by a professional will be of such significance so as to demonstrate incompetence. Assessing incompetence is a function of looking at the nature and extent of the mistake or mistakes and the circumstances giving rise to it or them. It may be self-inflicted or the result of negligence or ignorance.

In *Goldberg*, the hearing panel concluded at para. 63:

…the affidavits drawn by the Respondent demonstrate a complete lack of knowledge of the law of evidence. The Respondent’s written material demonstrated a serious lack of knowledge and skill for the reasons set out above.

On review, the review panel upheld the finding of incompetence in respect of the respondent’s
preparation and submission to court of materials in four criminal appeals. In doing so, it observed at para. 15 that “[i]ncompetence is the want of ability suitable to the task (see Mason v. Registered Nurses’ Association of British Columbia (1979), 13 B.C.L.R. 218 (S.C.).”

Findings of incompetent performance of duty have been made in various circumstances, including:

(a) Repeatedly missing court appearances and making misrepresentations to the court (2011 LSBC 24); and

Chapter 4

Professional Liability

[§4.01] Basis of Liability

Lawyers can be found liable to a client or former client for breach of contract, negligence, or breach of fiduciary duty. Lawyers may also be sued for breach of undertaking and breach of trust, conspiracy and fraud. The most common cause of action brought against a lawyer is negligence (including negligent misrepresentation).

A lawyer may be liable to a range of persons:

- A lawyer may be liable to his or her client for breach of a contractual duty (that is, breach of the retainer agreement). An implied term of every retainer is to exercise due care, skill and judgment in the delivery of legal advice and legal services.

- A lawyer may be liable in negligence to persons with whom he or she has no contractual relationship, under the principles of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L.) [Hedley Byrne].

- A lawyer may also be liable in negligence to persons with whom he or she has no contractual relationship under the broader neighbour and proximity principles of Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.) and its successor cases.

- A lawyer may be liable for breach of a fiduciary duty to persons with whom the lawyer has no contractual relationship (see §4.06).

- A lawyer may be liable to his or her client in negligence or for breach of a fiduciary duty in addition to liability for a concurrent breach of contractual duty.

[§4.02] Evolution of Liability in Negligence

The lawyer’s liability for professional negligence expanded as a result of three English cases that did not involve lawyer negligence. These cases established tests for the duty of care owed by defendants in negligence claims.

1. The Relationship of Proximity

Donoghue v. Stevenson, [1932] A.C. 562 (H.L.), the case of the snail in a bottle of ginger beer, held that the defendant manufacturer owed a duty of care to the plaintiff consumer, which shattered the privity-of-contract barrier. In Donoghue v. Stevenson at 580, Lord Atkin established the notion of a relationship of proximity in the following test:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

2. Reliance on Special Skill or Knowledge

The special duty of care set out in Hedley Byrne became an additional basis for liability. The plaintiff company asked their bankers for an opinion about the standing of a second company, and the bankers obtained an erroneous opinion about the second company from the second company’s bankers. The plaintiff company sued the second company’s bankers. Hedley Byrne was approvingly adopted by the Supreme Court of Canada in Queen v. Cognos Inc., [1993] 1 S.C.R. 87 at 109:

The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court […] suggest five general requirements: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Hedley Byrne and subsequent cases establish that reliance upon the defendant is a crucial element to a finding of professional liability.

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3. The Test of Neighbourliness

In *Anns*, a case involving a structural housing inspection by a local authority, the House of Lords brought together the *Donoghue v. Stevenson* principle of proximity with the *Hedley Byrne* principle of reliance on special skill or knowledge. *Anns* summarized a new two-stage test and an expanded duty of care, which has been interpreted by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79, at para. 30:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant’s act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? […] If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

The principle in *Anns* that a “prima facie duty of care” arises wherever there is a sufficient relationship of “proximity or neighbourhood” has been applied several times in Canada to help establish an expanded duty of care for lawyers. The British Columbia Court of Appeal affirmed this view in *Kripps v. Touche Ross & Co.* (1992), 94 D.L.R. (4th) 284.

It is intriguing to consider the continuing evolution of the neighbour relationship and just how expansion of the concept of duty of care to a neighbour could become. “There are few non-neighbors left in the world today.”2

### [§4.03] Scope of the Lawyer’s Liability in Negligence

Claims against lawyers for negligence are generally brought by those to whom a lawyer owes a duty of care: clients and former clients. However, even non-clients, such as opposing parties in business or property transactions, opposing parties in litigation, beneficiaries (or disappointed beneficiaries) under a will, and people who placed money in trust with a lawyer, may make a claim against a lawyer.

Although a lawyer generally owes no duty of care to non-clients, apart from breaches of undertakings and of trust, there are circumstances in which a lawyer may be found liable to a non-client. For example, in *Tracy v. Atkins* (1979), 16 B.C.L.R. 223 (C.A.), a case involving a mortgage transaction, the lawyer took on a role of proximity to a non-client; the non-client relied on the lawyer, who was liable. Also, a lawyer might be found to have a duty to non-clients to advise that they seek independent legal advice; see *De Cotiis v. McLellan*, 2009 BCCA 596, at paras. 26–27. In most situations, however, a non-client will be unable to establish the necessary reliance and the lawyer’s knowledge of that reliance by the non-client. For further discussion of these issues, see *Kamahap Enterprises Ltd. v. Chu’s Central Market Ltd.* (1989), 40 B.C.L.R. (2d) 288 (C.A.).

A lawyer cannot owe a duty of care to the opposite party in a commercial transaction: *Kamahap*. However, in *Elliott v. Hossack*, 1999 CanLII 6001 (B.C.S.C.), a lawyer was found liable to one partner in a business transaction because the lawyer had not made it clear to that partner that the lawyer did not act for him.

Generally, a barrister cannot owe a duty of care to the opposing party: see, for example, *Crooks v. Manolescu*, 1995 CanLII 1818 (B.C.S.C.). The courts will not impose on a lawyer a duty to a non-client if such a duty would conflict with that lawyer’s duty to the client: *Smolinski v. Mitchell*, 1995 CanLII 1545 (B.C.S.C.).

A lawyer may be liable to a non-client if the lawyer’s client is perpetrating a fraud with the lawyer’s unwitting assistance. In *Dhillon v. Jaffer*, 2012 BCCA 156, a lawyer was liable in negligence for assisting the fraudster to sell her matrimonial home and receive all the proceeds while the other spouse was out of the country.


When making referrals to other service providers, a lawyer must act “competently, prudently and diligently” and be satisfied that the service provider is sufficiently competent for the work (see *Salomon v. Matte-Thompson*, 2019 SCC 14, in which the Supreme Court of Canada found a lawyer and his firm liable for investment losses for referring their clients to a financial investor who turned out to be involved in a Ponzi scheme).

In British Columbia, a lawyer cannot contract out of liability for professional negligence: see Law Society Rule 8-3(c) and the *Legal Profession Act*, s. 65(3).

A lawyer is liable for the work performed by the law firm, even if it is delegated to non-lawyers, such as assistants or designated paralegals (see *Practice Material: Professionalism: Practice Management*, Chapter 1, §1.03).

### [§4.04] Limitation Period

Under the current *Limitation Act*, which came into effect June 1, 2013, the limitation period for a claim against a lawyer is two years after the day on which the claim is

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discovered (s. 6(1)). Divisions 2 and 3 of the Act set out the rules that determine when a claim is discovered.

[§4.05] Standard of Care

The standard of care of a lawyer has been authoritatively stated by the Supreme Court of Canada in *Central Trust v. Rafuse* (1986), 31 D.L.R. (4th) 481 at 523:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken: see *Hett v. Pun Pong*, [1890] 18 S.C.R. 290 at 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.


Lawyers must know the basics of the applicable law, and must be able to recognize circumstances that call for additional legal research:

A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his “working knowledge”, without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.

(*Central Trust v. Rafuse* at 524)

A lawyer is expected to know the relevant law, and to refer the court to that law, according to *Lougheed v. Armbruster* (1992), 63 B.C.L.R. (2d) 316 (C.A.):

[C]ounsel has a duty to be aware of all cases in point decided within the judicial hierarchy of British Columbia, which consists of the Supreme Court of Canada, this Court and the Supreme Court of British Columbia, and where applicable, one of its predecessor courts, the County Court, and to refer the court to any on which the case might turn.

Lawyers have a duty to warn their clients of any risk involved in proceeding in the manner recommended by the lawyer. See, for example, *Marbel Developments Ltd. v. Pirani*, supra.

[§4.06] Fiduciary Duty

According to the Supreme Court of Canada, where a relationship has as its essence discretion, influence over interests, and inherent vulnerability, a strong but rebuttable presumption arises out of the inherent purpose of the relationship that one party has a fiduciary duty to act in the best interests of the other: *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 at 647 and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409, as explained by Grant and Rothstein, *Lawyers’ Professional Liability*, 2nd ed. (Toronto: Butterworths, 1998), Chapter 3. The lawyer-client relationship falls into this category: lawyers owe fiduciary duties to their clients.

Fiduciary obligations for lawyers flow from three basic principles (Grant and Rothstein, *supra*):

1. lawyers must represent their clients with undivided loyalty;
2. lawyers must preserve their clients’ confidences; and
3. lawyers must make full disclosure of all relevant and material information relating to their clients’ interests.

A lawyer’s breach of fiduciary duty was canvassed in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534. The decision comments on misrepresentation or failure to disclose as a breach of a fiduciary duty. Fiduciary duty may be breached when the solicitor fails to inform a client of a relevant fact, or fails to advise the client to seek independent advice, even when the lawyer does not benefit personally from the non-disclosure or misstatement.

Although it is not uncommon for breach of fiduciary duty to be pleaded in lawyer’s negligence cases, some judges have advocated confining such a pleading to limited circumstances. Madam Justice Southin criticized a pleading of breach of fiduciary duty in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), stating that an allegation of breach of fiduciary duty carries with it “the stench of dishonesty – if not of deceit, then of constructive fraud” (at 362). In *Shedwill v. Clark Wilson*, [1990] B.C.J. No. 2747 (B.C.S.C.), Harginge J. states: “I think it unseemly for lawyers to allege breach of fiduciary duty by other members of the profession when all they really seek to prove or the most they could hope to prove would be simple common law negligence.” Harginge J. went on to clarify those remarks in *Shedwill v. Clark Wilson*, 1991 CanLII 2395 (B.C.S.C.):

It is true that in my reasons for judgment, I expressed disapproval of the tendency to couple allegations of breach of fiduciary duty with those of negligence and breach of contract whenever actions are brought against solicitors for damages based on their professional advice or lack thereof. However, my comments were not intended to suggest that any allegation of breach of fiduciary duty against a solicitor in respect of his professional responsibilities necessarily imports an allegation of intentional wrong doing. Indeed, as was held in *Nocton v. Lord Ashbury*,
[1914] A.C. 932 it is not necessary to prove moral fraud in order to succeed in an action for breach of fiduciary duty.

[§4.07] Causation

As with any other negligence claim, defences exist even if the standard of care was not met. The defences in a negligence claim against a lawyer include an absence of reliance or reasonable reliance, an intervening cause, a lack of foreseeability, and remoteness of damages. There also are defences specific to lawyer’s negligence cases, such as the lawyer’s scope of responsibility was reduced in keeping with a limited retainer, or the lawyer committed an error in judgment as opposed to negligence.

The defence of causation is frequently raised in negligence claims against lawyers. There are two aspects to the issue of causation in this context:

1. Would the client have still acted as she or he did if there had been no negligence?
2. Did the lawyer’s negligence cause the client any loss? (Or, is there any causative link between the negligence and the loss?)

A causation defence will succeed if a court finds that the client would have completed the transaction in any event. Conversely, the client must prove that he or she “would not have undertaken the course of action he did take if he had been fully advised” (R & L Contracting Ltd. v. A. (1981), 28 B.C.L.R. 342 (C.A.)). The defence will also succeed if the client cannot prove that there was “a real and substantial chance that the [client] would have benefitted from a better bargain” but for the lawyer’s negligence: Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw, 2001 BCCA 9. Further, if the client would have suffered the same losses in any event, if there is no factual causative link between the lawyer’s negligence and the client’s losses, or if the client ended up better off as a result of the lawyer’s negligence (e.g., the transaction fails but the client goes on to make a greater profit), the defence will succeed: Williamson Pacific Developments Inc. v. Johns, Southward, Glazier, Walton and Margetts, 2000 BCCA 622.

[§4.08] Conclusion

A lawyer’s obligations in meeting the requisite standard of care are set out in Lau and Aptex Canada Corporation v. Ogilvie, 2010 BCSC 1589 at para. 32:

1. be skilful and careful;
2. advise the client on all matters relevant to the retainer, so far as may be reasonably necessary;
3. protect the interest of the client;
4. carry out the client’s instructions by all proper means;
5. consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer; and
6. keep the client informed to such an extent as is reasonably necessary, according to the same criteria.

As the law continues to develop in the areas of tort, fiduciary duty and damages, it will also develop in the law surrounding the liability of lawyers. Lawyers should stay current.

A more detailed discussion of the principles reviewed in this chapter can be found in the following texts:

- Campion, John, and Diana Dimmer, Professional Liability in Canada (Toronto: Carswell, loose-leaf).
- Dodek, Adam (ed.), Canadian Legal Practice (Toronto: LexisNexis, loose-leaf).
Chapter 5

BC Lawyers Compulsory Professional Liability Indemnification Policy

[§5.01] Introduction

The Law Society of British Columbia (the “Law Society”) requires that each of its members in private practice maintain professional liability indemnity coverage for negligence. This coverage is provided through Part A of the BC Lawyers Compulsory Professional Liability Indemnification Policy (the “Policy”). The LSBC Captive Insurance Company Ltd. (the “Captive”), a wholly owned subsidiary of the Law Society, is the indemnitor under the Policy. The Lawyers Indemnity Fund (“LIF”), a department of the Law Society, provides claims management services in respect of all claims and potential claims reported by the Law Society’s members.

LIF has a Chief Operating Officer, two Claims Directors, an Underwriting and Claims Director, an Indemnity Risk Director, and eight lawyers who act as Claims Counsel on claim files. Although claims and potential claims must be reported in writing in order to comply with the reporting requirements of the Policy, LIF encourages lawyers to contact them to discuss any coverage or claims concerns they may have. Claims Counsel have developed expertise in handling claims in specific practice areas. For a listing of all of LIF’s professional staff and contact information by type of inquiry, see “Contact Us—by types of inquiries” in the LIF section of the Law Society’s website.

Every year, a new Policy is issued, and LIF publishes Indemnity Issues: Program Report, a report that highlights and explains any changes to the policy wording (formerly titled Insurance Issues). Both documents are available online in the LIF section of the Law Society’s website.

Please note that the information in this chapter relates solely to the indemnity coverage provided in the Policy under Part A: Professional Liability for Errors & Omissions. The Policy also provides coverage for Part B: Trust Protection for dishonest appropriation (theft of money or property by any BC lawyer relating to their practice of law) and Part C: Trust Shortage Liability (coverage for claims arising from social engineering fraud or reliance on fraudulent certified cheques). For more information, please contact LIF.

1 Revised regularly by the Lawyers Indemnity Fund, Law Society of British Columbia. Last revision effective January 2020.

[§5.02] Coverage

The following information on Part A of the Policy is not intended to be exhaustive or definitive, and is provided as a guide only. The Policy wording governs. Questions that lawyers may have about whether an activity or practice in certain circumstances is covered by Part A of the Policy are dealt with by LIF as “advance rulings”. For contact information for advance ruling advisors, see “Contact us—by types of inquiries” in the LIF section of the Law Society’s website.

1. Who Is Covered?

“Covered Party” is a defined term in the Policy, meaning either an “individual Covered Party” or “additional Covered Party”. Each of these terms is also defined. In general, the Policy covers members or former members of the Law Society who had paid the annual insurance or indemnity fee at the time of the error. The Policy also covers the individual Covered Party’s law firm, law corporation, law firm management corporation, partners, and support staff employees.

Lawyers who have left the practice of law, or are now exempt from coverage, are all included as “individual Covered Parties” under the policy in place at the time the claim is made, as long as they had paid the insurance or indemnity fee at the time the services giving rise to the error were provided.

2. What Is Covered?

Under the Policy, the Captive has two primary duties. The first is to defend the Covered Party. The second is to provide indemnity to pay settlements or damages awarded against a Covered Party. With one exception, the duty to defend is triggered by the obligation to indemnify. In other words, if there is no obligation to indemnify, there is no obligation to provide a defence. The exception is a claim for a “personal injury error”, which includes libel, slander and malicious prosecution. Even if coverage for a personal injury error claim is otherwise excluded, the Captive is still obliged to provide a defence. The Captive’s obligation to indemnify is set out in Indemnity Agreement A of the Policy, and states:

We shall pay on your behalf all sums which you become legally obligated to pay as damages because of any claim first made against you and reported to us during the policy period arising out of an error by you in performing or failing to perform professional services for others.

“Damages” means any compensatory damages award, including any related pre-judgment or post-judgment interest or costs, settlement, or repair costs, relating to covered allegations. The following are not covered:

Professionalism: Ethics
- the return or reimbursement of, or accounting for or disgorgement of, any property, benefit, legal fees or disbursements that the lawyer received;
- any order for punitive, exemplary or aggravated damages;
- any fine, sanction or penalty;
- any order for costs or indemnification for costs made against a lawyer in litigation in which the lawyer is not a party, or any order for special costs; and
- the cost of complying with declaratory, injunctive or other non-monetary relief.

“Error” means an actual or alleged negligent act, negligent error or negligent omission, or a “personal injury error” (which includes libel, slander, malicious prosecution, or a publication or utterance in violation of an individual’s right of privacy).

“Professional services” include the practice of law as defined in the Legal Profession Act (the “Act”). “Professional services” also include acting as a custodian, arbitrator, mediator or parenting coordinator; a guardian, trustee or in any other similar fiduciary capacity; or a patent or trademark agent, provided those services and the related appointment or retainer are connected and incidental to the individual Covered Party’s practice of law. Pro bono legal services and “sanctioned pro bono services” are also included, as are any other activities that the Law Society deems to be the practice of law. Mortgage brokering services are not “professional services” and are not covered by the Policy.

3. What Is Excluded?

(a) Exclusions

The Policy has a number of exclusions. For example, the Policy does not apply to acts made with actual or alleged dishonest, fraudulent, criminal or malicious purpose or intent.

Claims by family members (spouses, former spouses, children, parents or siblings), or by or in connection with any organization in which the lawyer, the lawyer’s family or law firm partners, associates, or associate counsel own more than 10% or have effective management or control, are not covered.

Claims arising out of the lawyer’s activities as an officer or director of a corporation or other entity other than a law corporation are also excluded from coverage.

Although lawyers are covered, prima facie, for the practice of any type of law, anywhere in the world, coverage will be excluded if the lawyer is a member of another law society outside of Canada, and the claim is connected to the lawyer’s permanent practice in that other law society’s jurisdiction.

Coverage is also excluded if the claim arises out of a lawyer’s practice of law in contravention of the rules of any other law society or bar.

(b) Breaches of Policy Terms

A lawyer’s entitlement to coverage may be jeopardized if certain conditions are not met. The two most critical conditions relate to the obligation to report claims and potential claims, and the obligation to cooperate with the Captive in the investigation and defense of a claim, in the investigation of coverage, or in the repair of an error.

The reporting obligation is dealt with in more detail later.

The usual breach of the obligation to cooperate is a failure to provide documents or information for the Captive to assess the claim, or a failure to refer the client out for independent legal advice in an effort to repair or mitigate the loss. LIF has ongoing relationships with experienced repair counsel, and will assist in choosing one with the appropriate expertise to act for the client on the repair. As a result, LIF is able to repair approximately 20% of all matters reported. However, repair efforts can be prejudiced through the non-cooperation of the individual Covered Party, resulting in a loss that could have been avoided.

4. What Are the Limits of Coverage?

The Policy provides each individual Covered Party with $1 million of coverage per error, up to an annual maximum of $2 million for all errors reported during the year. The per error limit is the Captive’s maximum liability for all damages, claims expenses and repair costs arising out of a single error or numerous related errors and regardless of, for instance, the number of claims, claimants or firm lawyers involved.

§5.03 Exempt Lawyers and Part-Time Practice

1. Exempt Lawyers

All members of the Law Society are required to maintain indemnity coverage or insurance, unless they are specifically exempted. Those exempt from coverage include lawyers not engaged in the practice of law, or residing outside BC and not engaged in the practice of BC law. Lawyers who are members of another law society or bar, and who have
professional liability indemnity coverage or insurance in that other jurisdiction that will cover them for their practice in BC, may also be entitled to claim an exemption. Lawyers providing only pro bono services may also choose to be exempt.

Lawyers are exempt if they are engaged in the practice of law only in the course of employment (dependent contractors are considered employed) with a corporation other than a law corporation, or with a society, trade union or similar organization. However, union and society lawyers, as well as public legal service lawyers (lawyers employed by legal aid and public advocacy groups providing pro bono legal services to the public) may choose to pay the annual indemnity fee, as the Policy will extend some coverage to these lawyers. Lawyers employed by the government and who practice law only in the course of that employment are also exempt, as are lawyers on contract to a branch of the provincial government or a Crown corporation that has provided an indemnity and who work for no one other than the provincial government or the Crown corporation.

Lawyers whose practice is limited solely to providing research and opinion services to other lawyers may choose to be exempt if they provide their work product solely to individual Covered Parties and have no contact with clients. Legal research is limited to preparing summaries or conclusions about the state of the law for the benefit of the individual Covered Party and incorporation into the individual Covered Party’s work.

Exempt lawyers may still face liability for their activities. Some choose to pay the annual indemnity fee, as the Policy provides coverage to them for their services (for example, lawyers doing pro bono work, or research). However, other exempt lawyers, such as most in-house counsel, cannot acquire coverage for their activities under the Policy, and are encouraged to consult an experienced broker to ask about coverage in the private market.

2. Part-Time Practice

Lawyers who work a limited number of hours per week (on average) receive a 50% discount on their indemnity fee. To be eligible, lawyers must practise law 25 hours per week or less (on average), and must not have had a paid claim within the past five years.

Because the average is calculated over a six-month period, lawyers may work 40 hours a week for a month, so long as the average hours over the six-month period work out to 25. All activities directly or indirectly related to the lawyer’s practice must be included in calculating the time.

[§5.04] Excess Insurance and Other Commercial Liability Insurance Products

Although the compulsory policy’s $1 million limit offers generous financial protection for the majority of claims lawyers face, this may not be enough to protect a lawyer and that lawyer’s firm in some cases. If a mistake in a lawyer’s practice might lead to a claim that will cost more than $1 million to defend and pay, both lawyer and firm are at risk. For instance, a lawyer might miss a limitation period for a client suffering a significant brain injury from a car accident, or might prepare a tax plan that results in a client being reassessed by the CRA, or might draft a contract that fails to give a client full value for a company the client has purchased. Without excess insurance, the lawyer, and potentially the firm partners, will start paying for that claim out of their own pockets as soon as the compulsory limits are exhausted.

Excess insurance must be purchased for the firm as a whole, not its individual lawyers. A broker can help lawyers decide how much excess insurance may be appropriate for their firm, if any. Besides the financial consequences of just one mistake, other factors that will be considered include the frequency of large transactions and the potential liability for the mistakes of former partners. In addition, because excess coverage is generally triggered by discovery of the claim (as opposed to when the work was done), lawyers will also want advice on how long to carry excess insurance, or extend the reporting period, so that the lawyer and firm will be protected if a claim is made long after the work was completed.

Every year, LIF receives many reports of potential excess claims and every year, claims are paid that exceed the Policy’s limits.

Excess insurance can also “drop down” and respond to risks that the compulsory policy does not cover (usually subject to a deductible or self-insured retention). Lawyers can also buy other insurance policies that have been developed by commercial insurers to protect the firm and its members against risks that the compulsory policy does not insure. There are different insurance options available and the terms of coverage, including deductible amounts, may vary between insurers.

For more information about the risks that you will face in private practice, and either the indemnity coverage that is provided through the compulsory policy or insurance that is available on the private market, read “Risks and insurance for the private practitioner: A closer view,” attached as Appendix A. It can also be found in the LIF section of the Law Society’s website.
§5.05 Reporting a Claim or Potential Claim

1. When to Report

Condition 4.1 of the Policy requires that if a lawyer becomes aware of an error or any circumstance that could reasonably be expected to be the basis of a claim, however unmeritorious, the lawyer must immediately give written notice to LIF, along with the fullest information obtainable. It is no excuse for a lawyer filing a late report to say that a claim seemed unlikely. The Captive will look at what the reasonable person in the lawyer’s position would have anticipated.

Early notice puts the Captive in the best position to defend and resolve anticipated litigation. It may allow the Captive to fix a problem or take steps to minimize the financial consequences of a mistake, thereby avoiding losses and saving money. It may also prevent a loss to the lawyer’s client, and prevent the stress to both the lawyer and client that results from a malpractice claim. Therefore, the rule is: when in doubt, report. For example, a lawyer should report to LIF in the following circumstances:

(a) the lawyer becomes aware of a new case or law or clarification of the law that suggests that advice the lawyer has given in the past is erroneous;

(b) the lawyer’s client has suggested that the lawyer gave inappropriate advice, was negligent, or caused the client to suffer loss;

(c) another party to the transaction in which the lawyer was involved (on behalf of a client) alleges the lawyer caused him or her loss or damage (even where the lawyer believes that he or she did not represent this party or offer advice);

(d) the lawyer may have made an error, however, the lawyer’s client has assured the lawyer that he or she will not sue; or

(e) the lawyer’s client has given the client’s file to a new lawyer for review, and the new lawyer has suggested that the original lawyer acted improperly or gave inappropriate advice.

Although a report must be in writing, LIF encourages lawyers to call if the matter is urgent, the lawyer needs immediate assistance, or the lawyer is uncertain whether or not a report is necessary. For contact information for Claims Counsel, see “Contact us—by types of inquiries” in the LIF section of the Law Society’s website.

In addition to the Policy’s reporting requirements, rules 7.8-2 and 7.8-3 of the BC Code impose ethical obligations on lawyers to give notice of claims and to co-operate with the Captive, and Law Society Rule 3-39 obligates lawyers to comply with the Captive’s terms. These provisions reduce the risk to the public of coverage being denied.

2. How to Report and Other Reporting Information

All claims or potential claims must be reported in writing—telephone notice is not sufficient and will not trigger coverage under the Policy. A written report containing the fullest information available must be mailed, faxed, or emailed to LIF as follows:

Lawyers Indemnity Fund
8th Floor, 845 Cambie Street
Vancouver, BC V6B 4Z9
Attention: Claims Director
Fax: 604.682.5842
Email: LIFclaims@lsbc.org

Reporting guidelines for lawyers are available in the LIF section of the Law Society’s website.

Any lawyer reporting a claim or potential claim should review the reporting guidelines for additional information, including what to include in a written report. For answers to questions that are asked frequently, see “My Claim: Questions and Answers” in the LIF section of the Law Society’s website.

3. Obligations to the Client

Rule 7.8-1 of the BC Code imposes an ethical obligation on a lawyer to inform the client promptly of the facts of certain errors or omissions, without admitting liability, and to recommend that the client obtain independent legal advice.

Condition 5.3 of the Policy prohibits a lawyer from admitting liability and places further restrictions on a lawyer’s ability to compromise their legal position without the Captive’s prior written consent. The restrictions include a prohibition against a lawyer entering into a settlement.

As noted earlier, lawyers are both contractually and ethically obliged to report to LIF any error or any circumstance that could reasonably be expected to be the basis of a claim, however unmeritorious. Accordingly, the Claims Counsel handling the report will assist the lawyer in meeting their ethical obligations, without prejudicing their indemnity coverage through a breach of Condition 5.3 of the Policy.

4. Confidentiality

LIF is a part of the Law Society, but maintains confidentiality over claims information, except on a “no name” or statistical basis, from other depart-
ments or committees of the Law Society. The only exception to this policy is if the claims information contains evidence of dishonest appropriation, fraud or criminal activity.

5. After a Report

New reports of claims and potential claims are reviewed by one of the Claims Directors and, depending on the area of law, assigned to one of LIF’s experienced, knowledgeable Claims Counsel.

Claims Counsel first makes sure that coverage is in order (it usually is), and then works to determine the most appropriate strategy to manage the matter. The strategy will depend on a number of factors. Is the lawyer reporting an actual claim or the lawyer’s discovery of a mistake that might lead to a claim? Can steps be taken to fix the mistake or minimize the loss? Is a vigorous defence required or should there be work towards a resolution? Is it best simply to “let sleeping dogs lie” and wait for further developments or to take immediate steps?

Generally, the lawyer can expect a phone call from Claims Counsel after the lawyer reports. The lawyer will also receive a letter. Claims Counsel may need more information and will want to discuss next steps with the lawyer. Claims Counsel can also answer any questions the lawyer may have, including what to say to their client.

[§5.06] Consequences of a Paid Indemnity Claim

If a report results in a claim where an amount is paid to indemnify the lawyer, there are consequences for the lawyer:

(a) the lawyer must pay a deductible of $5,000 for the first paid indemnity claim and $10,000 for any subsequent claims reported within three years of the first paid claim (a “deductible” is that portion of the damages awarded or settlement negotiated that must be contributed by the Covered Party);

(b) the lawyer must pay a surcharge of $1,000 per annum on the indemnity fee for each of the following five years in which the lawyer is in private practice; and

(c) the lawyer loses eligibility for the part-time discount for the next five years.

Defence costs and other expenses paid on a claim do not attract any of these consequences.

[§5.07] Optional Business Innocent Covered Party Coverage (“BIC”)

LIF offers optional business innocent covered party coverage to protect innocent partners in law firms who may face claims that would be otherwise uninsured or not indemnified because the business interests of another lawyer in the firm trigger Exclusion 6.2 of the compulsory policy (the “business exclusion” clause). The coverage will apply when partners are unaware, despite reasonable and regular inquiries, that another lawyer in the firm was providing legal services when the business exclusion would apply.

Full details regarding the BIC policy (including the cost) are available from LIF.

[§5.08] Additional Resources

The LIF section of the Law Society’s website is an excellent resource for information about the indemnity program.

The site offers information about the compulsory indemnification policy and the BIC Policy, as well as general information about the services of LIF. The site links to publications of LIF and the Law Society intended to encourage preventative action to avoid specific practice risks, including fraud.

The “Risk Management” section offers publications such as “Limitations and Deadlines Quick Reference List”. This list was updated in 2019, and it remains a useful guide to common limitation periods. A copy is attached as Appendix B. It can also be found on the LIF section of the Law Society’s website.

In addition, answers to a number of frequently asked questions about indemnity coverage are provided in the LIF section of the Law Society’s website.

These resources provide information about various initiatives that the Law Society has embarked on to respond to the needs of BC lawyers. They include multidisciplinary partnerships, mobility, free indemnity coverage for approved pro bono services, indemnity coverage for lawyers employed by legal aid and public advocacy groups (public legal services lawyers), fraud prevention and solicitor property sales.
Here’s a closer look at the insurance available through the Law Society (pink) and on the commercial market (grey).

<table>
<thead>
<tr>
<th><strong>Policy</strong></th>
<th><strong>Limits/deductibles</strong></th>
<th><strong>Risks</strong></th>
</tr>
</thead>
</table>
| **Part A** Professional Liability | » $1 million per error/$2 million annual aggregate  
» $5,000 or $10,000 deductible | Negligence claims for compensatory damages, or associated repair costs or claims expenses. |
| **Part B** Trust Protection | » $300,000 per error/$17.5 million annual profession-wide aggregate  
» No deductible | Client coverage for lawyer theft (dishonest appropriation), but you must repay if your own theft. |
| **Part C** Trust Shortage Liability | » $500,000 sublimit to Part A per error and annual aggregate/  
$2 million annual profession-wide aggregate  
» deductible is 35% of indemnity or claims expense payments, reduced by any overdraft | Loss of trust funds caused by either social engineering fraud (the intentional misleading of a lawyer into sending or paying trust money based on false information that is provided to the lawyer), or a bad certified cheque. |

<table>
<thead>
<tr>
<th><strong>Optional BIC Business Innocent Covered Party Coverage</strong></th>
<th><strong>Limits/deductibles</strong></th>
<th><strong>Risks</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Excess to the Part A professional liability limit</td>
<td>Limits in excess of $1 million may be $1, $2, $4 million or more.</td>
<td>Negligence claims that result in claims expenses and/or indemnity payments that exceed the Part A limits. May provide “drop down” coverage for risks that Part A does not cover such as: crime, employment practices liability or others.</td>
</tr>
<tr>
<td>Crime (fidelity) may be endorsed with Social Engineering or Funds Transfer Fraud coverage</td>
<td>Limits are generally $1 to $5 million; social engineering fraud coverage sublimit is often $250,000. Higher limits may be available.</td>
<td>Theft of trust funds or securities by a law firm employee or other third party. Includes coverage for other types of criminal losses typically excluded under property, such as employee forgery and alteration, computer fraud, loss of money and securities. Social engineering fraud will respond if you are defrauded through the intentional misrepresentation of some material fact, and funds transfer fraud will respond if your bank is defrauded.</td>
</tr>
<tr>
<td>Network Security Breach (aka “Cyber”)</td>
<td>Limits are generally $1 to $10 million. Often includes sublimits, including for first party and social engineering fraud coverage.</td>
<td>Coverage for: the receipt or transmission of a computer virus or other program via the internet or in any other electronic manner; the failure or violation of the security of computer, telecommunication or other devices, systems, or networks; and malicious computer code or programming intended to interrupt your system or obtain or release information without your consent. Usually includes coverage for both first party losses (notification costs if personal information is stolen, cyber extortion / ransomware, IT forensics, the cost to rebuild IT infrastructure and associated PR costs, assistance from experts such as data breach consultants) and third party liability. May also include social engineering fraud coverage.</td>
</tr>
<tr>
<td>Commercial General Liability (CGL)</td>
<td>Limits are generally $2 to $5 million. CGL and Property are often purchased as a combined policy (office package).</td>
<td>Bodily injury and property damage to third parties arising from your operations and premises, including injuries to clients and other visitors. Advertising liability, tenants’ liability, defamation and other personal injury claims.</td>
</tr>
<tr>
<td>Property</td>
<td>Limit depends on the value of the firm’s assets. Property and CGL are often purchased as a combined policy (office package).</td>
<td>Loss of physical assets including buildings (if owned), office contents, equipment and valuable papers/records, and business income/interruption as a result of perils including fire, theft, vandalism, flood and earthquake. May include a small sublimit for social engineering fraud.</td>
</tr>
<tr>
<td>Employment Practices Liability (EPL)</td>
<td>EPL and D&amp;O are often purchased as a combined policy. Limit $1 million or higher.</td>
<td>Employment related risks. Responds to a wide range of allegations related to wrongful employment practices, including wrongful dismissal claims, breach of contract, sexual harassment and discrimination.</td>
</tr>
<tr>
<td>Directors &amp; Officers Liability (D&amp;O)</td>
<td>D&amp;O and EPL are often purchased as a combined policy. Limit $1 million or higher.</td>
<td>Management related risks. Protects the law firm and its individual directors and officers in their capacity as such from risks such as mismanagement of the firm. Protects the personal assets of those individuals in the event of a bankruptcy.</td>
</tr>
</tbody>
</table>
**Limitations and Deadlines Quick Reference List**
*(June 2014 – later updates noted within the text)*

This list is provided for reference only. It is not exhaustive, and should not replace regular review of the relevant legislation (including the *Interpretation Act*), rules and case law (see *Beat the clock*, tips 30, 31).

<table>
<thead>
<tr>
<th>Area of Law, Statute and Section</th>
<th>Required Step</th>
<th>Deadline or Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Administrative</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 11</strong></td>
<td>Apply for judicial review</td>
<td>No limitation unless an enactment otherwise provides and the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay</td>
</tr>
<tr>
<td><strong>Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 24(1)</strong> (Act applies if specified in a tribunal’s enabling legislation)</td>
<td>File notice of appeal to appeal tribunal respecting a decision</td>
<td>Within 30 days from date of decision unless otherwise provided in a tribunal’s enabling Act, however, the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist</td>
</tr>
<tr>
<td><strong>Human Rights Code, R.S.B.C. 1996, c. 210, s. 22(1)</strong></td>
<td>File complaint pursuant to Code</td>
<td>Within one year of the alleged contravention [June 2019]</td>
</tr>
<tr>
<td><strong>Bankruptcy and Insolvency</strong></td>
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</tr>
<tr>
<td><strong>Bankruptcy and Insolvency Act, R.S.C. 1985, c-B3, s. 81(4)</strong></td>
<td>File proof of claim (relating to property in the possession of the bankrupt) with the trustee in bankruptcy</td>
<td>Within 15 days after the sending of notice by trustee</td>
</tr>
<tr>
<td><strong>Bankruptcy and Insolvency Act, s. 168.2(1)(b)</strong></td>
<td>Give notice of intention to oppose a bankrupt’s automatic discharge (to bankrupt, trustee and Superintendent)</td>
<td>Before the automatic discharge would otherwise take effect (see s. 168.1 to determine applicable period as may be as short as nine months)</td>
</tr>
<tr>
<td><strong>Bankruptcy and Insolvency Act, s. 135(4)</strong></td>
<td>Appeal disallowance of creditor’s claim by trustee</td>
<td>Within a 30 day period after the service of the notice, or such further time as the court may, on application made within that period, allow</td>
</tr>
<tr>
<td><strong>Bankruptcy and Insolvency General Rules, C.R.C. c. 368, ss. 30 and 31</strong></td>
<td>Appeal decision of the registrar or to Court of Appeal from decision of a judge (by filing and serving)</td>
<td>Within 10 days after the day of the decision appealed from</td>
</tr>
<tr>
<td><strong>Civil Procedure, Litigation and Remedies</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Limitation Act, S.B.C. 2012, c. 13, s. 27</strong></td>
<td>Sue for a judicial remedy or exercise a non-judicial remedy (some exceptions – see Creditors Remedies)</td>
<td>Not more than two years after the claim is discovered, regardless of the terms of any non-judicial remedy</td>
</tr>
<tr>
<td><strong>Limitation Act, s. 16</strong></td>
<td>Commence third party proceedings for contribution and indemnity</td>
<td>The later of the day on which the third party claimant is served with a pleading in respect of a claim for contribution and indemnity or the first day the claimant knew or reasonably ought to have known that a claim may be made</td>
</tr>
<tr>
<td><strong>Supreme Court Civil Rules, BC Reg. 168/2009, Rule 7-7(2)</strong></td>
<td>Respond to notice to admit</td>
<td>Within 14 days of service of the notice</td>
</tr>
<tr>
<td><strong>Supreme Court Civil Rules, Rule 3-5(4)</strong></td>
<td>Commence third party proceeding</td>
<td>Within 42 days after service of the notice of civil claim (or counterclaim), absent leave of the court</td>
</tr>
<tr>
<td><strong>Supreme Court Civil Rules, Rule 3-2(1), (3)</strong></td>
<td>Apply to renew an original notice of civil claim where defendant has not been served</td>
<td>On application by the plaintiff before (or in many circumstances, after) the expiry of 12 months from the date the notice of civil claim was issued</td>
</tr>
<tr>
<td><strong>Supreme Court Civil Rules, Rule 13-2(18), (19)</strong></td>
<td>Apply to renew writ of execution</td>
<td>Within one year of the issuance of the original writ or the date of renewal of the writ</td>
</tr>
<tr>
<td><strong>Supreme Court Civil Rules, Rule 23-6(9)</strong></td>
<td>File notice of appeal of a Master’s order</td>
<td>Within 14 days of the order or decision</td>
</tr>
<tr>
<td><strong>Court of Appeal Rules, BC Reg. 297/2001, Rule 34(1), (2)</strong></td>
<td>Apply to vary or discharge order of a justice</td>
<td>Within seven days after the order is made</td>
</tr>
<tr>
<td><strong>Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 14(1)</strong></td>
<td>Bring an appeal or apply for leave to the court to appeal (by filing and serving)</td>
<td>Unless otherwise specified, 30 days running from the day after the order is pronounced</td>
</tr>
<tr>
<td><strong>Supreme Court Act, R.S.C. 1985, c. S-26, s. 58</strong></td>
<td>Apply for leave to appeal/file notice of appeal where leave not required or granted</td>
<td>Within 60 days from the date of the judgment appealed from/within 30 days of judgment or order granting leave</td>
</tr>
<tr>
<td><strong>Corporate/Commercial</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Business Corporations Act, S.B.C. 2002, c. 57, s. 348(2)</strong></td>
<td>Name shareholder as a party to an action against a dissolved corporation</td>
<td>Shareholder to be added as a party to the action within two years of company’s dissolution</td>
</tr>
<tr>
<td>Area of Law, Statute and Section</td>
<td>Required Step</td>
<td>Deadline or Limitation</td>
</tr>
<tr>
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</tr>
<tr>
<td><strong>Business Corporations Act</strong>, s. 349(2)</td>
<td>Apply as a judgment creditor to the Minister for recovery against a dissolved company’s assets</td>
<td>Within two years of company’s dissolution</td>
</tr>
<tr>
<td><strong>Canada Business Corporations Act</strong>, R.S.C. 1985, c. C-44, s. 118(7)</td>
<td>Sue director(s) for liability to the company</td>
<td>Within two years from the date of the resolution authorizing the director’s action</td>
</tr>
<tr>
<td><strong>Canada Business Corporations Act</strong>, s. 119(3)</td>
<td>Sue directors for liability to employees</td>
<td>While still a director or within two years of the termination of the directorship</td>
</tr>
</tbody>
</table>

**Creditors’ Remedies**

| **Limitation Act**, S.B.C. 2012, c. 13, s. 14¹ | Commence a proceeding for a claim on a demand obligation | Within two years of a failure to perform the obligation after a demand for performance has been made |
| **Limitation Act**, ss. 6 and 38² | Commence a proceeding for an unpaid debt | Not more than two or, for government debt, six years after the day on which the claim is discovered |
| **Limitation Act**, s. 7(a) ¹ (see s. 1 definition of “local judgment”) | Sue on a local judgment for the payment of money or the return of personal property | 10 years after the date on which the judgment becomes enforceable |
| **Court Order Enforcement Act**, R.S.B.C. 1996, c. 78, s. 91 | Apply to renew registration of a judgment | Any time before the expiry of two years from the registration or last renewal of registration of the judgment |
| **Court Order Enforcement Act**, s. 29(1) | Apply to have foreign judgment registered in the Supreme Court | Before the time for enforcement has expired in the originating state or 10 years have expired since the date the judgment became enforceable in the reciprocating state [June 2016] |

**Employee Relief and Compensation**

| **Employment Standards Act**, R.S.B.C. 1996, c. 113, ss. 112(3) and 122 | Appeal to tribunal of director’s determination | 30 days after the date of service of the determination if served by registered mail; 21 days if served personally, or by fax or email in compliance with s. 122 |
| **Employment Standards Act**, s. 74(3) | Deliver complaint to director regarding termination | Within six months from last day of employment |
| **Workers Compensation Act**, R.S.B.C. 1996, c. 492 s. 59(2) | Apply for compensation | Within one year of the date of injury, death or disablement, unless special circumstances exist |
| **Human Rights Code**, R.S.B.C. 1996, c. 210, s. 12(5) | Action by employee for discrimination in wages | 12 months from the termination of employment |
| **Canada Labour Code**, R.S.C. 1985, c. L-2, s. 240(2) | Make complaint to inspector for unjust dismissal | Within 90 days from the date on which the person making the complaint was dismissed |

**Estates and Trusts**

For additional limitations and deadlines relating to wills and estates, see the Wills, Estates and Succession Act and the Supreme Court Civil Rules, Part 25

| **Wills, Estates and Succession Act**, S.B.C. 2009, c. 13, s. 59(3) | Apply for rectification of will | Within 180 days from issue of representation grant |
| **Wills, Estates and Succession Act**, s. 146(3) | Commence a proceeding in respect of disputed claim against an estate | Within 180 days after notice is given if the debt is due at the time of the notice, or within 180 days of the time the debt falls due if not due at notice date |
| **Wills, Estates and Succession Act**, s. 61(1)(a) | Commence a wills variation proceeding | Within 180 days from issue of representation grant |
| **Wills, Estates and Succession Act**, s. 61(5) | File a certificate of pending litigation in support of wills variation claim | Within 10 days of starting wills variation proceeding |
| **Limitation Act**, S.B.C. 2012, c. 13, s. 12(1), (2) and (3)¹ | Commence a proceeding based on fraud, fraudulent breach of trust or recovery of trust property | Within two years of when the beneficiary becomes fully aware of the facts enumerated in s. 12(2) |

**Family**

| **Family Law Act**, S.B.C. 2011, c. 25, s. 147(4) | Apply for child support from stepparent | Within one year of stepparent’s last contribution |
| **Family Law Act**, s. 198(2) and (5) | Apply for division of family property or debt, for pension division, or for spousal support | No later than two years after, for married spouses, a judgment granting a divorce or an order declaring a nullity; for spouses living in a marriage-like relationship, the date the spouses separated (family dispute resolution process may suspend running of time) |
| **Family Law Act**, s. 198(3) | Apply to set aside or replace an order or agreement respecting property or spousal support | No later than two years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application |
| **Family Law Act**, s. 233 | Appeal order of Provincial Court to the Supreme Court | 40 days beginning the day after the order is made |

[June 2014; updates noted within the text]
<table>
<thead>
<tr>
<th>Area of Law, Statute and Section</th>
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<th>Deadline or Limitation</th>
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</thead>
<tbody>
<tr>
<td>Canada Pension Plan, R.S.C. 1985, c. C-8, s. 55.1(1)</td>
<td>Apply for division of CPP benefits (between former spouses or former common-law partners)</td>
<td>Within three years of death of former spouse, if spouses apart for more than one year; within four years from the date of separation or at any time with the consent of both former common-law partners</td>
</tr>
<tr>
<td>Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29, s. 19(2)</td>
<td>Apply to set aside the registration of a foreign order</td>
<td>Within 30 days after receiving notice of the registration</td>
</tr>
<tr>
<td>Interjurisdictional Support Orders Act, s. 36(5)</td>
<td>Appeal an order of any BC court</td>
<td>Within 90 days after the date the ruling, decision or order is entered as a judgment of the BC court</td>
</tr>
</tbody>
</table>

**Insurance** For additional insurance limitations, see the Insurance Act (life, disability, accident and sickness) and “Personal Injury and Death” (motor vehicle) below

| Insurance Act, R.S.B.C. 2012, c. 1, s. 23 | Proceeding against an insurer in relation to property and some other contracts of insurance (see ss. 2 and 8 for exceptions) | If property loss or damage, not later than two years after the date the insured knew or ought to have known the loss or damage occurred; in any other case, not later than two years after the date the cause of action against the insurer arose |
| Insurance Act, s. 76(1) | Proceeding against an insurer for recovery of life insurance money in the event of death | No later than the earlier of two years after the insurer receives the information mandated by the statute (s. 73) or six years after the date of death |

**Landlord and Tenant**

| Residential Tenancy Act, S.B.C. 2002, c. 78, ss. 46(4), 47(4) and 49(8) | Apply for arbitration to dispute landlord’s notice to end tenancy | Five, 10, 15 or 30 days from the date the tenant receives notice, depending on the landlord’s reason for termination [June 2019] |

**Liens** Other liens with limitations or deadlines include woodworkers, tugboat workers and repairers liens

| Builders Lien Act, S.B.C. 1997, c. 45, s. 20 | File a claim of lien | No later than 45 days after certificate of completion issued or, if none, head contract completed, abandoned or terminated or, if no head contract, improvement completed or abandoned |
| Builders Lien Act, s. 33 | Sue to enforce a claim of lien and file certificate of pending litigation in support of lien action | No later than one year from the date of the filing of the claim of lien unless 21-day notice issued |
| Builders Lien Act, s. 14 | Sue in trust | One year after head contract completed, abandoned or terminated or, if none, improvement completed or abandoned |

**Municipal Liability**

| Local Government Act, R.S.B.C. 2015, c. 1, s. 736(1)-Vanouver Charter, S.B.C. 1953, c. 55, s. 294(2) [May 2016] | Give written notice of damage to municipality or the City of Vancouver (includes actions against municipal police forces) | Within two months from the date on which the damage was sustained |
| Local Government Act, s. 735/-Vanouver Charter s. 294(1) [May 2016] | Sue a municipality or the City of Vancouver for damages caused by exercise of a power conferred by an enactment | Within six months after the cause of action first arose |

**Personal Injury and Death**

| Local Government Act, R.S.B.C. 2015, c. 1, s. 736(1)-Vanouver Charter, S.B.C. 1953, c. 55, s. 294(2) [May 2016] | Give written notice of damage to municipality or the City of Vancouver (includes actions against municipal police forces) | Within two months from the date on which the damage was sustained |
| National Defence Act, R.S.C. 1985, c. N-5, s. 289 | Sue armed forces personnel | Six months after act or six months after continuing injury or damages cease |

<p>| Insurance (Vehicle) Regulation B.C. (Order in Council no. 595) where s. 103 Notice is issued [April 2019] | Sue ICBC for Part 7 benefits4 for MVA before April 1, 2019 | Two years4 from the date of: (i) the accident; (ii) last payment of benefits to insured; or (iii) receipt by ICBC of the s. 103 notice for which benefits are claimed but have not been paid (such notice must be provided within two years of the MVA). |
| Insurance (Vehicle) Regulation B.C. (Order in Council no. 595) where s. 103 Notice is not issued [April 2019] | Sue ICBC for Part 7 benefits4 for MVA after April 1, 2019 | Limitation period is suspended indefinitely by written notice to ICBC in compliance with new s. 103 of Insurance Vehicle Regulation (Order in Council No. 595) if ICBC does not issue a written response. If ICBC issues a written response to the new s. 103 notice (the “Response”), the Part 7 action must be filed in the CRT within the later of: (i) 3 months from the date of the Response; (ii) 2 years from the date of the accident; and (iii) 2 years from the last payment of benefits to the insured. |
| Insurance (Vehicle) Regulation B.C. (Order in Council no. 595) where s. 103 Notice is issued [April 2019] | Sue ICBC for Part 7 benefits4 for MVA before April 1, 2019 | Two years4 from date of: (i) the accident; or (ii) last payment of benefits to insured. |
| Insurance (Vehicle) Regulation B.C. (Order in Council no. 595) where s. 103 Notice is not issued [April 2019] | Sue ICBC for Part 7 benefits4 for MVA after April 1, 2019 | Two years4 from the date of: (i) the accident; or (ii) last payment of benefits to insured. (Filed in the CRT.) |</p>
<table>
<thead>
<tr>
<th>Area of Law, Statute and Section</th>
<th>Required Step</th>
<th>Deadline or Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Marine Liability Act, S.C. 2001, c. 6, s. 6(1), s. 14(1) [July 2019]</strong></td>
<td>Dependents(^3) sue person or ship for damages for personal injury to family member</td>
<td>Two years(^4) after the cause of action arose(^5)</td>
</tr>
<tr>
<td><strong>Marine Liability Act, s. 6(2), s. 14(2) [July 2019]</strong></td>
<td>Dependents(^3) sue person or ship for damages for death</td>
<td>Two years(^4) after the death of the deceased person(^5)</td>
</tr>
<tr>
<td><strong>Marine Liability Act, s. 23(1) [July 2019]</strong></td>
<td>Personal injury resulting from a collision between ships (not involving a “passenger”)</td>
<td>Two years(^4) after the loss or injury arose(^5)</td>
</tr>
<tr>
<td><strong>Marine Liability Act, s. 37(1) / Athens Convention Article 16 [July 2019]</strong></td>
<td>Personal injury to a “passenger” whether arising from a collision or not</td>
<td>Two years(^4) from the date of disembarkation</td>
</tr>
<tr>
<td><strong>Death of a “passenger”</strong></td>
<td></td>
<td>In the case of death during carriage, two years(^4) from the date when the “passenger” should have disembarked In the case of death after disembarkation, two years(^4) from the date of death of the “passenger”.</td>
</tr>
<tr>
<td><strong>Marine Liability Act, s. 140 [July 2019]</strong></td>
<td>Other personal injury claims (such as single vessel accidents where the injured person is not a “passenger” on a commercial vessel)</td>
<td>Three years(^4) after the cause of action arose</td>
</tr>
</tbody>
</table>

### Tax – Personal, Property and Business

<table>
<thead>
<tr>
<th>Statute</th>
<th>Required Step</th>
<th>Deadline or Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income Tax Act, R.S.C. 1985, c. 1, s. 169(1)</strong></td>
<td>Appeal to the Tax Court of Canada</td>
<td>90 days from the date the notice was mailed to the taxpayer</td>
</tr>
<tr>
<td><strong>Income Tax Act, s. 165(1)</strong></td>
<td>File notice of objection to assessment</td>
<td>The later of 90 days from the date of mailing the notice or one year from the taxpayer’s filing due date</td>
</tr>
<tr>
<td><strong>Assessment Act, R.S.B.C 1996, c. 20, s. 33(2)</strong></td>
<td>Appeal property tax assessment</td>
<td>No later than January 31 of the year following the year of the assessment</td>
</tr>
<tr>
<td><strong>Property Transfer Tax Act, R.S.B.C. 1996, c. 378, s. 19(1)</strong></td>
<td>Mail notice of objection to reassessment to Minister</td>
<td>Within 90 days of the date shown on the notice of assessment</td>
</tr>
</tbody>
</table>

### Victim Compensation

<table>
<thead>
<tr>
<th>Statute</th>
<th>Required Step</th>
<th>Deadline or Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Crime Victim Assistance Act, S.B.C. 2001, c. 38, s. 3(2)</strong></td>
<td>Apply for compensation</td>
<td>Within one year from date of the event or offence</td>
</tr>
<tr>
<td><strong>Crime Victim Assistance Act, s. 13(2)</strong></td>
<td>Request that director reconsider decision to deny compensation</td>
<td>Within 60 days from the date the notice of decision was delivered</td>
</tr>
<tr>
<td><strong>Criminal Injury Compensation Act, R.S.B.C. 1996, c. 85, s. 6</strong></td>
<td>Apply for compensation</td>
<td>Within one year from the date of injury or death</td>
</tr>
</tbody>
</table>

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1. The former Limitation Act, R.S.B.C. 1996, c. 266 applies to pre-existing claims discovered before June 1, 2013. The pre-June 2013 Quick Reference List’s references to those limitations are available through www.lawsociety.bc.ca.

2. A non-judicial remedy does not survive the expiration of a limitation period (s. 27). Therefore, it would be prudent to sue within two years of discovery.

3. See s. 4 of the Marine Liability Act (MLA). The MLA provides for a much broader class of dependents than under the Family Compensation Act.

4. No postponement for infants.

5. Subject to possible extension see Section 23(2) of the MLA.
Chapter 6

Specific Issues

[§6.01] Making Legal Services Available

1. Excerpt From the BC Code, rule 2.1-3(f)

It is a lawyer’s right to undertake the defence of a person accused of crime, regardless of the lawyer’s own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client’s instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.

2. Excerpt From Rondel v. Worsley [1969], 1 A.C. 191 (H.L)

It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right. And it is a judge’s (or jury’s) solemn duty to find that out by a careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits.


Our system cannot survive if there is to be one standard for those who have fallen from grace. Neither can it survive if there is to be one standard of justice for the accused who draw public sympathy and a different standard for those who are held in public contempt. Particularly disquieting is the growing tendency of members of the Bar to shun the acceptance of representation on the side that meets with public disfavor. When the lawyer takes his oath he is not entering a popularity contest. He is assuming solemn obligations, not to be taken lightly at any time during this professional career. [Leon Jaworski, Special Watergate Prosecutor]

4. Law Society Initiatives

The Access to Legal Services Advisory Committee of the Law Society monitors developments on issues affecting access to legal services, and reports those developments to the Benchers on a semi-annual basis. The committee advises the Benchers annually on priority planning with respect to access to legal services.

The Law Society has been making regulatory changes to expand the services that non-lawyers may provide. The Legal Services Regulatory Task Force proposed in 2014 that, with proper training, non-lawyers could be permitted to practice in specific areas of law, including family, employment, collections, and advocacy in Provincial Court and before administrative tribunals.

In September 2018, the Alternate Legal Service Providers Working Group prepared a consultation paper discussing family law legal service providers. The proposal is that these non-lawyers be trained and regulated, and allowed to provide some limited legal services.

In November 2018, amendments to the Legal Profession Act were proposed that would create a new class of “licensed paralegals”: they would be regulated by the Law Society and allowed to perform limited legal services unsupervised. The legislation to amend the Legal Profession Act has since received Royal Assent but the amendments are not yet in force. At the 2018 Annual General Meeting, Law Society members voted that the Benchers ask the government to delay implementing the changes and also that the Benchers not authorize licensed paralegals to practice in the area of family law. In March 2019 the Benchers established a Licensed Paralegal Task Force to consult broadly with the profession to identify opportunities for the delivery of legal services by licensed paralegals in areas where there is a substantial unmet legal need. Note that currently “designated” paralegals may provide certain legal services under the supervision of a lawyer.

For more about Law Society initiatives, see §6.23 or visit www.lawsociety.bc.ca.
5. Access Pro Bono Society of BC

The Access Pro Bono Society of British Columbia (“APB”) is an independent charitable organization whose mission is to promote access to justice in BC by providing and fostering quality pro bono (free) legal services for people and non-profit organizations of limited means. APB is funded mainly by the Law Foundation of BC and the Law Society of BC.

To volunteer with APB, register online at www.accessprobono.ca/lawyer-registration.

(a) Activities and Initiatives

APB’s main activities and initiatives as of November 2018 are as follows:

Pro Bono Legal Services
- Intake & Referrals—a first point of contact for people and non-profit organizations of limited means seeking legal help, and for lawyers seeking to provide legal services;
- Legal Advice—over 120 legal advice clinics operating in communities throughout BC, including access via Skype and telephone;
- Legal Assistance & Representation—the BC-wide Roster Program, as well as the Vancouver-based Civil Chambers Program, Paralegal Program, and Wills Clinic Project.

Pro Bono Engagement
- National Projects—co-administration of national pro bono conferences and projects with sister pro bono organizations across Canada;
- Training & Education—legal training and materials for pro bono lawyers through Continuing Legal Education courses, publications and web links;
- Support Services—full insurance coverage for pro bono lawyers when providing approved legal services, and disbursement coverage for registered pro bono cases;
- Policy & Program Development—advice for law firms developing pro bono policies and programs, and for partnerships between law firms and community organizations.

Legal Advocacy & Outreach
- Events—hosting annual events including the Advice-a-thon and Ride for Justice to raise awareness of legal needs in BC;
- Litigation—conducting test-case litigation on issues concerning access to justice for low- and middle-income BC residents;
- Outreach—providing media information and making submissions on the gaps in legal services for low- and middle-income British Columbians.

APB’s programs and projects offer a full range of pro bono legal services to several thousand British Columbians each year. These services benefit individual clients, but also contribute to the general well-being of BC communities.

Pro bono legal services often prevent social problems from escalating. For example, they often mean the difference between people staying in their homes or becoming homeless, or receiving social assistance payments or becoming destitute. Repeated cuts to legal aid erode the legal safety net for British Columbians of limited means, making pro bono legal services vital.

(b) Core Services

While APB engages in a wide variety of service and advocacy endeavours outlined above, the following programs and projects comprise APB’s core legal services:

Summary Advice Program
APB operates over 120 summary legal advice clinics in community centres, social service agencies, churches and courthouses throughout BC. Some civil (non-family) law clinics are operated in conjunction with the Justice Access Centre at the Vancouver Courthouse. Low- and modest-income individuals can make appointments through APB’s Vancouver office and, in some instances, directly through a local clinic. APB volunteer lawyers provide up to a half-hour of free legal advice to clients on a wide range of criminal, family, civil and immigration law matters. Additional appointments are available. For some individuals located in remote communities or whose mobility is restricted, APB operates clinics by Skype and telephone.

Lawyer Referral Service

APB’s Lawyer Referral Service helps British Columbians of any income to find a suitable lawyer to serve their legal needs. Any member of the public may call the Lawyer Referral Service to obtain the contact information of a lawyer who will meet for a free half-hour legal consultation. Any British Columbian may access APB’s Lawyer Referral Service by calling 1-800-663-1919 or (604) 687-3221 (in Metro Vancouver) from Monday to Friday, 8:30 a.m.

Contributed by Jamie Maclaren, Executive Director, Access Pro Bono Society of BC.
to 5:00 p.m. They may also email lawyerreferral@accessprobono.ca.

Civil Chambers Program

The Civil Chambers Program provides legal assistance and representation services to low- and modest-income individuals engaged in civil (non-family) chambers litigation matters before the Supreme Court and the Court of Appeal in Vancouver. The Civil Chambers Program operates in partnership with the Justice Access Centre at the Vancouver Courthouse. Each Tuesday and Thursday, volunteer lawyers from Vancouver-area law firms provide pro bono legal assistance and representation to otherwise unrepresented chambers litigants.

Roster Program

The Roster Program provides representation for particular case types to qualifying individuals and non-profit organizations. Client applications are screened by APB staff and volunteer coordinators, and are then sent to lawyers for their consideration. Lawyers who respond choose the scope of their services. Roster lawyers qualify for full insurance coverage and disbursement coverage of up to $2,500 per case for the following case types:

- family law;
- barrister services (for judicial review, Court of Appeal and Federal Court, but not BC Supreme Court or Provincial Court);
- wills and estates (simple and non-litigious matters only);
- refugee sponsors seeking advice; and
- corporate matters for non-profit organizations (through the Solicitors’ Program).

Consumer Protection Clinic

APB offers clinics providing summary advice at the Vancouver Justice Access Centre at the Vancouver Courthouse and at the Canadian Chinese Consumer Association in Richmond. Legal advice covers topics such as unfair debt collection practices, bankruptcy, foreclosure, product liability and deceptive advertising.

Employment Standards Program

Volunteer lawyers and law students provide free representation to employees and former employees who meet the income threshold and are appearing before the Employment Standards Branch. Legal advice covers topics such as vacation pay, overtime and termination pay.

Mental Health Program Telephone Clinic

APB volunteer lawyers provide free advice over the telephone to persons detained under the Mental Health Act or their families. Legal advice covers topics such as applying for a review and preparing for a review hearing.

Residential Tenancy Program

Volunteer lawyers and law students provide free representation to landlords and tenants who meet the income threshold and are appearing before the Residential Tenancy Branch. Legal advice covers topics such as contesting an eviction, disputing a rent increase, seeking orders for repairs or recovering security deposits.

Paralegal Program

APB, in partnership with the Law Courts Center and the Ministry of Justice, operates the Paralegal Program each Wednesday evening at the Justice Access Centre at the Vancouver Courthouse. Under the direct supervision of volunteer lawyers, volunteer paralegals assist low-income clients to draft affidavits and court forms required for civil matters before the BC Supreme Court.

Wills Clinic Project

APB, in partnership with the federal Department of Justice and the provincial Ministry of Justice, operates a weekly will preparation clinic at the Vancouver Justice Access Centre at the Vancouver Courthouse. Trained lawyers and articling students draft and execute simple wills and representation agreements for low-income seniors (ages 55+) and people with terminal illnesses. Clinics are held each Wednesday.

(c) Volunteer Opportunities

APB offers a wide and flexible range of pro bono legal services for lawyers practicing in communities throughout BC. APB’s programs and projects are structured to suit lawyers’ schedules, interests and needs. From providing legal advice for a few hours each month to selecting one or two pro bono representation cases each year, litigators and solicitors may choose to volunteer with APB in any number of ways.

6. Legal Services Society (Legal Aid)

The Legal Services Society of British Columbia ("LSS") is an independent, non-profit organization that provides legal help to people in BC who have limited income. LSS provides legal aid to eligible people in the form of services, information and referral. Staff lawyers provide some services, while lawyers in private practice provide other services on a roster and referral basis.
LSS pays legal fees and disbursements for financially eligible people in certain matters.

Eligible family matters include the following:
- serious matters involving child protection, or the safety or security of a spouse or child; or
- high-conflict situations where one spouse is obstructing the other from carrying out lawful parenting or guardianship responsibilities.

Eligible criminal matters are those where the accused, if convicted, could:
- go to jail;
- serve a conditional sentence that would severely limit liberty; or
- lose the ability to earn a living.

Legal aid is also available to Indigenous persons in less serious criminal matters who cannot represent themselves due to illness or disability, where the case affects the person’s ability to follow a traditional livelihood of hunting and fishing.

LSS operates a call centre and provides online information and resources in plain language and in videos.

To keep current about issues and services funded by LSS, see: lss.bc.ca.

[§6.02]  Civil Disobedience and the Legal Profession

Occasionally, members of the legal profession are involved in civil disobedience, either by personally engaging in the unlawful acts, or by advising clients to do so. In “The Rule of Law and Civil Disobedience” in Benchers’ Bulletin (2018: No. 4, Winter) the Law Society’s Rule of Law and Lawyer Independence Advisory Committee said that “justified civil disobedience must be viewed as a very narrow exception to the rule of law.” Portions of the article are extracted below:

The rule of law is central to our freedoms. In Canada, all people (including government) are bound by the law, and those in government do not ultimately interpret the law. It is not a perfect system—not all laws are equally just—but a society adhering to the rule of law benefits from a legal process that permits laws to be challenged or re-interpreted before a group of arbiters (judges) whose independence from the executive and legislative branches of government is assured. This system allows Canadians to enjoy both the freedoms and the stability to society that the law provides, but also to use the justice system to challenge any efforts under law, whether private or state sponsored, to limit or infringe on their legal rights and freedoms.

Manifesting our personal dislike of validly enacted laws through civil disobedience may be justified in rare circumstances, where illegitimate exercises of state power or fundamentally unjust laws nevertheless find support under the prevailing social opinions of the times.

Civil disobedience has a narrow place in civil society, but it presents its dangers too. Where citizens conclude that it is acceptable to act contrary to laws they disagree with because their conscience compels them to do so, the rule of law is diminished.

When we ask whether lawyers may properly disobey laws in order to further what they believe is justice, we raise not one, but several problems. One question is whether such lawyers are legally liable for their acts. Another is whether their conduct is morally justifiable. A third is whether they should be professionally disciplined. It is important to recognize that these are three distinct problems. One might believe that a lawyer is morally justified in breaking some law, yet feel that the lawyer should be held legally responsible for doing so; another might think that the lawyer’s conduct is not morally defensible, yet believe that the matter is of no concern to the lawyer’s professional association.

1. The Legal Problem

It is necessary first to clarify what is meant by “unlawful conduct.” Refusal to comply with a statute that the courts declare to be unconstitutional for some reason would clearly not be unlawful, since an invalid statute cannot create law. Indeed, sometimes the only way a private citizen can challenge the constitutional validity of a statute in the courts is by deliberately disobeying it and inviting prosecution. However, citizens who defy the law on constitutional grounds do so at their own risk. If the statute is held to be intra vires, their conduct will be regarded as unlawful, regardless of the sincerity or reasonableness of their belief. The common law maxim that ignorance of the law is no excuse, now embodied in s. 19 of the Criminal Code, has been held to apply even where the defendant, before acting, obtained an opinion from a lawyer that the conduct would be lawful. Even acts done in reliance on a statute later found to be unconstitutional may be penalized. There are, of course, exceptions to this rule, including: (a) the absence of guilty knowledge or intent, where it is required by statute; (b) an officially induced error; and (c) mistake of fact.

If a lawyer actively participates in some act of civil disobedience—a pipeline protest or road block, for example—the lawyer obviously cannot expect to be treated differently than any other participant. If the
others are liable, so is the lawyer. But what if the lawyer does no more than to advise clients that a road block would be in their best interests? Is the lawyer legally liable for advising a client to break the law?

It might be argued that a lawyer who does so is guilty of conspiracy, civil or criminal. Conspiracy has been defined as: “the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.” Loftiness of motive is no defence where the conspiracy involves inherently unlawful methods. The question is whether a lawyer who advises the client to do an unlawful act can be regarded as having “agreed” to the commission of the act. The better view is that a lawyer who has no personal interest in an unlawful act cannot realistically be said to “agree” to do it merely by advising that it would assist the client.

Apart from conspiracy, there are two other grounds upon which a lawyer might be held liable for counselling civil disobedience: the lawyer may be regarded as a party to the offence, or may be found to have induced the offence. Liability on these grounds seems to vary according to whether the act counselled was a crime, a breach of contract, or a tort. If the lawyer recommends breach of a criminal law, he or she risks liability of both types. Section 22 of the Criminal Code states that anyone who counsels someone else to commit a crime is a party to any crime committed as a result, and s. 464 provides that even if the offence counselled is not committed, the person counselling or procuring is criminally liable. Does a lawyer’s advice to break the law amount to “counselling” within the meaning of the Code? The American case of Goodenough v. Spencer, 46 How. Prac. (N.Y.) 347 at 350 states that it does:

No attorney or counsel has the right, in the discharge of professional duties, to involve his client by his advice in a violation of the laws of the state; and when he does so, he becomes implicated in the client’s guilt, when, by following the advice, a crime against the laws of the state is committed. The fact that he acts in the capacity and under the privileges of counsel, does not exonerate him from the well-founded legal principle which renders all persons who advise or direct the commission of a crime guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given.

It appears that a lawyer who recommends a violation of criminal law will be liable either as a party or as an inducer. However, a lawyer might be able to escape liability by drawing the client’s attention to the possibility and probable advantages of breaking the law, without advising that it be done.

Lawyers who advise clients to break contracts are unlikely to become personally liable. Counselling someone to break a contract does not make the counsellor a party to the act—you cannot be liable for breach of a contract unless you are one of the contracting parties. Instead, counselling is treated as a tort—the tort of inducing breach of contract, to which there are several defences. For one thing, “mere advice ... does not amount to an inducement.” For another, the lawyer can escape liability by showing “justification” for the inducement.

2. Justification

The limits of justification have never been clearly defined. It seems to be a question for the discretion of the court in the light of all the circumstances of the case. Mr. Justice Gale, of the Ontario High Court, described some of the situations in which justification is likely to be found in Posluns v. Toronto Stock Exchange (1964), 46 D.L.R. (2d) 210:

In several instances the Courts have sanctioned interference, particularly where it has been promoted by impersonal or disinterested motives. For example, in some of the early cases it was intimated that a defendant might be excused from the consequences of his otherwise illegal act if he was under the influence of some great moral or religious force, reference being made to a father who might induce his impressionable daughter to break a contract for the promise of marriage with a scoundrel. And I suppose if a doctor were to cause a patient to end a contract of service for health reasons, he would likewise be protected.

It is probable that a lawyer advising a client to break a contract for morally justifiable reasons would be regarded in the same light as this hypothetical doctor. Certainly this would be so if the lawyer held a bona fide and reasonable belief that the statute in question was unconstitutional. In any event, it has been held that an employee who induces his employer to break a contract cannot be held liable, and an independent agent like a lawyer would probably be treated similarly.

What if the act counselled is a tort, rather than a crime or breach of contract? Unless the courts are prepared to recognize inducement of a tort as a separate tort, subject to the same defences as the tort of inducing breach of contract, the lawyer who advises commission of a tort can expect to be made personally liable.

3. The Problem of Professional Discipline

While moral choice is a matter of private judgment, the Canon of Legal Ethics in rule 2.1-1(a) of the BC Code expressly prohibits disobeying the law:
A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

In addition, rule 2.2-1 of the BC Code and the commentary to that rule state as follows:

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.

[...] 

[2] 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.

[3] 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.

[4] 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.

If a lawyer participates in or counsels civil disobedience that the lawyer believes is morally justifiable, that lawyer would generally not, except in extreme cases, be the subject of professional discipline. Many cases of conscientious civil disobedience will not cast doubt on the lawyer’s professional integrity, or reflect adversely on the legal profession or the administration of justice. At the same time, there are obviously circumstances where a lawyer’s breach of rule 2.2-1 could amount to professional misconduct, even though the lawyer honestly believed the conduct was justifiable. Whether the lawyer’s or profession’s integrity was called into question would depend in part on the nature of the unlawful conduct.

[§6.03] The Authority of a Lawyer to Act on a Client’s Behalf

Lawyers who act without proper authority from their clients do so at their peril. Regardless of good faith and honesty in so acting, they are liable for any harm caused to persons misled by their conduct.

The orderly conduct of litigation requires that the courts, litigants and their counsel can assume that any lawyers involved in the judicial process are acting with authority.

While a lawyer’s authority to act is normally assumed, when challenged, the onus is on the lawyer to prove that authority exists: *Sasko Wainwright Oil & Gas Ltd. v. Old Settlers Oils Ltd.* (1957), 20 W.W.R. 613 (Alta. S.C.–A.D.).

A lawyer acting without authority may be liable for the costs involved in setting aside an unauthorized action. For example, see *Kennedy v. Kennedy* (1959), 27 W.W.R. 295 (B.C.S.C.), in which a lawyer filed a petition on behalf of a minor without the authority of a litigation guardian.

When acting for a corporate client, a lawyer must be very careful to ensure that he or she has instructions from a person or persons properly authorized by an existing company: *Standard Construction Co. Ltd. v. Crabb* (1914), 30 W.L.R. 151 (Sask. S.C.). However, the case of *Marley-King Line Const. v. Marly*, [1962] O.W.N. 253 (H.C.) held that a lawyer need not examine the internal workings of a company to show that the resolution authorizing the lawyer to proceed was in accordance with company bylaws.

[§6.04] Authority to Settle

Note that under the BC Code “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” (rule 3.2-4).

A solicitor acting under a general retainer has, in the absence of any restriction contained in the retainer, whole charge of the conduct of the action and of all things incidental to the action. This authority includes the right to do all things that may be necessary in the action, provided the solicitor does so with the honest belief that he or she is acting in the best interests of the client, informs the client of proposals of settlement and explains them properly, and provided further that he or she obtains the express consent of the client when necessary (for example, before agreeing to a final settlement). As set out in rule 3.2-2 of the BC Code “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.”

A lawyer acting for a client stands to the client in the relationship of agent and principal. The lawyer is the general agent of the client in all matters that may reasonably be expected to arise for decision in the case. The client must expect that a cause may not be carried to its natural conclusion, and that it is proper, usual and often necessary to compromise. The lawyer has power to compromise the action in a fair and reasonable manner.
However, consider the following:

(a) In many cases, a lawyer has express limitations placed on this general authority;

(b) If a lawyer purports to make an offer that is outside of his or her authority, and the offer is accepted, the lawyer may be exposed to an action by the client if the settlement is enforced, or to an action for breach of warranty of authority by the opposing party if it is unenforceable (Yannacopoulos v. Maple Leaf Milling Co. Ltd. (1962), 37 D.L.R. (2d) 562 (B.C.S.C));

(c) As a matter of ethics, the client and not the lawyer should always make the important decisions in negotiation, including the decision of whether or not to accept a settlement offer. That is, negotiators should base their authority to settle on a full prior review of the options with the client, and abide by the client’s decisions concerning the objectives of the negotiations and the means by which the objectives will be pursued. Further, to avoid the ethical problem of agreeing to an option not previously discussed with the client, negotiators may need to have available a “creative options” adjournment, for which it would be useful to have the clients available instantly (by telephone or in separate rooms) to respond to new options;

(d) As a matter of practice, lawyers in British Columbia should not settle actions without obtaining specific instructions from the client. When lawyers say “I will recommend this to my client”, they usually mean that they will obtain the client’s agreement barring major unforeseen circumstances; and

(e) As a matter of law, a lawyer who purports to settle an action without obtaining instructions from the client runs the risk of a negligence action for any resulting loss (Yannacopoulos, supra). Whether the lawyer obtained adequate instructions will depend on the circumstances.

Problems can arise when a limitation on the solicitor’s authority is not apparent to the other parties in an action, who agree to a compromise to settle the matter. In such cases the court might interfere when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand (3 Hals. (4th ed.) p. 650).

In Hawitt v. Campbell & Cameron (1983), 46 B.C.L.R. 260, the Court of Appeal stated that it would not recognize a settlement and refuse to grant a stay of proceedings if there was:

(a) a limitation of the instructions of the solicitor known to the opposite party and the settlement was not within the limited instructions;

(b) a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;

(c) fraud or collusion; or

(d) an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement.

Claims to set aside settlements on the basis of a “misapprehension of instructions” appear to be very restricted. In Mandzuik v. Cheshire Cheese Inn Ltd. (16 August 1991), Vancouver No. B891827 (S.C.), the plaintiff instructed her solicitor to settle “for what he could get.” When the solicitor received an all-inclusive offer of $30,000, he communicated the offer to the plaintiff and she accepted. Later she asserted she was not bound by the settlement because she had understood that it was for $30,000 plus costs. Her application was denied; the court held that a lawyer’s misapprehension of the instructions is not a ground for setting aside a settlement where, as here, the settlement did not require a court order to implement it. In any event, any misapprehension of the instructions in this case was on the part of the plaintiff, not the solicitor.

In Adamoski & Adamoski v. Mercer (1984), 54 B.C.L.R. 117 (S.C.), the plaintiff brought an action for damages suffered in a motor vehicle accident. The defendant’s solicitor took instructions from his client’s insurer respecting a settlement of $130,600 and dictated a letter to the plaintiff’s solicitor outlining this offer. Before the letter was mailed, the defendant’s insurer instructed the defendant’s solicitor to offer only $90,000. The defendant’s solicitor inadvertently sent out the letter embodying the settlement offer of $130,600, and after the plaintiff accepted the offer, sought to withdraw it. The court held that the defendant was bound by the offer, because there was no misapprehension of the client’s instructions that would result in injustice or make it unreasonable or unfair to enforce the settlement. There was no misapprehension of instructions in the sense that they were not understood; they were merely forgotten. Accordingly, the defendant’s insurer was left with a remedy against his solicitor.

In McCaskie v. McCaskie (1990), 25 R.F.L. (3d) 291 (B.C.C.A.), the solicitors for each side reached what they thought was a settlement over the telephone. However, before the wife’s solicitors could mail the confirming letter they had prepared, the wife terminated their retainer. At trial there was evidence that the articling student for the wife’s solicitors was to have sent a draft letter to the wife “as one last check.” The Court of Appeal held that it was open to the trial judge to conclude, after reviewing the circumstances, that a final settlement had not been reached and that the settlement in the case.
had to be in writing and approved by the parties before it could be binding.

[§6.05] Duty to the Court Generally

Rule 2.1-2(a) of the BC Code states:

A lawyer’s conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

The lawyer’s duty of candour and respect to the courts must be balanced with the duty of tenacious representation owed to clients. The object of the legal system is to determine truth and achieve justice. As a result, there must be limits placed on the adversarial nature of the litigation process. The effectiveness of the system relies heavily on the credibility of the courts as independent and competent arbitrators. Therefore, the conduct of counsel before the courts is governed by rules which assure that the courts are treated with proper respect and that there is no appearance of impropriety.

Especially where counsel is proceeding without notice to the other party, counsel owes the court a duty to make full and frank disclosure of the material facts: Evans v. Umbrella Capital LLC, 2004 BCCA 149.

[§6.06] Accuracy in Pleadings

It is clearly improper for a lawyer to deliver a pleading that asserts a cause of action having no foundation in law.

It is improper not only to disguise a cause of action that is not maintainable, but also to advance a claim that clearly has no basis in law. This is not to say that it is improper to deliver a pleading which puts forward a claim relying on what, in the advocate’s opinion, is an erroneous view of the law. But the border is crossed into the area of misconduct if the law is sufficiently clear that the lack of legal foundation would not be the subject of reasonable dispute among reasonably competent lawyers.

Another clear rule is that a lawyer must not deliver any pleadings containing allegations of fact he or she knows to be false.

However, with respect to knowledge of the facts, a lawyer is subject to severe limitations in that he or she generally receives information from the client and sources available through the client. To the extent that documentation exists, he or she must rely on the client and the available witnesses for identification and clarification.

[§6.07] Abuse of Process

Lawyers have a duty not to use the litigation process to delay unfairly or cause the other party unnecessary cost. It is also improper to use the process to harm the other party maliciously, which may subject the lawyer to professional discipline as well as to court sanctions. One example of the latter occurred in Sonntag v. Sonntag (1979), 24 O.R. (2d) 473 (S.C.), where an unnecessarily repetitious solicitor unduly interfered with the conduct of discovery by examining counsel. The court found his conduct constituted an obstruction of the process of the court, resulting in costs being incurred unnecessarily or wasted by the opposing party. The solicitor was ordered to pay the costs of the opposing party of the aborted discovery.

Improperly instigating a criminal prosecution may constitute the tort of malicious prosecution. Compromising a criminal liability, by taking money to drop a prosecution, for example, can constitute extortion in many circumstances, creating civil and even criminal liability. Levy ing civil execution, such as seizure or garnishment, for improper purposes or for excessive amounts or by using methods not authorized by law, is a tort.

Rule 3.2-6 of the BC Code states as follows:

3.2-6 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.

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In contested proceedings, the lawyer has a limited affirmative duty to ensure that all relevant evidence is presented to the court. He or she is concerned with establishing the *prima facie* case, with destroying it and with its restoration.

Notwithstanding the partisan nature of an advocate, lawyers owe duties to the court, including the duty not to engage in the following:

(a) a lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused’s guilt or innocence, in the justice or merits of the client’s cause or in the evidence tendered before the court (rule 2.1-2(c) of the *BC Code*);

(b) a lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer’s or a client’s favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort (rule 2.1-2(d) of the *BC Code*);

(c) when acting for a client, 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 (rule 3.2-7 of the *BC Code*); and

(d) 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 controversy (rule 3.2-10 of the *BC Code*).

Rule 5.1-2.1 deals with incriminating physical evidence, and states:

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

See also the commentary to rule 5.1-2.1.

Rule 5.1-2 of the *BC Code* states that, 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 fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(l) knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation;

(m) abuse, heckle or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

(p) appear before a tribunal while under the influence of alcohol or a drug.

Many of these examples are supported by case law which reflects that breach of a duty will be visited with the severest penalties imposed by the court.

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5 Based on Finlay, *supra*, pp. 22–30; revised by PLTC.
For instance, it is a contempt of court to do anything to keep a potential witness “out of the way”, such as suggesting that he or she might take a short trip, even where he or she has not been subpoenaed. Any of the conduct set out in the last four items in the above list constitutes a contempt of court if the purpose is to deter or influence the witness from or in giving testimony.

The failure to disclose adverse but relevant evidence may be improper. The crown in criminal matters has a duty to disclose all relevant evidence. In civil matters, especially in proceeding without notice, there is an obligation to present the court with all the facts that would influence the court’s decision: *McKnight v. Hutchison*, 2009 BCSC 343 at para. 31.

Where the lawyer adduces evidence, the lawyer is not the one judging its credibility, which may create ethical difficulties in certain situations:

(a) deciding whether to call a witness of doubtful veracity;

(b) hearing a client lie for the first time while giving evidence; and

(c) being told by a client after a trial that the client had committed fraud.

The lawyer may not know or have reason to believe that the evidence is false. Mere inconsistency between what a person says at one time and another is insufficient to conclude that the person will offer or has offered false testimony. If inconsistency appears in a client’s or witness’s statements or testimony, the lawyer has a duty to the court to explore the inconsistency at the first opportunity. If the lawyer, based on that enquiry, is certain that the client or witness intends to offer false evidence, then the lawyer’s duties to the court with respect to false evidence arise (discussed later); otherwise, the lawyer is entitled to proceed and leave it to the court to assess the truth of the statements or testimony.

For a lawyer to put forward false evidence knowingly is “at the very least, a gross neglect of duty” and very likely a criminal offence. In *Re Ontario Crime Commission*, 1962 CanLII 140 (Ont. C.A.) the Court of Appeal found that counsel had inserted “scurrilous and shoddy statements” in an affidavit, which the court concluded could only have been inserted for the purpose of attracting publicity and undermining public confidence in the Commissioner. The court concluded this aspect of the case with the following comments:

It is no answer for counsel to say that he was merely carrying out his client’s instructions. If the instructions are to do that which is wrong, counsel is abetting the wrong if he carries out the instructions. If he knows that his client is making false statements under oath and does nothing to correct it his silence indicates, at the very least, a gross neglect of duty. Regardless of any other sanctions which may be imposed upon him, there will be an order that counsel for the applicant personally pay the costs of all other parties appearing on this motion.

While the lawyer must not adduce false evidence knowingly, he or she should not be considered as “vouching” for the credibility of a witness. This would place an obligation on the lawyer that he or she is not particularly well equipped to discharge. In addition, it may be necessary to call a witness of doubtful veracity to establish a purely formal matter, such as to identify a document or to bring in a single, but essential, fact. That the witness may be a notorious liar with respect to other matters should not deprive counsel of the means of proving other facts. At the same time, a lawyer must not call any witness who has advised the lawyer that he or she intends to offer false testimony: see the *BC Code*, rule 5.1-2(e) generally.

Nowhere are the problems of conduct more acute than in the case of evidence, known by the lawyer to be false, given by the client without warning at the trial. The lawyer’s duty to preserve confidences and the duty not to mislead the court or further a fraud seem to collide unavoidably. There is no doubt that if the client advises counsel before the hearing of his or her intention to perjure himself or herself, counsel must convince him or her not to, or withdraw: see the *BC Code*, rule 3.7-7(b) generally.

A lawyer must not disclose the fact that a withdrawal was caused by a client’s insistence on giving false testimony: see the *BC Code*, rule 3.7-9.1 generally.

To what extent does a lawyer have a duty to expose to the court evidence that is adverse to the client? There is a fine line between conscientious advocacy for one’s client, which includes not concealing anything unnecessarily to the opposition, and the unethical concealing of information that ought to be disclosed: *Harper v. Harper* (1979), 98 D.L.R. (3d) 600 (S.C.C.).

In *Harper v. Harper*, lawyers for both parties were unaware that the husband had repaid a loan on the matrimonial home prior to trial; the change in title had not been registered. The husband’s lawyer learned of this matter confidentially while preparing the husband’s appeal of the husband’s entitlement to a share of the property. The issue of the husband’s entitlement had not been dealt with at trial, and the appeal was argued on the record created at trial.

In a subsequent discipline hearing against the husband’s lawyer, the Benchers found that the lawyer had a duty to his client not to disclose the confidential information to anyone. However, his duty to the client did not require him to institute an appeal on a new issue, the factual basis for which was known to him to be untrue.

Even if there was no fraud in the creation of the record, the conduct of the lawyer in this case was “contrary to the best interests of the public” in that the court was invited to accept a factual premise not in issue at trial, not
adequately dealt with at trial, and known to be untrue to the appellate counsel. The lawyer’s conduct in the pursuit of the appeal was found to be conduct unbecoming a member of the Society.

§6.09  Manufacturing Evidence

In *Dicks v. Dicks*, [1949] 2 W.W.R. 866 (B.C.S.C.), Farris C.J.S.C. made the following oral remarks:

The facts would indicate that the solicitor for the respondent had apparently advised the respondent of the steps necessary to enable the parties to be divorced. In so doing he must have advised the respondent to commit the act of adultery, and not only that, but himself undertook to obtain a detective and did instruct a detective to be present so that the evidence for the divorce could be obtained... On the face of it, it would seem that the solicitor, in apparently advising and taking the steps which he did, would have been acting in a manner which would be most highly reprehensible.

§6.10  Respect for Counsel

While it is the duty of a lawyer to treat the courts with respect and candor, a certain reciprocal respect and trust on the part of the bench is required for the system to operate effectively. The court should assume, until the contrary is demonstrated, that counsel is acting honestly and competently. This, however, is balanced against the court’s inherent jurisdiction to protect the integrity of the legal system it represents.

§6.11  Contempt of Court

The only common law offence for which a person may now be convicted is the offence of criminal contempt of court; see the *Criminal Code*, ss. 9 and 10.

In *Re Duncan*, [1958] S.C.R. 41, the Supreme Court of Canada stated:

There is no doubt that a counsel owes a duty to his client, but he also has an obligation to conduct himself properly before any court in Canada... It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray*, that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could, or would, treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category, which Lord Chancellor Hardwicke had as early as 1742 characterized as “scandalizing a Court or a judge.”

The matter is put succinctly in the 3rd edition of *Halsbury*, vol. 8 (1954) at p. 5:

The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting... It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice.

The following passages illustrate two types of situations in which a lawyer can be convicted of criminal contempt of court.

1. Failure to Appear in Court

In *R. v. Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.), counsel explained his failure to represent his client at a preliminary hearing on the basis of inadvertence arising from a breakdown of a system which ordinarily worked for the counsel in question. The Ontario Court of Appeal set aside a conviction for contempt, noting that the conduct of the lawyer in question was neither deliberate nor indifferent. At the most, his conduct was an isolated and inadvertent lapse, which under the circumstances would not constitute contemptuous conduct. See also *R. v. Kopyto* (1981), 122 D.L.R. (3d) 260 (Ont. C.A.).

2. Withdrawal During Trial

In *R. v. Swartz*, [1977] 2 W.W.R. 751 (Man. C.A.), the lawyer asked the court for a two-week adjournment so that expert reports which he had requested but were unfinished could be introduced. The judge refused the motion, and on hearing the lawyer state he would have to withdraw from the case, ordered him not to leave the courtroom, threatened to report him to the Law Society, had the constable arrest him, and charged him with contempt. The lawyer was convicted and appealed.

The appeal was allowed. The Court of Appeal stated:

In contempt proceedings the attitude or intent of the actor is all important. The lawyer who deliberately and of set purpose frustrates the due carrying on of court proceedings by a willful act of non-attendance is surely on a different footing from the lawyer who, like Mr. Swartz here, impulsively reacts to an adverse and rather shattering ruling of the court by attempting to withdraw. The first is a case of willful and contemptuous conduct. The second is at worst an error of judgment.

The Court of Appeal referred to a quotation from Shimon Shetreet in *Judges on Trial*:

A better course of action for counsel [except in extraordinary circumstances is] to continue to
take part in the trial and raise his complaints against the conduct of the judge on appeal. . .
Sometimes counsel cannot divert the judge from a course of conduct, which makes it very difficult for him to discharge his duties, and renders it impossible for his client to have a fair trial. In those cases courageous counsel have sometimes withdrawn from the case and walked out of court in protest. The traditions of the Bar do not exclude such an extreme measure. The Bar Council gave the following ruling in 1933:

. . . if counsel is unfairly interfered with to such extent as to defeat the course of justice it may be necessary for counsel to withdraw from the case or to leave the matter to be dealt with on appeal. Counsel should always remember that his paramount duty is to protect the interest of his client.

Naturally, this measure has been taken by counsel only in exceptional cases.

In most cases where withdrawal from the record is based on matters relating to the conduct of the case or disagreements with the client about the conduct of the case or otherwise, it is appropriate for counsel merely to announce that he or she does not propose to carry on. However, counsel do not have an unfettered right to withdraw.

The BC Code addresses withdrawal from representation in section 3.7. Further guidance on the lawyer’s right to withdraw appears in the commentary to the rules in section 3.7.

Rule 3.7-1 states: “A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.” For guidance as to what constitutes “reasonable notice,” see commentary [2] to rule 3.7-1.

Rule 3.7-2 states: “If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.”

Other rules in section 3.7 address withdrawal for nonpayment of fees (rule 3.7-3), withdrawal from criminal proceedings (rule 3.7-4), obligatory withdrawal (rule 3.7-7), manner of withdrawal (rule 3.7-8), withdrawal when the reason for withdrawal results from confidential solicitor-client communications (rule 3.7-9.1), and the duty of the successor lawyer (rule 3.7-10).

See also the Practice Material: Criminal Procedure, §3.27 (Withdrawal as Counsel), on the court’s jurisdiction to refuse to permit counsel to withdraw from a criminal case in certain circumstances, and the Opinion of the Ethics Committee from December 2018 regarding withdrawal of legal aid and duty counsel services (www.lawsociety.bc.ca/Website/media/Shared/docs/publications/code/ec/EC-opinion.pdf).

Note also that a lawyer must comply with Supreme Court Civil Rule 22-5 before being relieved of duties as the “solicitor acting for the party.”

[§6.12] Costs Against Lawyers

Costs may be ordered against a lawyer personally where the lawyer’s conduct constitutes “abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice”: Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26 at para. 26.

A superior court has the power to award costs as part of its inherent jurisdiction. In Jodoin, Chief Justice McLachlin (as she then was) said the courts must be cautious in awarding costs personally against a lawyer.

Courts have ordered solicitors to pay costs in the following kinds of situations:

(a) a lawyer assumed a case would come on for trial later than it did;
(b) a lawyer underestimated the length of the trial;
(c) a lawyer improperly acted for both sides;
(d) a lawyer attempted to intimidate witnesses to prevent them from testifying, resulting in special costs (O.E.X. Electromagnetic Inc. v. Coopers & Lybrand, [1992] B.C.W.L.D. 2449 (S.C.));
(e) a lawyer irregularly issued a subpoena;
(f) the subject matter of the suit was important to the lawyer but not to the client; and
(g) a lawyer acted without proper authority.

In O’Neil v. Pacific Great Eastern Railway (1971), 24 D.L.R. (3d) 628 (B.C.A.), counsel, in his examination-in-chief of a witness in a jury trial, disregarding objections by opposing counsel, asked the witness questions on a matter that had become irrelevant as a result of earlier evidence. In so doing, he elicited answers that were most prejudicial to the defence and might well have led to an improper verdict. The Court of Appeal found that the trial judge had correctly exercised his discretion in discharging the jury and ordering the solicitor personally to pay the costs of the abortive trial. The Court of Appeal said:

A trial judge has the inherent power to prevent either party being prejudiced by references which might lead to an improper verdict, and the discretion of the trial judge is only interfered with in exceptional circumstances; and no such exceptional circumstances, in my view, exist here. . . It is clear, I think, that in appropriate circumstances an order to pay costs thrown away may be made against a solicitor.
See also Re Bisyk (No. 2) (1980), 32 O.R. (2d) 281 (H.C.), affirmed March 12, 1981 (C.A.), where the validity of a will was attacked. Allegations of undue influence were pursued to the conclusion of the case. The court found the allegations were unfounded and had been pursued without justification. In dealing with the question of costs, the court noted that the lawyer was:

...in control of the litigation and in any event [had] joined himself to the proceedings as attorney and in that capacity ... participated in the proceedings. [The lawyer] must assume responsibility for the allegations advanced and should bear the risk of costs where allegations are made irresponsibly and without foundation. An order will go for costs on a solicitor and client basis against [the lawyer] personally.

If an order is sought under the court’s inherent jurisdiction against a lawyer to pay costs personally, the lawyer must be given an opportunity to meet the complaint. If no such opportunity is given before the order is made, the order will be set aside on appeal: Abraham v. Jutsun, [1963] 2 All E.R. 402 (C.A.).

In upholding the decision of the British Columbia Court of Appeal to reverse an award of solicitor-client costs against counsel personally, the Supreme Court of Canada in Young v. Young (1993), 84 B.C.L.R. (2d) 1 made some general statements as to the availability of that extraordinary measure. At p. 29, McLachlin, J. (as she then was) said,

The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court .... Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

In Interstate Investments Ltd. v. Pacific International Securities (14 August 1995), Vancouver Registry, C941054 (B.C.S.C.), the defendant filed with the court an argument that the plaintiff’s solicitor was guilty of “outrageous conduct” tainted by serious misconduct. The nature of the “serious misconduct” was that the plaintiff and the plaintiff’s solicitor (acting on instructions from the plaintiff) knew about and agreed to the transaction for which they subsequently accused and then commenced action against the defendant for breach of trust. Moreover, at the time of oral argument, the defendant argued that “...if not directly, then by necessary implication that the plaintiff’s solicitor had sworn an affidavit which was false, possibly knowingly.”

Madam Justice Koenigsberg, in rendering her decision stated as follows:

It is, in my view, improper practice to suggest even indirectly that a professional colleague has acted improperly, without strong evidence, carefully tested, that such an allegation is merited.

Both the defendant’s written material and in part its argument before the court, fell short of the standard of professional conduct and courtesy required before this court. The defendant’s solicitor disregarded the professional reputation of a colleague and officer of this court, and made insufficient effort to ensure that any allegations, publicly made, of unprofessional and unethical conduct, were well-founded ...

The plaintiff’s solicitor had no direct interest in this litigation other than to represent her client’s interests in the transactions. She was and is a professional person, engaged in carrying out her professional duties both in communicating with the defendant and in swearing the affidavit she did. As is the case with any legal practitioner, her reputation for integrity is the most valuable asset she has. Each professional owes all others reasonable even vigilant care in assessing actions undertaken and words said, before allegations or imputations are made which can have the effect of undermining another practitioner’s reputation for integrity. Defendant’s counsel failed to exercise that care. The allegation of serious misconduct in the context in which it was made and relied on in this proceeding by the defendant was not well-founded and the obvious steps were not taken to determine whether such an allegation did have any foundation.

Such conduct on the part of the defendant is deserving of “chastisement.”

In the circumstances I award special costs to be paid to the plaintiff to be applied to all matters in the proceeding from and following the filing of the defendant’s chambers brief ...

[§6.13] Avoiding Conflicts of Interest

1. Introduction

Solicitors owe their clients a duty of undivided loyalty. A conflict of interest arises if the lawyer has an interest that conflicts with that duty. The duty of loyalty is meant to ensure that lawyers exercise independent professional judgment in assisting their clients. If the lawyer’s judgment is potentially

6 Based on material prepared by Bryan F. Ralph for the CLE, Solicitors’ Liability - Criminal, Civil & Professional (January 1990); revised and updated by PLTC. Refer also to Appendices 1–2, at the end of this chapter, for more guidance in the area of conflicts of interest.
affected by some other interest, such as a conflicting duty to a related client or a financial interest that could be affected by the client’s transaction, the client does not obtain the full benefit of the lawyer’s independent judgment and undivided loyalty.

Conflicts of interest can give rise to problems for lawyers both in terms of liability in court actions and in disciplinary proceedings. Avoiding conflicts of interest is desirable both from the standpoint of the adequate representation of clients and for the self-protection of lawyers.

This section examines conflicts in a general way:

(a) types of conflict of interest that can arise for lawyers;
(b) sources of law that define a solicitor’s obligation to avoid conflicts of interest; and
(c) areas where conflicts of interest commonly arise.

The following discussion is primarily directed at commercial transactions rather than litigation situations. Clearly there are professional obligations to avoid conflicts of interest in both types of work, and in many respects the considerations are similar. However, the discussion does not fully fit the litigation context. For example, while the consent of parties to having a solicitor act for both of them may be sufficient in a commercial transaction, it may often be insufficient in litigation.

Note as well that the BC Code contains special conflicts rules for the provision of “short-term summary legal services,” that is, pro bono or not-for-profit legal services provided with the expectation that the lawyer will not provide continuing legal services in the matter. See BC Code rules 3.4-11.2 to 3.4-11.4.

For guidance on firm procedures for detecting conflicts of interest, see Professionalism: Practice Management, Chapter 3, §3.03.

2. Categories of Conflict of Interest

Most definitions of conflict of interest have similar features. The phrase is defined in section 1.1 of the BC Code:

“conflict of interest” means the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.

In a general way, these definitions embrace a number of categories where conflicts of interest may arise. The following are the most common types of situations:

(a) a lawyer is asked to represent both sides of a transaction, e.g. acting for a mortgagee and mortgagor, a vendor and purchaser, a lessor and lessee;
(b) the lawyer acts for multiple clients who may not be on the “opposite side” of a transaction, e.g. a number of partners entering a partnership, co-defendants in a civil or criminal action;
(c) the party on “the other side” is a former client; and
(d) there may be a conflict between the lawyer’s personal interest in a matter and the interest of the client, either as a result of the financial interest of the lawyer in the transaction or as a result of some other relationship the lawyer may have with a third party (e.g. being a co-investor with the client, borrowing from the client or having a family member as a party to the transaction).

3. Sources of “Law” on Conflicts of Interest

(a) Where the “Law” is Found

One source of law is the decisions of the courts arising out of the exercise of their inherent jurisdiction to supervise lawyers as officers of the court. A number of decisions exist in this area where the court was asked to rule on the conduct of a lawyer and to make an appropriate order in a given situation. For example, the court may be called upon to “disqualify” a lawyer from continuing to act in a matter because the opposing party is a former client: Aldrich v. Struk (1986), 1 B.C.L.R. (2d) 71 (B.C.S.C.), and MacDonald Estate v. Martin, [1991] 1 W.W.R. 705 (discussed later). See also the review of conflicts cases by Jeffrey G. Hoskins and Michael Lucas in the Annual Review of Law & Practice (Vancouver: CLE).

A second source is to be found in the decisions of the courts where lawyers are parties to actions and have been sued for damages as a result of their negligence or breach of fiduciary duty in failing to fully represent a client by reason of the lawyer’s conflict of interest. A valuable collection of pre-1990 decisions is the Solicitors’ Liability Index (it has not been updated recently) in the Courthouse Library.

A third source is found in the rules of the BC Code, and specifically in section 3.4. In particular, see rule 3.4-1 which states as follows:

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.
The rule reflects the principle articulated in *R. v. Neil*, 2002 SCC 70 and *Strother v. 3464920 Canada Inc.*, 2007 SCC 24: a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer-client relationship may be irreparably damaged where the lawyer’s representation of one client is directly adverse to another client’s immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer’s representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer-client relationship.

The Supreme Court of Canada recently reconsidered its approach to conflicts of interest in the case of *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39. In this case, the SCC re-evaluated the traditionally held “bright line” rule that applies to conflicts of interest between existing clients, allowing for a contextual approach and identifying key factors to consider.

According to commentary [7] to rule 3.4-1, factors for the lawyer’s consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients’ reasonable expectations in retaining the lawyer for the particular matter or representation.

Commentary [8] to rule 3.4-1 provides a number of examples of situations where conflicts may arise. These examples include: acting as an advocate for a client on one matter and against the client on another matter; acting for a client in commercial transactions and against a client in employment matters; having a sexual or close personal relationship with a client; sole practitioners practising together, or acting as a director and lawyer for a client.

In addition to the above sources, the Ethics Committee of the Law Society makes statements from time to time. No record of these is published on any regular basis, although some opinions are published in the *Benchers’ Bulletin*. For specific matters that may have been the subject of opinion by the Committee, inquiries may be sent to the Law Society.

(b) Who Decides on Matters of Conflict

The Supreme Court of British Columbia exercises its inherent jurisdiction to supervise lawyers in making some decisions, as indicated above. In addition, it is the most likely court to make decisions with respect to liability for negligence or breaches of fiduciary duty, although it does not have an exclusive jurisdiction in this area.

The Benchers of the Law Society exercising their disciplinary authority is usually the body which makes decisions with respect to breaches of the Rules of the Law Society. However, this jurisdiction cannot be said to be exclusive in light of the supervisory role which the Supreme Court occasionally exercises.

**[§6.14] Conflicts of Interest—Acting Against a Former Client**

Rule 3.4-1 of the *BC Code* is a general prohibition on acting where there is a conflict. The Commentary makes clear that it applies to all situations, including current clients. Note that the definition of conflict includes specific reference to the duty of loyalty.

Rule 3.4-2 of the *BC Code* states as follows:

3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

(ii) the matters are unrelated;
(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

Rule 3.4-10 of the BC Code outlines the conditions that a lawyer must fulfill in order to act against a former client. See also Rule 3.4-11 for guidance on when another lawyer in the lawyer’s firm may act against a former client of the lawyer.

In MacDonald Estate v. Martin, [1991] 1 W.W.R. 705, the Supreme Court of Canada addressed a difficult professional issue—the conflict of interest that can arise when a lawyer transfers between two large law firms which are acting for opposing parties in litigation. The court ordered a law firm to withdraw from its representation of the plaintiff in protracted litigation because one of the firm’s associates, who was not involved in the litigation, had previously done legal work for the defendant in the same matter, and there was a need to protect confidential information of the client. The court stated that the test to determine whether the firm could continue to act was whether “the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.”

MacDonald Estate left many unanswered questions. For example, what happens if the transferring lawyer, while in the former law firm, had no involvement in the litigation? What happens if such a lawyer satisfies the court that he or she acquired no confidential information? What types of measures, such as a physical or procedural barrier that will prohibit the tainted lawyer from communicating with the other lawyers working on the matter and “cones of silence” (a declaration by the tainted lawyer that under no circumstances will he or she divulge to anyone in the firm information that he or she possesses) must law firms take to ensure that no disclosure will occur?

Several cases in British Columbia have held that the lawyers in the circumstances should not be disqualified on the basis of receiving confidential information, including:

- Manville Canada Inc. v. Ladner Downs (1992), 63 B.C.L.R. (2d) 102 (S.C.);
- Kaiser Resources Ltd. v. Western Canada Beverage Corp. (1992), 71 B.C.L.R. (2d) 236 (S.C.): application to disqualify the plaintiff’s counsel because the law firm had acted for three minority directors of the defendant corporation;
- I.R.I. Services Ltd. v. Stewart (9 December 1991), Vancouver Doc. C904405 (S.C. Master);
- Pielak v. Crown Forest Industries (5 June 1991), Vancouver No. C885874 (S.C.); and

In Arends v. Arends, [1995] B.C.W.L.D. 2752 (B.C.S.C.), where the solicitor for the petitioner/wife was a shareholder in the family corporation, which the solicitor also acted for, the court held that there was no conflict. Davies J. held that there may be a conflict if the family corporation were declared a family asset; however, the respondent had never had a solicitor-client relationship with the firm nor had the firm obtained any confidential information from communications with him.

For a decision in which the solicitor was removed, see Clouthier v. Milljour, [1995] B.C.W.L.D. 2505 (B.C.S.C.).

Also, in Rosin v. MacPhail (1997), B.C.L.R. (3d) 279 (B.C.C.A.), the Court of Appeal determined that the lawyer had not met the heavy burden of satisfying the court that no confidential information was imparted in the course of the first retainer that could be relevant to the action in question. Moreover, “the points of connection between the two retainers were sufficient to establish a realistic possibility of mischief.”


Although the “appearance of impropriety” test of MacDonald Estate, supra, appears to be under some attack, it was acknowledged to be an important issue in Manville, and the test has been used in other cases to disqualify lawyers and others from representation: United States Mineral Products Co. v. Pinchin Harris Holland Associates Ltd. (1992), 70 B.C.L.R. (2d) 171 (B.C.S.C., in chambers).

In Manville, three law firms in Canada had formed an international partnership with centres outside Canada. An application to disqualify the Vancouver firm from a number of actions was taken by the petitioner, who had consulted with the Toronto firm on several matters including the defence of the present actions. Chief Justice Esson dismissed the application, holding that the firms remained separate entities and that there was no realistic possibility that confidential information given one firm would be communicated to the other as a result of the affiliation. The Chief Justice pointed out that applications to disqualify law firms were increasing, and in some cases appeared to be used as a tactical weapon against the opposing party, resulting in delay in litigation and increase in cost. He stated:

[The remedy of disqualifying a firm] necessarily imposes hardship and, given that the party deprived of its representative is an innocent bystander in an issue between its lawyer and the opposite party, some degree of injustice on the innocent party. The imposition of such hardship and injustice can only be justified if it is inflicted to prevent the imposition of a
more serious injustice on a party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of “real mischief”, not a mere perception.

An expert witness who had previously testified for a company in an American action cannot subsequently testify against the same company in British Columbia: Hunt v. Hunt, [1992] B.C.W.L.D No. 1672 (S.C.). A member of the public would reasonably conclude that lawyers in a small firm would discuss their cases with one another, although the lawyer swore that he could not recall ever discussing the petitioner’s case with anyone in his former firm several years ago.

[§6.15] Transactions Between Lawyers and Clients

Consult the BC Code and the CBA Code of Professional Conduct, Chapter VI.

Generally speaking, lawyers must, if they have a financial interest in a matter they are conducting for a client, adopt the position of saying “I can be your business partner or I can be your lawyer but I cannot be both.”

The following principles of law from 36 Halsbury (3d) at 86 and 89–90 are instructive:

There is no absolute rule that a solicitor cannot sell property to, or buy property from, a client, but, in order that the transaction may be upheld if it is challenged, the solicitor should preserve evidence to enable him or her to show that the client was advised in the transaction as diligently as he or she would have been if contracting with a stranger, and that the transaction was as advantageous to the client as it would have been if he or she had been contracting on reasonable and equal terms with a stranger. For practical purposes the position may be stated thus: a transaction of sale or purchase between a solicitor and client will be upheld if the solicitor can prove: (1) that he or she made full disclosure to the client of all relevant information known to the solicitor; (2) that the price was fair; and (3) that the client was advised by an independent solicitor to whom all circumstances were disclosed. . . . The requirement of independent advice may not strictly be justifiable in law as a necessary requirement, [in order that a transaction of sale should be upheld] but in practice it is certainly expedient . . . . The giving to the client of competent independent advice is . . . probably the best means of ensuring that the client is emancipated from any possible influence from the solicitor.

The foregoing principles may apply even where the relationship of solicitor and client, in the strict sense, has ended before the impugned transaction: Allison v. Clayhills (1907), 97 L.T. 709 at 712. See also McMaster v. Byrne, [1952] 3 D.L.R. 337 (P.C.); Milligan v. Gemini Mercury Sales Ltd. (1977), 1 B.L.R. 63 (Ont. H.C.).

In British Columbia, clients frequently have taken lawyers to court after discovering a lawyer-client conflict. A lawyer’s failure to advise the client to seek independent legal advice where there is a conflict can result in claims that go beyond the limits of the BC Lawyers Compulsory Professional Liability Indemnification Policy. In Callin v. King (1984), 51 B.C.L.R. 149 (S.C.), the defendant solicitor, after having acted for the plaintiff in several real estate transactions, approached the plaintiff to participate in a joint venture to acquire and develop certain properties. The plaintiff was to provide the sole financing, and the solicitor was to be both a director of the joint venture and a participant who provided legal and other services. The plaintiff was not advised to obtain independent legal advice. In the ensuing joint venture, the solicitor was negligent in carrying out his duties, which resulted in financial loss to the plaintiff. The court held that the defendant breached his fiduciary duty to advise the plaintiff to seek independent legal advice on the question of the plaintiff’s involvement. As a result, the defendant had to reimburse the plaintiff for the considerable losses sustained and restore the plaintiff to the position he would have been in had he been properly advised.

A lawyer who acts when he or she has a personal business interest in a transaction may not be indemnified because of the business exclusion in the BC Lawyers Compulsory Professional Liability Indemnification Policy. The Policy does not apply to claims by family members (spouses, former spouses, children, parents or siblings), or by or in connection with any organization in which the lawyer, the lawyer’s family or law firm partners, associates, or associate counsel own more than 10% or have effective management or control.

[§6.16] Testamentary Instruments and Gifts to Solicitors

BC Code rule 3.4-39 prohibits a lawyer from accepting a gift “that is more than nominal” from a client, unless that client has received independent legal advice.

Rule 3.4-37 prohibits a lawyer from including a term in a client’s will directing the executor to retain the lawyer to administer the client’s estate.

Rule 3.4-38 prohibits a lawyer from preparing an instrument (such as a will) giving the lawyer or an associate “a gift or benefit from the client, including a testamentary gift”, unless the client is a family member of the lawyer or the lawyer’s partner or associate.

The annotations to rule 3.4-38 note that this rule does not prevent a lawyer from including a charging clause in the client’s will, at the client’s request, if the client wishes the lawyer to act as executor of the will.
When dealing with unrepresented persons, it is especially important to bear in mind rule 7.2-1 of the BC Code: “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.”

Lawyers are sometimes sued by people whom the lawyer did not think was a client at the relevant time. Unrepresented parties may allege that a lawyer caused them to act to their detriment by misleading them in some manner. When there is an unrepresented person in a matter, the BC Code requires lawyers to do as follows:

7.2-9 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.

To minimize the potential for action:

(a) follow similar procedures for people who come along to meetings with your client;

(b) watch for requests that you explain to opposite unrepresented parties the nature of documents they are to sign or accept. A casual statement that a document is “in the usual form” or “just a mortgage to secure the balance” may well be partially untrue; and

(c) watch especially for situations where you are consulted but never get final instructions to proceed. People often want to think about a problem and “let you know”, and when they consult another lawyer it may be too late to do anything and they may forget you warned them that various time limitations might apply.

Note that when you witness the signature of someone who is not well known to you, you would be wise to follow the client identification steps set out in Law Society Rules 3-98 to 3-110.

Giving Independent Legal Advice

Claims arising from lawyers giving independent legal advice (“ILA”) occur every year. In a relatively recent example, a member received a call from another lawyer in the area, and was told that one of the parties to a commercial transaction closing that day needed independent legal advice. The member agreed to help, and met with the party a short while later. During a 45-minute meeting with the party, the member quickly reviewed a number of commercial documents and talked with his client about the transaction, in which the client was loaning money to a company. The member recommended investigating title to the assets, but the client was in a hurry and did not want to spend a lot of time fussing over details. At the end of the conference the member charged the client a nominal fee. Fortunately the member made comprehensive notes of the conference with the client.

When the company failed to repay the loan, and the company’s title to the security proved to be deficient, the client alleged that the lawyer failed to warn the client to investigate title to the company’s security.

A review of ILA claims suggests a few precautions all members can take. When you receive a request to provide ILA services, stop to consider whether you are competent to give advice in the particular area and whether you have enough time to do a proper job. Parties needing ILA services are often under time pressures and do not want to spend a lot of time or money getting advice. If the client does not want to allow you reasonable time to review the documents and discuss the transaction, or the client does not want to pay for all the time involved in those services, why take the time?

When you provide ILA services, spell out for the client exactly what you are doing and not doing. For example, if you are independently advising a client on a bank guarantee for a loan to a small business, tell your client that you are only advising on the guarantee, not on the loan between the bank and the borrower.

Similarly, after you’ve reviewed a document with an ILA client, the client may ask, “Do you think I should sign it?” You may wish to say that your role is only to give legal advice, not business advice. Explain that your job is to explain the legal consequences of signing the document so the client can make an informed decision about whether to proceed.

The best practice is for members to advise ILA clients to make all necessary enquiries. You should also warn clients of the dangers of not investigating relevant matters. For example, in our case, it would not have been enough to recommend searching title to the security. You would have to go on to warn the client about what could happen if he or she did not investigate the security. The claims cases suggest, “Take notes, take notes, take notes.” Our insurers were able to effectively deal with this million-dollar claim because the member had comprehensive notes about the meeting with the client.

At a conference of the County of Carleton Law Association (Upper Canada), Mr. Philip Epstein, a family practitioner and bencher, had some useful comments regarding ILA. Cristin Schmitz summarized these comments in an article for The Lawyers Weekly 14:28 (November 25, 1994) as follows:

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• [Mr. Epstein] criticized the common but dangerous practice of sending clients “down the hall” for ILA. Clients should instead be given a short list of lawyers in the area.

• The typical ILA scenario involves a client signing a loan guarantee after spending 15 to 20 minutes with a lawyer the client has never met before. When the lawyer is later asked about the ILA (because the client has been sued on the guarantee), the lawyer can’t remember the client; has no file, notes or reporting letter; and either hasn’t charged very much, or has charged very little and the bill doesn’t detail the work.

• Mr. Epstein said most lawyers probably do an adequate job of warning their clients when giving ILA. But too often they can’t prove it. To help solve this problem, Mr. Epstein recommended an ILA checklist. After a lawyer reviews the checklist with the client, the checklist should be signed by the client and placed in the file.

• Lawyers should also make notes, and write a brief reporting letter after the transaction which again covers, in writing, the essential matters that were canvassed during the meeting.

• When giving ILA, it is important to go much further than simply asking whether the client understands the document. The lawyer must spend enough time to ensure that the client also understands the document’s consequences. For example, a lawyer shouldn’t presume that the client understands the language.

The Law Society has developed a checklist. It is available at Appendix 2 or on the Law Society’s website: www.lawsocty.bc.ca/Website/media/Shared/docs/practice/resources/checklist-ila.pdf.

2. **BC Code Duties**

Rule 3.3-1 of the **BC Code** restates the duty of lawyers to hold clients’ communications in confidence:

A lawyer at all time 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.

In a number of cases, solicitor-client privilege has been lost by a privileged document falling into the hands of someone other than the solicitor or client, such as the opposing party; the law is not settled on the circumstances in which the privilege is lost. Lawyers should take all reasonable steps to ensure the privacy and safekeeping of the client’s confidential information. Lawyers must avoid indiscreet conversations or gossip, particularly about a client’s affairs, even if the client is not named or otherwise identified. If a lawyer 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, the lawyer must:

(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.

A lawyer may disclose the client’s affairs to partners, associates and articled students and, to the extent necessary, to other employees of the firm, unless the client directs otherwise.

A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm: rule 3.3-3 of the **BC Code**. Remember that solicitor-client communications are not privileged when they are made to further a fraud...
or crime, whether the lawyer is party to the illegality or completely innocent: see e.g. Re Church of Scientology and R. (No. 3) (1984), 47 O.R. (2d) 90 (H.C.J.).

Beyond both the professional and evidentiary rules regarding solicitor-client privilege, lawyers should take account of the Supreme Court of Canada decisions that have recognized solicitor-client privilege as a principle of fundamental justice protected under s. 7 of the Charter and as part of the right to privacy under s. 8.7 Arbour J. provided the following summary of the status of solicitor-client privilege in Lavallee at para. 49:

Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental, infringements of the privilege erode the public’s confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.

The Supreme Court of Canada applied the Lavallee principles in Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7, where it affirmed that “solicitor-client privilege “must remain as close to absolute as possible if it is to retain relevance” (at para. 44) and “the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context” (at para. 38). See also the discussion of the nature of the privilege in Canada (National Revenue) v. Thompson, 2016 SCC 21 and Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53.

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7 In Lavallee, Rackel & Heintz v. Canada (Attorney General); White v. Ottenheimer & Baker v. Canada (Attorney General), [2002] 3 S.C.R. 209, the Court held that the privilege is protected under s. 8 as a right to privacy, and struck down a section of the Criminal Code (s. 488.1) on the basis that the procedure provided for under that section allowed the client to lose the privilege without knowing it or consenting to it. In R. v. McClure, [2001] 1 S.C.R. 445, paras. 41-42, the Court declared the privilege to be a principle of fundamental justice under s. 7 such that an individual’s privilege should yield to an accused’s right to make full answer and defence to a criminal charge. The privilege could only be infringed when “core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction.”
Counsel who receive a production order for documents or data that may be subject to privilege should contact the Law Society for guidance.

[§6.20] Without Prejudice Communications

The words “without prejudice” have both a generalized and a particular meaning. In Maracle v. Travellers Indemnity Co. of Canada (1991), 80 D.L.R. (4th) 652 (S.C.C.), an insured attempted to rely on a “without prejudice” letter to estop an insurer from asserting a limitation period defence. Sopinka J. stated:

[T]he letter … was made without prejudice to the liability of the insurer. The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights unaffected by anything stated or done in the negotiations.

Sopinka J.’s definition of “without prejudice” may be described as its generalized meaning, i.e., that a “without prejudice” communication is not intended to affect rights or liabilities.

When lawyers and others use the generalized meaning, often they do not view the communication as privileged, and they do not anticipate that the communication will be excluded from evidence. Generally, this view is correct, but it leads to the major source of mistakes in using “without prejudice” communications.

The problem is that in its particular meaning, “without prejudice” means that a communication is privileged. Under the particular meaning, the communication will not be admitted as evidence unless both parties waive the privilege. There is a fundamental practical difference between “without prejudice” communications that are evidence and those that are privileged, and lawyers must keep in mind that the rules for the exclusion of evidence in this area are very complex.

Paul Perell’s article “The Problems of Without Prejudice” (June 1992), 71:2 Canadian Bar Review 223, reviews the case law and concludes with a number of practical suggestions, including the following:

(a) if you wish to exclude the communication from evidence, there must be a dispute present or pending, and you must make it clear that the communication is for the purposes of settlement and not for any other purpose. The communication must not be prejudicial or made in bad faith. You must be aware that there are exceptions to the privilege;

(b) although it is probably too late to abandon the short form of expressly describing the communication as “without prejudice”, if you wish to assert the privilege you should not rely on this language. The language is neither necessary nor sufficient. You should articulate your intent. This will be helpful not only because the court may have to adjudicate on the issue of intent, but because, even if the communication fails to qualify as privileged, you may still argue that the communication had minimal probative value;

(c) if the purpose of the communication is to communicate in a way that does not affect rights and liabilities while preserving the communication as evidence, then once again it is helpful to articulate this precise intent.

[§6.21] Retaining a Diverse Profession

Lawyers have a special duty to respect the requirements of human rights law: see BC Code, rule 6-3 and commentary.

The Equity and Diversity Advisory Committee monitors developments on issues affecting equity and diversity in the legal profession and the justice system. It reports to the Benchers on those developments and assists the Benchers with priority planning. The Law Society also offer a number of model policies designed to help law firms achieve equity and diversity in the workplace.

1. Keeping Women Lawyers in the Profession

For many years the Law Society of British Columbia has been studying and exploring discriminatory practices that impact women in the profession. Many recent studies within Canada and the United States have confirmed that the number of women lawyers remaining in private practice has not improved significantly over the past 20 years.

The Retention of Women in Law Task Force was established by the Benchers on April 4, 2008. The creation of this Task Force was recommended by the former Women in the Legal Profession Task Force (“WILP”) in its final report in January 2008, to advise the Benchers on the best approach to address these complex issues. Specifically, WILP recommended that a group be struck to draft a business case for the retention of women within law firms, and to consider the Law Society of Upper Canada’s recent report, the Women’s Bar Association of DC’s reports, and other material gathered by WILP.


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8 This section is based on material prepared by Paul Perell for his articles, “The Problems of Without Prejudice” (June 1992), 71(2) Canadian Bar Review 223; revised for PLTC.
The Law Society urges firms to consider the business case for retaining and advancing women lawyers in private practice. The business case does not suggest that women should receive special treatment. It stresses the competitive advantages of creating firms that retain and advance talented lawyers, with a focus on serving clients in effective ways that make business and people sense. The business case contains reference materials and best practices that will be of value to firms of all sizes.

The following excerpt comes from the Law Society Benchers’ Bulletin 2009: No. 3 Fall.

Law Society presents business case for retention of women in private practice

An exodus of women from the legal profession and a looming shortage of lawyers has prompted the Law Society to develop a business case for keeping women lawyers in private practice.

In 2008, the Retention of Women in Law Task Force was charged with preparing the business case and presented its final report at the July Benchers meeting this year.

Kathryn Berge, QC, who chaired the task force, reported that “one third of new women lawyers called in 2003 had dropped out of the profession by 2008. This happened during a time when a record number of women entered the profession, yet today women lawyers still represent only 29 per cent of private practice lawyers in the province.”

The business case explains the demographic issues facing the legal profession in BC and explains the business advantages of retaining and advancing women in private practice. However, it does not suggest that women should receive special treatment. It stresses the competitive advantages of creating firms that retain and advance talented lawyers, with a focus on serving clients in effective ways that make business sense and people sense.

“The benefits of retaining women lawyers are significant,” said Berge, who practises in a small firm in Victoria. “Keeping and developing talent increases efficiency, client service, lawyer morale and future recruitment ability. This holds true in both good and bad times. There is also the benefit of a stronger and more sustainable firm culture based on merit, flexibility and diversity.”

The business case has already received considerable attention in the media. Over the next few months, members of the task force will be speaking to law firms, law-related organizations and others to promote the business case and increase awareness of the benefits of retaining women lawyers in private practice.

For background on prior committees and initiatives, please see the 2005: No. 3 July-August and 2005: No. 2 April-May Benchers’ Bulletins.

2. Supporting Indigenous Lawyers

The Law Society has identified the retention of Indigenous lawyers in the profession as a key objective. In May 2018 the Law Society released its Truth and Reconciliation Action Plan, which includes a commitment to support Indigenous lawyers, articled students and law students in BC, and a commitment to ensure the cultural competence of all lawyers.

To address this important issue, PLTC includes components on the legacy of residential schools, Indigenous child welfare and Gladue sentencing principles, among others.

Also, the Law Society has created an Indigenous Lawyers Mentorship Program, the first of its kind in North America. The program has four goals:

1. support the development of the knowledge, skills and attributes needed by Indigenous lawyers to be successful in their legal careers;
2. assist Indigenous lawyers in developing strategies to mitigate common issues that arise for many Indigenous legal professionals;
3. promote collegiality to expand and strengthen the professional networks of Indigenous lawyers; and
4. foster the retention and advancement of Indigenous lawyers in BC.

The Indigenous Lawyers Mentorship Program came about as part of the Law Society’s aim to increase diversity in the legal profession and provide culturally appropriate legal services. The following news release addresses the history of the program (excerpts posted November 21, 2011).

Mentoring Project Aimed at Helping to Retain More Aboriginal Lawyers

Vancouver—The Law Society is undertaking a mentoring initiative to help retain Aboriginal lawyers in BC, improve access to legal services for Aboriginal peoples, and increase diversity within the legal profession.

Currently, Aboriginal lawyers are significantly underrepresented in the legal profession and this has important implications regarding access to culturally appropriate legal services. In addition, the public is best served by a more representative and inclusive profession. “We are very concerned about the current situation and that’s why we are taking immediate action with this
program,” said Law Society President Gavin Hume, QC.

The Society has hired lawyer Rosalie Wilson to develop a collaborative mentoring program to support Aboriginal lawyers. She is a member of the Syilx (Okanagan) and Secwépemc (Shuswap) Nations. “I believe it’s in the public interest to have strong Aboriginal representation among lawyers,” said Wilson.

For more information, see www.lawsociety.bc.ca/our-initiatives/equity-and-diversity/supporting-indigenous-lawyers/indigenous-lawyers-mentorship-program.

[§6.22] Equity Ombudsperson

The Law Society provides the legal profession in British Columbia with the services of an Equity Ombudsperson who can assist with resolving concerns about discrimination and discriminatory harassment. Lawyers, articled students, law students and support staff of legal employers are all free to contact the Equity Ombudsperson. The service is voluntary, confidential and free to participants.

The Equity Ombudsperson’s role includes the following functions:

(a) **Intake and advice:** Receive inquiries, provide information and discuss options with individuals and employers;

(b) **Mediation:** Resolve concerns informally with the consent of both the complainant and respondent; and

(c) **Reporting:** Provide anonymized statistical reports on the incidents of discrimination and discriminatory harassment dealt with by the Equity Ombudsperson, as well as the proactive measures undertaken by the Equity Ombudsperson to prevent discrimination and discriminatory harassment in the legal profession.

The Equity Ombudsperson is an employee of the Law Society of British Columbia in the Practice Advice Department. Calls to the Equity Ombudsperson will remain strictly confidential, protected by the same measures that safeguard the confidentiality of all calls to practice advisors. The Equity Ombudsperson is separate and unconnected with the Law Society discipline process.

If a complaint is not resolved through the Equity Ombudsperson, a complainant can later make a complaint to the Law Society. Alternatively, a complainant can bypass the Equity Ombudsperson and make a complaint directly to the Law Society.

The Equity Ombudsperson, Claire Marchant, can be reached on her office line at 604.605.5303, her mobile at 236.888.2133, or by email at equity@lsbc.org.

[§6.23] Law Society Advisory Committees and Task Forces

In addition to the governing and regulatory committees of the Law Society, the Benchers regularly strike advisory committees and task forces to report or advise on particular issues or areas that the Benchers identify. These advisory committees and task forces often include non-Bencher members who have a particular interest and skill relating to the area or issue. The recommendations contained in committee and task force reports are not Law Society policy unless and until the recommendations are formally adopted by the Benchers. These are current Law Society Advisory Committees:

**Access to Legal Services Advisory Committee**

The Access to Legal Services Advisory Committee monitors developments on issues affecting access to legal services, and reports those developments to the Benchers on a semi-annual basis. The committee advises the Benchers annually on priority planning with respect to access to legal services.

**Equity, Diversity and Inclusion Advisory Committee**

The Equity and Diversity Advisory Committee monitors developments on issues affecting equity and diversity in the legal profession and the justice system. It reports to the Benchers on those developments and assists the Benchers with priority planning.

**Lawyer Education Advisory Committee**

The Lawyer Education Advisory Committee monitors developments on issues affecting lawyer education in BC, and reports to the Benchers about those developments on a semi-annual basis. The committee advises the Benchers annually on priority planning with respect to the education of lawyers in BC.

**Rule of Law and Lawyer Independence Advisory Committee**

The Rule of Law and Lawyer Independence Advisory Committee monitors developments on issues affecting access to the independence and self-governance of the legal profession and the justice system in BC, and reports those developments to the Benchers on a semi-annual basis. The committee advises the Benchers annually on priority planning with respect to independence and self-governance.

**Truth and Reconciliation Advisory Committee**

The Truth and Reconciliation Advisory Committee provides guidance and advice to the Law Society on legal issues affecting Indigenous people in the province, including those highlighted in the Truth and Reconciliation Commission of Canada’s report and recommendations. The committee monitors and
reports to the Benchers on those developments, advises the Benchers on priority planning and develops recommendations and initiatives.

**Legal Aid Advisory Committee**

The Legal Aid Advisory Committee monitors and advises the Benchers on key matters relating to the state of legal aid in British Columbia. This advisory function supports the Law Society’s public interest mandate, and advances the Law Society’s Vision for Publicly Funded Legal Aid that the Benchers adopted on March 3, 2017 (the “Vision for Legal Aid”). The Committee advances the recommendations in the report of the Legal Aid Task Force (March 3, 2017), and may explore additional concepts that are consistent with the findings of that report and the Vision for Legal Aid.

**[§6.24] Other Issues**

This chapter is a review of a few of the professional responsibility issues that frequently arise in practice. Many other important professional responsibility issues that frequently arise receive no coverage in this chapter because there is adequate coverage in the BC Code or the CBA Code of Professional Conduct. Lawyers are expected to become familiar with the rules and commentary in those authorities. In addition, professional responsibility issues are discussed throughout the Practice Material. Some general professional issues are dealt with elsewhere in the Practice Material:

- Conduct in court—see Civil, Chapter 6.
- Communicating with clients—see Professionalism: Practice Management, Chapters 3 and 5.
- Fees, limitation dates, and retainers—see Professionalism: Practice Management, Chapter 4.
- Trust accounting—see Professionalism: Practice Management, Chapter 6.
- Undertakings—see Real Estate, Chapter 5.