The Law Society of British Columbia

Communications Toolkit

Learning Materials

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Please note: *Course learning material contents have been updated at various times, as indicated herein.*

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INTRODUCTION

The Law Society views effective communication skills as critical to lawyer professionalism and considers effective communication to have a direct bearing on the quality of service provided. Poor communication is a common thread that runs through numerous complaints the Law Society receives about lawyers. This course describes common problem areas and provides examples of how communication can be improved.

Lawyers who maintain a professional standard of communication:

- are less likely to face complaints to the Law Society;
- are better able to manage client expectations;
- are better able to serve their clients in a professional manner;
- enjoy better professional relationships; and
- enjoy greater respect from their clients, their peers, and the judiciary.

The purpose of this course is to assist lawyers in communicating to the standard that is expected of them.

This course provides information and best practices from the perspective of the Law Society as the regulator of lawyers in British Columbia with reference to the *Legal Profession Act*, the Law Society Rules, and the Code of Professional Conduct for British Columbia (the "*BC Code*" or the "Code").

The *BC Code* should guide the conduct of lawyers, not only in the practice of law, but also in other activities. 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 their professional obligations, lawyers should be guided in their conduct equally by the language in the Code rules, commentary and appendices. Also, lawyers are encouraged to review the Annotations which list, as examples, instances in which the Code (or the *Professional Conduct Handbook*) rules have been considered by the Ethics Committee, the Discipline Committee, and the courts. The Annotations have been updated to 2015. Additional insights about lawyer communications can be found in the *Bencher's Bulletins*.

While this course contains some examples of situations where competing standards might exist, it does not advise how those situations will be resolved, so you must understand and consider the standards expected of you in various situations.

If you are not sure about your obligations, discuss them with a colleague, a Law Society practice advisor, or a Bencher.

Remember that courts and tribunals govern their own processes, and you might be held to a different standard in discharging your obligations in those settings.

Do not assume that complying with the standard set by the Law Society will necessarily meet the standard expected of you by a court or tribunal.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this course was last reviewed *en masse* for update in 2020.

DISCLAIMER:

The information contained in this course, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this course.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

MODULE 1 – COMMUNICATION SKILLS

1.1 - Communication Basics

Communicating clearly, listening, and managing expectations

Over the course of our lives we develop a set of communication skills that helps us:

- appreciate the effect of tone and content on meaning and how our communications are received;
- appreciate silence and non-verbal communication;
- develop fluency with written communication; and
- understand social rules about communication, including distinguishing acceptable communications from communications that fall below the societal norm.

Avoid Complaints

Many of the complaints the Law Society receives involve communication issues. These issues can often be avoided if lawyers:

- listen to their client in order to understand the client's needs and determine at the outset, whether the client is a good match for the lawyer's experience, skill-set, personality and style of practice;
- realistically and clearly advise the client of potential outcomes and costs;
- tell the client what the lawyer can and cannot do and then keep their word;
- establish an understanding with the client about the preferred method of communication and the lawyer's time frame for responding to communications;
- confirm their understanding of the existence and scope of the retainer using a written retainer or, if not retained, by sending a non-engagement letter;
- keep the client informed of progress on the file, even if only to explain why matters have been delayed or are in a holding pattern;
- respond promptly to communications from the client, other lawyers, the Law Society, and others;
- ensure that the tone of every communication was civil, and that content was limited to relevant matters;

- avoid delay in billing and ensured that bills were fully explained; and
- otherwise manage their client's expectations.

What may initially be minor communication oversights, can deteriorate into serious situations, for example:

- clients who are not kept up to speed in their matters may claim their lawyer is keeping them in the dark;
- ignoring communications from the lawyer on the other side of the file can quickly escalate into discord between counsel that distracts from the interests of the client;
- failing to respond to communications from the Law Society arising from a complaint from the client or the other lawyer; and
- hasty or perfunctory communications may come across as uncivil and unprofessional, and such situations can quickly become toxic.

Lawyers are encouraged to be thoughtful, measured and respectful in all communications.

Professionalism in Practice

In addition to the professional imperative to communicate effectively, there is also a practical need to do so. Lawyers are subject to numerous stereotypes, many of them negative. Consequently, few people approach a lawyer without a set of assumptions and perceptions already in place. Poor or disrespectful communication skills diminish your standing within the profession and reinforce the public's negative perception of the entire profession. There is no practical benefit to such behaviour, and the harm associated with it is very real. The best opportunity you have to overcome negative perceptions is to adhere to a high standard of conduct and communication.

The Cannon referred to in *BC Code* rule 2.1-5 provides that every lawyer should assist in maintaining the honour and integrity of the legal profession. Lawyers' duties include:

- promoting the interests of the state;
- serving the cause of justice;
- maintaining the authority and dignity of the Courts;
- being faithful to clients;
- being candid and courteous in relation to other lawyers; and
- demonstrating personal integrity.

1.2 - Inclusive Language

Regardless of our intention, the words we use can make others feel excluded, judged and hurt. Using inclusive language creates safety in our communications with others.

Inclusive communications is important to the practice of law for a number of reasons, including:

- **Our conduct matters.** The conduct of lawyers should reflect favourably on the legal profession and inspire the confidence respect and trust of clients and of the community; *BC Code* rule 2.2-1, Commentary [2].
- **Courtesy matters.** Lawyers must be courteous and civil and act in good faith with all persons with whom they have dealings in the course of their practice; *BC Code* rule 7.2-1.
- **How we communicate matters.** Lawyers must not, in the course of a professional practice, communicate to any person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer; *BC Code* rule 7.2-4.
- **Clients matter.** Lawyers have a duty to communicate effectively with a client; *BC Code* rule 3.2-1, Commentary [3]. Clients communicate more openly if they do so without fear of judgement.
- **Our staff matters.** Employees are more engaged and productive when they feel included and seen.
- **Complying with the law matters.** Lawyers have special responsibility to comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws; *BC Code* rule 6.3, Commentary [1].
- **Competence matters.** To be competent, lawyers need to adapt to changing professional requirements, standards, techniques and practices; *BC Code* rule 3.1-1 (k). This includes being conscious of how to communicate with others in a manner that is inclusive and recognizing such communication is going to evolve over time.

1 - References & Resources

The following references and resources provide additional guidance:

- *BC Code* rule 2.1-5
- BC Public Service Agency's *Words Matter: Guidelines on using inclusive language in the workplace*

MODULE 2 – MARKETING & ADVERTISING

2.1 - Marketing of Legal Services

Often, your first communications with potential clients is through your marketing and advertising.

***BC Code*, Chapter 4** governs the marketing of legal services and applies to any marketing activity undertaken or authorized by a lawyer in which they are identified as a lawyer, mediator or arbitrator (**rule 4.2-3**).

Lawyers must ensure their marketing and advertising are consistent with current professional standards. The ways in which lawyers market their services will continue to grow and change with innovative new marketing tools and communication mediums that said, constraints remain and lawyers have an obligation to familiarize themselves with the relevant requirements, including the *BC Code*.

2.2 - What is a Marketing Activity?

The definition of "marketing activity" includes any publication or communication in the nature of an advertisement, promotional activity or material, letterhead, business card, listing in a directory, a public appearance or any other means by which professional legal services are promoted or clients are solicited (*BC Code* rule 4.2-4).

Any marketing activity undertaken or authorized by a lawyer must not be false, inaccurate, unverifiable, reasonably capable of misleading the recipient or intended recipient, or contrary to the best interests of the public (rule 4.2-5). A marketing activity violates this rule if it is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient, is likely to create in the mind of the recipient or intended recipient an unjustified expectation about the results that the lawyer can achieve, or otherwise brings the administration of justice into disrepute (rule 4.2-5, Commentary [1]).

2.3 - Describing You and Your Practice

Chapter 4 of the *BC Code* also addresses expectations of lawyers when they:

- advertise themselves as a notary public (rule 4.2-7), or
- list the name of someone who is not entitled to practise law in British Columbia (rule 4.2-8).

There are also *BC Code* rules regarding:

- listing preferred areas of practice (rule 4.3-0.1),
- restrictions on claims of being a "specialist" or a similar designation (rule 4.3-1),
- what to include in marketing when engaged in real estate sales (rule 4.3-2), and
- restrictions and expectation regarding use of the term "multi-disciplinary practice" (rule 4.3-4).

Any marketing activity undertaken or authorized by a lawyer must not be false, inaccurate, unverifiable, reasonably capable of misleading the recipient or intended recipient, or contrary to the best interests of the public (rule 4.2-5).

There are also several relevant Annotations to Chapter 4 - *Marketing of Legal Services* in regard to naming and describing a legal practice that are worthy of review.

2 - References & Resources

The following reference provides additional guidance:

- *BC Code*, Chapter 4 – Marketing of Legal Services

MODULE 3 – STARTING THE LAWYER-CLIENT RELATIONSHIP (OR NOT)

3.1 - Considering a Prospective Client

When considering a prospective client, you should be clear regarding:

- **Who is (or are) the client(s)?**
  - When the client is an organization, see *BC Code* rule 3.2-3, Commentary [1] and [2]
  - If there are multiple potential clients and you are considering a joint retainer, see rules 3.4-5 to 3.4-9, and the associated commentary
  - You should only receive instructions from the client or the client's authorized representative
- **Does the client have capacity?** – see rule 3.2-9, Commentary [1] and [2], and rule 3.3-1, Commentary [10], as well as the resources listed in the box below
- **Do you have a close personal relationship with the potential client?** – see rule 3.4-1 and rule 3.4-26.1, and the Lawyers Indemnity Fund article *About to act for family and friends? (Resist – it's just too risky!)*

Be cautious about casual chats involving legal matters: solicitor and client relationships are often established without formality. If you aren't careful, you might find yourself learning confidential information that may prevent you from subsequently acting for another party (rule 3.3-1, Commentary [4], Commentary [6], and rule 3.4-1). Further, if you aren't clear that you have no intention to act for the person, they may rely on you for your assistance and on that basis, fail to take steps to protect their own interests which could lead to missed limitation periods for the individual – and possibly a complaint for you.

You must also ensure you are:

- competent to handle the matter and have the time available to do so,
- screening for any potential conflicts, and
- complying with your client identification and verification requirements.

Capacity

Be sure to review *BC Code* rule 3.2-9 (Clients with diminished capacity) and the associated Commentary.

An overview of the relevant obligations and resources regarding client capacity and undue influence is covered in these Practice Advisor's - Frequently Asked Questions.

Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website, including:

- Practical guidance on acting for clients with diminished capacity can be found in "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

The BC Law Institute (BCLI) has helpful resources including:

- Tests for capacity are analyzed and evaluated in this Report on Common-Law Tests of Capacity
- Guidance regarding circumstances involving potential undue influence in this Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid

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Competence

Competence is founded upon both ethical and legal principles. *BC Code* rule 3.1-2 and the associated commentary address the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises; rule 3.1-2, Commentary [2].

A client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf; rule 3.1-2, Commentary [1]

A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence; rule 3.1-2, Commentary [5]

The commentary to rule 3.1-2 provides helpful guidance on how to address circumstances when you do not feel competent to handle a matter, including seeking instructions to consult other lawyers and experts, the importance of avoiding bold assurances and how to clearly communicate with clients about the limits of your opinion and/or representation.

Conflicts of Interest

Lawyers have a duty to avoid conflicts of interest (*BC Code* rule 3.4-1). Commentary [1] to the rule explains:

> *A conflict of interest exists when there is 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. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.*

In practice, this involves conducting conflict of interest checks at the start of and throughout the retainer (rule 3.4-1, Commentary [2]). In determining a lawyer's duties to their clients, the court may be guided by the Law Society's conflict of interest rules but is not bound by them.

Client Identification & Verification

Client identification and verification is an essential element of a lawyer's professional responsibilities.

See the Client Identification & Verification page on the Law Society website for resources including:

- an Anti-Money Laundering Measures webinar (eligible for two hours of CPD ethics credits),
- practice advice articles in the Benchers' Bulletins (particularly Summer 2020, Spring 2020, Winter 2019, and Fall 2019),
- FAQs on various topics (including source of money, use of agents, and monitoring),
- case studies,
- risk advisories,
- Discipline Advisories, and
- the Client Identification, Verification and Source of Money Checklist.

3.2 - Cultivating a Reputation for Professionalism

Easy to Avoid Pitfalls

Being a good lawyer is so much more than just providing a great quality work product; indeed, it is also about providing professional service and cultivating a reputation for both. Reputations are something that we cultivate personally, but can also depend on the viewpoints of others. There are actions you take that, when observed by a prospective client, new colleague, or unfamiliar opposing counsel question your professionalism - here are some tips to avoid those potential pitfalls:

- **When someone enters a professional office, they should be treated with politeness and respect.** A professional workspace and attitude builds confidence in clients, colleagues and others that you are up to the task and will be a trusted representative for their interests.
- **How you treat your staff also informs a person's impression of you.** Treat your staff with courtesy and respect and make it clear that you expect that they do the same with everyone who contacts or enters your office.
- **Be punctual.** If you anticipate being late, get a message to your client in advance. If you can't get a message to your client, ensure someone in your office explains your delay and when you will be available. Being late for meetings or court appearances is seen as a sign of disrespect and sloppy practice. Seek assistance for improving your time management skills before lateness becomes a habit.
- **Office setting and décor can often form an important part of cultivating a professional reputation.** For example, a messy office might leave the impression that you are unorganized. Every so often, try walking into your office with fresh eyes and consider the first impression it makes on you. Updating need not be expensive or time consuming, and might only mean a bit of cleaning or de-cluttering.

3.3 - The Importance of Listening

It's hard to overstate the importance of listening to your client. If you don't listen carefully, you are more likely to miss key information, and make mistakes.

Here are some tips for careful listening:

- Resist the assumption that you have heard your client's story before and already know the solution.
- Avoid speaking over the client to demonstrate that you are clever, wise and know the right answer to their problem.
- Develop the habit of letting your client speak, ask open-ended questions to get more information, then narrow the issues with follow-up questions.
- When appropriate, don't hesitate to let your client know that you may need to do additional work to test your initial analysis of their situation.

3.4 - Be Clear: Are you establishing a lawyer-client relationship?

It is important to always be clear regarding whether or not you are committing to providing services to someone who has sought your advice.

> ***"client"*** *means a person who: (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.*
>
> *BC Code* rule 1.1 (Definitions)

The lawyer-client relationship may be established without formality; rule 1.1, Commentary [1].

This is why it is so important to be cautious about accepting confidential information on an informal or preliminary basis: possession of that information may prevent you from subsequently acting for another party (rule 3.3-1, Commentary [4] and [6], see also rule 3.4-1).

Generally, unless the nature of the matter requires such disclosure, you should not disclose having been:

(a) retained by a person about a particular matter; or
(b) consulted by a person about a particular matter,

whether or not the lawyer-client relationship has been established between you (rule 3.3-1, Commentary [5]).

For further guidance, see the following sections in this course:

- ***4.1 - Retainers***
- ***4.2 - Non-Engagement***

3 - References & Resources

The following references and resources provide additional guidance:

- *BC Code*
  - section 1.1 (Definitions)
  - section 3.1 (Competence)
  - rule 3.2-9 (Clients with diminished capacity) and the associated Commentary
  - section 3.3 (Confidentiality)
  - section 3.4 (Conflicts)
- Law Society Rules, *Division 11 – Client Identification and Verification*, Rules 3-98 through 3-110
- Law Society's Client Identification and Verification Frequently Asked Questions
- Law Society's Client Identification, Verification and Source of Money Checklist
- Law Society's Practice Checklist Manual
  - ***Client file opening and closing*** checklist
- Lawyers Indemnity Fund article *About to act for family and friends? (Resist – it's just too risky!)*
- BC Law Institute (BCLI) has helpful resources including:
  - Report on Common-Law Tests of Capacity
  - Undue Influence Recognition & Prevention: A Guide for Legal Practitioners (December 2022), which includes this Undue Influence Recognition and Prevention: A Reference Aid
- Client capacity
  - Practice Advisor's - Frequently Asked Questions include an overview of the relevant obligations and resources regarding client capacity and undue influence
  - Additional resources to assist in navigating issues of client capacity are available in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the heading *Capacity*, including "Acting for a Client with Dementia", Spring 2015 Benchers' Bulletin.

MODULE 4 – THE TERMS OF ENGAGEMENT: HAVE YOU BEEN RETAINED?

4.1 - Retainers

If you are going to take the file, clearly establish the scope of the retainer

Everyone has been in a situation where someone expected them to do something, or they expected someone to do something and as a result of miscommunication, that "something" was not done. More often than not these oversights cause little harm and are accepted with good grace because no one involved in the miscommunication was being held to a higher standard of conduct than the other. However, fiduciary relationships impose a higher standard of conduct. The onus lies with a lawyer to guard against miscommunication and any subsequent harm. While it is true that lawyers are not required to confirm the scope of the retainer with their client in writing, it is always a best practice to do so, if only by email. The scope of the retainer should also specify services you will not be performing for your client. The burden of proving the scope of the retainer lies with the lawyer, and written confirmation of the retainer provides the best evidence of the parties' intention.

Managing expectations and documenting intentions

Retainer letters are a useful tool for managing client expectations and documenting the intentions of you and your client regarding your contractual relationship. Among other things, a good retainer letter establishes the scope of services, how fees and disbursements will be charged, ground rules for communication, and terminating the relationship. If you fail to confirm the retainer in writing, you will introduce unnecessary risk into your practice. If circumstances change so that you need to revise the retainer, promptly discuss the need for change with your client, and then confirm your new understanding in writing.

Bear in mind that a retainer agreement is about more than fees and disbursements - it should cover the essential aspects of the lawyer-client relationship, including your communication plan, legal strategy, scope of services, an authorization to act, and the roles of your client, opposing counsel, and you.

- **Scope of services:** In addition to preventing future problems, a written retainer provides your client with a document to refer to throughout the relationship. This may help you keep the relationship focused on the services for which you were contracted. For example, you might have been retained to obtain default judgment, but your client might think that also includes your services to collect on the judgment. In such a situation, you can end up with an unhappy client, even though you did your job well. A retainer letter is also an ideal place to inform your client about the services you will not be providing and set out the terms on which you both may terminate the relationship.

- **Limited scope retainers:** If you and your client agree at the outset that only a limited amount of work will be done, you should have a limited scope retainer as set out in *BC Code* rule 3.2-1.1.
    - *BC Code* rule 3.1-2, Commentary [7.1] reminds you that, when considering whether to provide legal services under a limited scope retainer, you must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. See also *BC Code* rule 7.2-6.1 regarding communications with opposing counsel.

- **Short-term summary legal services:** Consider whether you are providing short-term summary legal services, which is defined as "advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter." The limits of this relationship are set out in *BC Code* rules 3.4-11.1 to 3.4-11.4, and the subsequent Commentary.
    - *BC Code* rule 3.1-2, Commentary [7.2] reminds you to disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable.

The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following*:*

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

For further guidance, see the following sections in this course:

- ***5 - Managing Your Clients' Expectations***
- ***6 - Fees & Disbursements***

4.2 - Non-Engagement

If you are not engaged to provide legal services, communicate this clearly and carefully

If you determine that you will not provide legal services to the person who consulted you – either because they have not retained you or because you decline the engagement – you should consider confirming the non-engagement in writing as soon as possible.

Because the onus lies with the lawyer to prove the scope of a retainer, make it a practice to send non-engagement letters to people who sought your services, but with whom you will not enter a retainer.

If you do not intend to accept a retainer, it is important to communicate your intention to the person who sought your services. In the absence of such communication, the person may believe you are acting for them, even if you had no intention to do so. Such miscommunications can create serious problems, particularly if a person thinks you are taking steps to protect their rights and so does not take steps themselves, possibly resulting in lost rights through missed limitation periods. You are setting yourself up for a complaint if you are not clear about non-engagement.

Communicating that you do not intend to take the retainer is only part of the task

It is essential that the person understand that a lawyer-client relationship has not been formed, and to know that while you are not advising them as to the potential merit of their situation, there might be limitations that affect their rights or obligations. You should also suggest they seek the advice of another lawyer. As mentioned, it is best practice to confirm your retainer, or non-engagement, in writing.

Remember that you owe a duty of confidentiality to anyone seeking your advice or assistance on a matter invoking your professional knowledge, even if you are not formally retained – as in, even if you don't agree to represent the person and never render an account.

The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes **sample non-engagement letters** under the heading *Client files.*

4 - References & Resources

The following references and resources provide additional guidance:

- *BC Code*
  - section 1.1 (Definitions)
  - section 3.1 (Competence)
  - section 3.3 (Confidentiality)
  - section 3.4 (Conflicts)
- Law Society Rules, *Division 11 – Client Identification and Verification*, Rules 3-98 through 3-110
- Law Society's Client Identification and Verification Frequently Asked Questions
- Law Society's Client Identification, Verification and Source of Money Checklist
- Law Society's Practice Checklist Manual
  - ***Client file opening and closing*** checklist
- Support and Resources for Lawyers > Practice Resources area of the Law Society's website:
  - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
  - Sample non-engagement letters under the heading *Client files*

MODULE 5 – MANAGING YOUR CLIENTS EXPECTATIONS

5.1 - What Can Clients Expect?

Managing your client's expectations means providing them with a reasonable assessment of their situation and explaining the scope of your professional relationship with them – this includes what you will do for them and what you will not do for them.

Confidentiality

You owe a duty of confidentiality to anyone who seeks your advice or assistance on a matter invoking your professional knowledge, whether or not you agree to represent the person.

As noted previously, a solicitor and client relationship is often established without formality. If you learn confidential information even on an informal or preliminary basis it could prevent you from subsequently acting for another party in the same or a related matter (*BC Code* rule 3.3-1, Commentary [4] and Commentary [6], and rule 3.4-1).

Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been: (a) retained by a person about a particular matter; or (b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them (rule 3.3-1, Commentary [5]).

Further, at the end of the lawyer-client relationship, subject to exceptions permitted by law, if your reason for withdrawal from a retainer results from confidential communications between you and your client, your duty of confidentiality means that you must not disclose the reason for the withdrawal unless the client consents (rule 3.7-9.1, and see Commentary [1] regarding an exception).

Quality of Service

You have a duty to provide courteous, thorough and prompt service to your clients; quality service is service that is competent, timely, conscientious, diligent, efficient and civil (*BC Code* rules 3.1-2 and rule 3.2-1).

Clients are entitled to expect that you will perform legal services for them according to the standards of a competent and ethical lawyer. Guidance in the *BC Code* includes the following:

- Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises (rule 3.1-2, Commentary [2]).
- A lawyer should obtain relevant facts and consider the applicable law before advising a client and "should be wary of bold assurances" to the client, especially where the lawyer's employment may depend on such assurances (rule 3.1-2, Commentary [9]).
- A lawyer must possess the requisite knowledge and skill for serving a client before accepting the retainer, and for practising in that area of law (rule 3.1-2, Commentary [3]).
- An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service (rule 3.2-1, Commentary [2]).

The principles set out in these rules are inter-related. They require you to assess critically your skill and knowledge with respect to the client's legal situation. If you know that you are able to act competently, you may be retained, obtain the relevant facts, consider those facts in light of the law, and advise the client in a measured fashion.

The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. *BC Code* rule 3.2-1, Commentary [5] provides the following, non-exhaustive, list of expected practices in this area:

(a) keeping a client reasonably informed;
(b) answering reasonable requests from a client for information;
(c) responding to a client's telephone calls;
(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;
(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;
(g) ensuring that work is done in a timely manner so that its value to the client is maintained;
(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
(i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
(j) informing a client of a proposal of settlement, and explaining the proposal properly;
(k) providing a client with complete and accurate relevant information about a matter;
(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;
(m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client; and
(n) being civil.

Quality service also means meeting your deadlines, unless you are able to offer a reasonable explanation and ensure that no prejudice to the client will result. Per *BC Code* rule 3.2-1, Commentary [2]:

- Whether or not a specific deadline applies, you should be prompt in prosecuting a matter, responding to communications and reporting developments to the client.
- In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

Before entering into a retainer, and throughout the course of the retainer, you must know your professional capacity and obligations, as well as be vigilant of any signs of an unrealistic or unethical client. You may have to advise clients, in clear but polite terms, that you are unable to do what they ask. Explain why such conduct would be inappropriate and offer an appropriate course of action. If you are concerned that your client may be involved in something dishonest, criminal or fraudulent, review the guidance in *BC Code* rule 3.2-7 (for individual clients) and rule 3.2-8 (if your client is an organization), as well as the associated Commentary.

Note: If your client persists in instructing you to act against your professional ethics, you must withdraw (*BC Code* rule 3.7-7).

For more information about withdrawal, see section ***8 - Ending the Lawyer-Client Relationship*** of this course.

Honesty and Candour

You owe a duty of honesty and candour to your clients which means you must inform a client of all information known to you that may affect their interests in their matter (*BC Code* rule 3.2-2).

Being honest and candid means you should disclose to your client all the circumstances of your relations to the parties and any interest in or connection with the matter that might influence whether the client selects or continues to retain you (rule 3.2-2, Commentary [1]).

When a client seeks your legal advice, you have a duty to give them a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and your own experience and expertise. The advice must be open and undisguised and must clearly disclose what you honestly think about the merits and probable results (rule 3.2-2, Commentary [2]).

Occasionally, you may have to be firm with a client. There may be circumstances in which you disagree with your client's perspective, or have concerns about their position on a matter, and give advice that will not please them. Being clear about your concerns and advice may legitimately require firm and animated discussion with the client. Firmness, without rudeness, is not a violation of the duty of honesty and candour or the rules (rule 3.2-2, Commentary [3]).

Loyalty

You owe a duty of loyalty to your clients. *BC Code* rule 3.4-1, Commentary [5] reminds us:

- The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client.
- This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.
- To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty.
- Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest.
- The rule governing conflicts of interest is founded in the duty of loyalty, and the value of an independent bar is diminished unless the lawyer is free from conflicts of interest.

A "conflict of interest" exists when there is 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 (rule 1.1-1 and rule 3.4-1, Commentary [5]). This is why you can never represent opposing parties in a dispute, even with consent (rule 3.4-3 and Commentary [1]).

5.2 - Communication Plan

Match your style with the client's needs

Managing your client's expectations starts at the first meeting and continues throughout the relationship.

Set the ground rules for communication as soon as you meet your client. It is a good idea to include your communication plan in the retainer letter (covered above in section ***4 - The Terms of Engagement*** of this course).

- **Explain to your client how you prefer to communicate and be sensitive to their needs, too.** Your client may not have a computer to access emails, may be functionally illiterate, and/or may not be fluent in English. Don't assume that one size fits all.

  Language Rights - *BC Code* rules 3.2-2.1 and 3.2-2.2

  Notably, lawyers have a duty to advise a client of their language rights, including the right to proceed in the official language of the client's choice, and should do so as soon as possible (rule 3.2-2.1, and Commentary [1]).

  In British Columbia, civil trials must be held in English; under section 530 of the *Criminal Code*, R.S.C 1985, c. C-46 an accused has the right to a criminal trial in either English or French (rule 3.2-2.2, Commentary [4]).

  In all such cases, a lawyer must not undertake a matter unless the lawyer is competent to provide the required services in the language of the client's choice (rule 3.2-2.2).

- **Tell your clients that you will try to return their communications promptly and let them know when they can expect a reply.** Explain that, on some occasions, there may be a delay in you responding to their call, however you are committed to resolving their legal problems and what is your general expected turn-around time to get back to them.
  - *BC Code* rule 3.2-1, Commentary [3] reminds lawyers that they have a duty to communicate effectively with their clients. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

- Depending on the client, it may be appropriate to explain how important it is that they respond promptly when you need their instructions, and what steps you can reasonably be expected to take if they are non-responsive.
- If your client constantly requests updates and information, you need to actively manage expectations. Ignoring such communications is not the solution and could make matters worse.

Mapping out the legal process and clarifying who is responsible for what

Give your clients information about the legal process and the plan for advancing their cause. It is important, particularly in litigation, to let the client know that you may need to adjust assumptions and strategies if circumstances change. It is wise to provide a timeline of events like interviews, pleadings, examinations for discovery, settlement discussions, pre-hearings and trial, and keep it current. Let your clients know what to expect of you at each stage, and what you expect of them.

If your clients have assumed responsibility for some tasks, explain exactly what you need from them and when. Diarize these tasks with sufficient time to remind your clients you are expecting action on certain dates. Always leave enough time in client meetings to explain the ongoing proceedings and their purpose.

Provide your client with a copy of any new material, as well as periodic status reports so your client sees that you are working. It is also a good idea to send interim bills, as they remind your client of the work you have done. You are inviting conflict if you send a bill without keeping your client informed about progress on the file, or if you only send a large bill at the end of the matter.

Reasonable turn-around times

"I don't know, I'll look into it, and I'll get back to you soon"

One of a lawyer's most freeing experiences is learning to say, "I don't know." Contrary to common belief, clients often do not expect you to know everything at the outset. Most clients will be quite satisfied with you telling them that you don't know the answer. Rather, you might say that you will look into the matter and get back to them with a clear answer in a timely fashion. In following this practice, you will show your clients that you are thoughtful, and you may find relief from your own unrealistic expectation that you must immediately know the answer to every question your client asks.

That said, you should always ensure that matters are attended to within a reasonable time frame. If you can reasonably foresee undue delay in providing advice or services, you have a duty to inform your client so that they can make an informed choice about their options, such as whether to retain new counsel (rule 3.2-1, Commentary [4]).

5.3 - Client Survey

Using a client survey can be helpful to track the efficacy of your client communication skills and help you identify strengths and weaknesses in your practice. You could give your client the survey at the beginning of the retainer and ask them to fill it out when the work is completed. This approach lets your client know that you are interested in communicating effectively, and that you value their feedback. It might also open the door for your client to alert you about concerns earlier in the relationship.

For example, see the **Model Client Survey** in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the heading *Client service and communication.*

5 - References & Resources

The following references and resources provide additional guidance:

- *BC Code*
  - section 3.1 (Competence)
  - section 3.2 (Quality of Service)
- **Model Client Survey** in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the heading *Client service and communication*

MODULE 6 – FEES & DISBURSEMENTS

6.1 – Fair & Reasonable

Communicating effectively with your client about fees and disbursements is essential in preventing disagreements later. Lawyers' duty of candour to their clients extends to billing. Lawyers must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion (*BC Code* rule 3.6-1). What is "fair and reasonable" depends on various factors which are important to consider when setting your fee estimate, including the time and effort expected to be spent on the matter, the level of difficulty of the matter, whether any special skills are required, the expected results, urgency, and your experience and abilities (rule 3.6-1, Commentary [1]).

6.2 – Retainers

Be sure that the terms of your retainers are clear.

- ***Joint Retainers:*** With a joint retainer, unless there is an agreement by the clients otherwise, the fees and disbursements must be divided equitably (*BC Code* rule 3.6-4).

- ***Third Party Payers:*** If you accept money from someone other than your client for some or all of the retainer, be sure to confirm the following, ideally in writing:
    - the non-client individual who is paying the funds is not your client (see *BC Code* rule 7.2-9 regarding communications with an unrepresented person);
    - their contribution toward the retainer does not entitle them to updates or any information regarding your clients' matter;
    - their contribution toward the retainer does not entitle them to instruct you with respect to your clients' matter; and
    - who is to receive the contributed funds in the event there is any remaining at the end of the retainer.

- ***Contingency Fee Agreements****:* If you are entering into a contingent fee agreement (CFA) with a client, that agreement must be in writing and follow the rules on CFAs in the *Legal Profession Act*, ss. 64 – 68, *Law Society Rules*, Part 8, and *BC Code* rule 3.6-2.
    - Note that, although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in *BC Code* rule 3.7-1, special circumstances apply when the retainer is pursuant to a CFA (rule 3.6-2, Commentary [2]).

Effective communication about fees involves more than providing your client with a fee estimate. It requires putting that estimate in context based on the facts, the services the client is seeking, and informing the client if issues arise that may change your initial estimate. It is a good idea to explain the steps that you need to take on the file and an estimate of the time required for each step. When applicable, explain the settlement process and the effect of a settlement on the estimated fee. Your estimate of fees should also include an explanation for how the fees will be calculated, how disbursements will be calculated and charged, and expected timelines for the payment of fees.

The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following*:*

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

6.2 – Complaints about Lawyers' Fees

If problems do develop, your fees can be reviewed under the provisions in Part 8 (Lawyers' Fees) of the *Legal Profession Act*, and the Registrar can consider your fee estimate in determining whether your fee was fair and reasonable. In some cases, the Law Society Fee Mediation Program may be an appropriate alternative; the program offers free, private, informal mediations for fee disputes ranging from $1,000 to $25,000 on the consent of both the parties.

6 - References & Resources

The following references and resources provide additional guidance:

- *BC Code* section 3.6 (Fees and disbursements) for important information on topics such as contingent fees and CFAs, joint retainers, division of fees and referral fees, pre-paid legal service plans, and more.
- *Law Society Rules*, Part 8 - Lawyers' Fees regarding the form, content and limits of CFAs.
- *Legal Profession Act*, Part 8 - Lawyers' Fees, including the definitions and rules for fee agreements, CFAs and bills, as well as the processes for the examination of an agreement and the review of a bill.
- The yearly "Lawyers' Remuneration" chapter of the Continuing Legal Education Society of BC's *Annual Review of Law & Practice* provides a good overview of developments in the area of lawyers' remuneration.
- Gordon Turriff, Q.C., *Annotated British Columbia Legal Profession Act* (Canada Law Book)
- The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following:
    - **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
    - **Sample non-engagement letters** under the heading *Client files*

MODULE 7 – COMMON COMMUNICATION PROBLEMS

7.1 - Obligations under the *BC Code*

The *BC Code* provides extensive guidance on proper communication, including:

- Avoid personal remarks and quarrels; rule 2.1-4
- Courteous, thorough, prompt, timely service; rule 3.2-1
- Do not threaten complaint or criminal proceedings; rule 3.2-5
- No bribes; rule 3.2-6
- Be courteous and civil; rule 7.2-1
- Use proper tone; rule 7.2-4
- Communication with represented persons must be through lawyer; rule 7.2-6
- Urge self-represented persons to obtain legal advice; rule 7.2-9
- Dealing with communications received inadvertently; rule 7.2-10

These *BC Code* rules are the minimum standard by which you should practise. Satisfying these rules does not make you an effective communicator - that can only be accomplished with diligent attention and mindful acknowledgement of interpersonal relationships.

7.2 - Communicating with Other Lawyers

If you practise law, sooner or later you will run into a lawyer who gets under your skin. Lawyers have different styles and when another lawyer's style is vastly different than your own, it may be hard to understand. Some lawyers may seem overly aggressive while others may seem passive, disorganized or unresponsive. Oftentimes conflicts are due to misunderstandings and can be resolved through clarifying communication.

Remember the *BC Code* requires you to communicate appropriately regardless of anyone else's lapse of communication. Do not let another lawyer's communication style dictate how you practice law. You can manage your relationship with these lawyers, using many of the tools for dealing with clients. Your professional obligations require you to respond with reasonable promptness to communications from other lawyers that require an answer and be punctual in

fulfilling all commitments (*BC Code* rule 7.2-5). As with clients, think before you respond and stick to essential information in formulating your response. While you should document all communication with other lawyers, it is particularly important to document communications with lawyers who you find difficult and to maintain civility in your own communications.

If confronted with communications you consider improper or offensive, craft a response and then wait before responding. The amount of time to wait will depend on the urgency of the need to respond. Try to review the response objectively and edit as required. Your tone should be civil and the content to the point. You may find it helpful to ask a colleague to provide feedback on your draft response. Remember that lawyers must be punctual in fulfilling professional commitments (rule 7.2-5). People have the right to expect this of you, and you have the right to expect it of other lawyers.

Depending on the circumstances, it may be appropriate to advise the other lawyer that you think their communications are improper and that you expect to be treated with civility and professional courtesy. Consider whether this is likely to improve communications going forward. If the difficult communications persist, you may choose to advise them that future dealings will only be by way of correspondence.

If you are considering making a complaint about another lawyer, see section ***9.3 - Complaining about another Lawyer*** later in this course.

7.3 - Communicating with Other Parties

When dealing with people on the other side of the file, first determine if they are represented by counsel.

Your communications with represented parties are governed by *BC Code* rule 7.2-6. As set out in the rule, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of that person's lawyer, approach, communicate or deal with the person on the matter, or attempt to negotiate or compromise the matter directly with the person.

There may be circumstances where the other person is partially represented under a limited scope retainer.

Limited Scope Retainers are governed by *BC Code* rule 7.2-6.1. In these situations, the opposing limited scope counsel should inform you of the matters on which you should be communicating with them, and which matters the client is handling. Commentary [1] states that, where notice has been provided to a lawyer for an opposing party of a limited scope retainer, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer. That said, rather than rely on the opposing party's lawyer to advise you of the limits of their retainer, if you have any uncertainty, contact the lawyer and insist that they set out in writing the circumstances where it is permissible to contact the person on the other side of the file. Until you have the lawyer's confirmation, the best practice is to communicate only through the lawyer and not through the opposing party. As always, document your communications.

In either case, show respect to the opposing party and try to both understand their position and voice that you understand their position relative to the party (or their counsel). Differences of opinion are our stock and trade. Recognizing the opposing position and projecting that recognition is the start to a sensible execution of your mandate.

Differences of opinion are our stock and trade. Recognizing the opposing position and projecting that recognition is the start to a sensible execution of your mandate.

7.4 - Communicating with Unrepresented Parties

When you are dealing with an unrepresented party or a partially represented party (someone under a limited scope retainer), pursuant to *BC Code* rule 7.2-9, you must:

- ensure they understand
    - you are not their lawyer and are not protecting their interests,
    - that you are acting exclusively in the interests of your client, and
- urge the unrepresented person to obtain independent legal representation.

You should also explain to your client the protocol for dealing with unrepresented parties, including that you have to respond to communications from the unrepresented party, and will have to have contact with them about settlement and other matters.

You may find yourself dealing with an unrepresented party who acts reasonably but there are cases where the behaviour can be more challenging. For example, when an unrepresented party sends you numerous communications in an effort to harass you or your client and increase your

client's legal costs. If you find yourself dealing with an unreasonable unrepresented party, remember to remain calm and reasonable and feel welcome to reach out to a practice advisor for assistance. Do not ignore the communications. Consider whether the communication is one that requires a reply. If it includes procedural or substantive content, answer within a reasonable time. You may want to respond to multiple communications in a batch response. If so, it is helpful to be clear about which communications you are responding to by listing them at the outset of your response. Also keep in mind that you don't have to accede to unreasonable requests or time limits imposed by the other party.

It is critical to document your communications with unrepresented parties. In addition, remember that you should never seek to gain paltry advantage in carrying out your duties as a lawyer, *BC Code* rule 2.1-4(c), especially when dealing with unrepresented people because:

- such tactics will be looked upon unfavourably by the courts and the Law Society;
- the perceived benefits are illusory; and
- such conduct has a negative effect on public perception.

As set out in *BC Code* rule 2.1-4(c):

- A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter.
- A lawyer should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice.

The best practices of responding to communications in a timely fashion, documenting communications, being civil, and keeping communications on topic apply equally when dealing with unrepresented or partially represented parties.

Potential Complaints

Sometimes unrepresented parties may indicate that they are going to complain about you.

Be sure to review the prohibition on inducements for the withdrawal of criminal or regulatory proceedings set out in *BC Code* rule 3.2-6.

When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present (rule 3.2-6, Commentary [4]).

7.5 - Communicating with Other People

Depending on the nature of your practice, you will likely have professional dealings with many people other than your clients and other lawyers, including landlords, staff, court and registry staff. Make sure there is a clear understanding of your role and relationship with these people. Although the nature of various relationships is different, you must always communicate in a professional manner.

Recognize that you have a duty to promptly meet financial obligations in relation to your practice, *BC Code* rule 7.1-2.

- Ensure any payment obligation for their services is clear, confirm your contracts in writing, and keep copies of all contracts.
- Pay your bills on time.
- Ensure your office systems capture routine billing requirements and be sure to set aside sufficient time to manage the business side of your practice.

Unpaid practice debts can lead to contractual liability and can also have professional conduct consequences.

7.6 - Communicating with Witnesses, including Experts

When communicating with a potential witness, you must explain:

- why you are contacting them,
- the purpose for which you are interviewing them, and
- that there is no ownership in a witness and that they are not your client.

See *BC Code* section 5.3 (Interviewing witnesses) and rule 7.2-9.

Again, as with when contacting any party, be sure to determine whether the individual is represented and if so, be sure to direct all your communications through their counsel unless you have counsel's consent to do otherwise (see *BC Code* rule 7.2-6).

Note that it is not improper for a lawyer to request a witness to decline to talk to the other side unless he is present (*[PCH]* EC May 1997, item 8).

Guidance regarding communicating with a witness giving evidence is set out in *BC Code* section 5.4 (Communication with witnesses giving evidence).

Competence & Additional Expertise

Part of being a competent lawyer is recognizing when it is important to bring in additional expertise. Sometimes this may involve expertise in a particular area of law (see *BC Code* rule 3.1-2, Commentary [4]). In other circumstances, competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields and, when it is appropriate, you should not hesitate to seek your client's instructions to consult experts (rule 3.1-2, Commentary [7]).

- Pick the right expert for the case.
- Do your research and ask questions before retaining the expert.
- Before retaining an expert, determine how their fee is calculated and obtain instructions from your client authorizing the use of the expert.

Who is paying the expert?

If you are retained under a contingent fee agreement, clarify who is responsible for paying the expert.

If you retain a consultant, expert or other professional, you should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment (*BC Code* rule 7.1-2, Commentary [2]).

When you are dealing with experts, pay their bills promptly. If you no longer require the services of an expert, advise them in writing as soon as possible. Failing to inform the expert can result in lost time and opportunity for the expert, who may expect compensation for their lost business opportunities. In circumstances where the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so (rule 7.1-2, Commentary [2]). For example, if you are on a legal aid retainer, explain to the expert the process for obtaining approval and payment of disbursements. If in doubt, contact the Legal Services Society.

Addressing and Contacting Experts

Use particular care when addressing an expert, whether they are a witness or information provider or on the opposite side of a matter.

Note that a lawyer must notify an opposing party's counsel when the lawyer is proposing to contact an opposing party's expert; ***Benchers' Bulletin,*** **Summer 2014**

Change of Lawyer

If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer (rule 7.1-2, Commentary [3]).

7.7 - Issues with Professional Communication

Failure to Respond Promptly (or at all)

The most common communication problem is lawyers who either delay responding to communications or fail to communicate altogether. An excuse for failing to respond only serves as an explanation for why the lawyer failed to communicate but does not excuse the failure. There is no excuse to not return communications within a reasonable time or within the timelines you promised your client.

- Be aware of all incoming communications that require your professional attention and maintain records as to how each was addressed.

Inappropriate Tone and Content

Civility in communications is an essential skill to understand and practice. The content of your communication is as important as the tone. Don't clutter your communications with superfluous statements, stick to essential and clear information. Only make statements that are objectively defensible and necessary.

A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer (*BC Code* rule 7.2-4).

- Be precise and try to avoid ambiguous communications.

If you think your communications have been misunderstood, take the time to clarify prior communications to ensure there is no misunderstanding. As long as you are reasonable, your

audience will appreciate your efforts to ensure clarity in the face of a potential misunderstanding. The key is to keep communications on point.

Failure to Stay Objective

Most people hire lawyers when they need help with a significant issue in their life. The legal matter will usually have a monetary impact on the client, but it can also involve important personal and property rights. In some circumstances, particularly in family law, the client is faced with a very emotional situation. Such a client will often be seeking your advice when they cannot see their situation objectively, and sometimes when they are particularly vulnerable. The fiduciary nature of the lawyer-client relationship, and the trust obligations that arise from that relationship, require that you maintain your objectivity.

While it is appropriate to understand and respect your client's emotional state, it is inappropriate to mimic it. You have a duty to provide objective, disinterested professional advice to your clients (*BC Code* rule 3.4-1, Commentary [8]). Your client is entitled to feel the way they feel and to be governed by emotion. You are not. Effective communication skills can help mitigate some of the risks of dealing with emotional clients. Your client has hired a lawyer, and if the client is operating under a misapprehension of what they can expect from you, it is imperative that you disabuse them of any notion that you are a mere mouthpiece for their displeasure. Managing your client's expectations requires you to be firm and upfront about the services you will provide, and your obligation to provide those services in a civil and professional manner. In a matter that might proceed to litigation, it is particularly important to let the client know that the way client and counsel conduct themselves can affect the outcome, including cost awards. It is also important to let your client know that as a professional and as an officer of the court, you are required to adhere to the *BC Code*, which is a professional code of conduct.

There are several benefits to ensuring your clients understand that, while you are sympathetic to their situation, you are required to provide them with objective advice. This is because:

- Being objective and not over-identifying with your client allows you to apply your legal skills with reasoned action, rather than by impulsive reaction. This increases the likelihood of obtaining a favourable result.
- By not over-identifying with the client, you are less likely to personalize the legal matter. Lawyers who personalize matters are more prone to engage in communications that offend the opposing party or counsel. In addition to being unprofessional, personal attacks and observations can lead to complaints.
- In circumstances where you give your client free rein to dictate the way you communicate, you become a puppet rather than an advocate for their rights. When matters conclude, it is not uncommon for the emotional client to remain unsatisfied and

complain that you failed to serve them in a conscientious and diligent manner. Lawyers who over-identify with their clients often set themselves up for censure.

7.8 - Issues with Professional Written Communication

Inappropriate Affidavits

Restrict the content of affidavits to statements the deponent can swear or affirm to be true, and that are necessary to deal with the legal issue. Language in affidavits must be civil and factual. Peppering affidavits with personal attacks and inflammatory language is a misguided approach.

Some areas of practice, such as family law, can lend themselves to inappropriate content in affidavits. Clients can be emotional and lawyers sometimes fail to serve those clients in a professional manner. An affidavit is not a vehicle to spit venom in the most objectionable manner that you or your client can conjure. In addition, certain legal disputes require the parties to have some form of enduring relationship and using improper language in an affidavit can harm that relationship. If your client requires continued contact with a spouse on custody, exacerbating the situation through inflammatory language is not in the best interest of the children, your client, or society. Your client does not have the right to demand that you produce uncivil affidavits and place them before the court. If your client is engaging in this sort of behaviour and you need help determining how to proceed, it is always a good idea to call a Law Society practice advisor for guidance.

Inappropriate Demand Letters

A demand letter should be firm and direct, but polite. Allow for reasonable accommodations and explain to your client the value of reasonable accommodation. Never abuse a reasonable accommodation you have been extended, nor jeopardize your client's position by allowing the other party or counsel to abuse a reasonable accommodation you have granted. Don't editorialize or stray off point in a demand letter. Be sure to review *BC Code* rule 3.2-5 (Threatening criminal or regulatory proceedings) and the associated annotations, in particular EC February 1998, item 11.

7.9 - Issues with Professional Commitments

Breaching Undertakings

When you are retained on matters that require undertakings, educate your client about their purpose and the relevant rules. It is important to let your client know that once you have accepted an undertaking, you cannot breach it, even on instructions from your client.

Don't insist on undertakings where a lesser form of promise will suffice.

When undertakings are required, ensure you comply with the *BC Code* rule 2.1-4, rule 5.1-6 and rule 7.2-11.

Note that a breach of undertaking or trust condition that has not been consented to or waived is a mandatory duty to report under *BC Code* rule 7.1-3(a.1).

7.10 - Issues When Appearing as Counsel

Explain the Adversarial Process

Take the time to ensure your client understands how the adversarial process works. Your client may have preconceived and perhaps misguided notions about litigation. You are inviting complaints if you do not take the time to educate your client and keep them well informed about how the court process works, how settlement operates within the system, and the issue of costs.

Your client must understand that litigation involves risk, and even if the client believes the cause is just, the result might not be to their liking. Your client should also be aware that litigation is costly, and there is a risk that they may have to pay costs. Take the time to explain the concept of cost awards. If your client is pushing you to behave unprofessionally, remind your client about cost sanctions as well as special costs.

It may be that the best course of action will be for the client to settle the case. Since most filed cases settle, explain to your client why cases settle and have a frank discussion about why and when settlement is desirable. This conversation is a natural fit with a discussion about costs. Also tell your client about your obligation to encourage settlement of a dispute whenever it is possible to do so on a reasonable basis, and to discourage continuing useless legal proceedings, see *BC Code* rule 3.2-4 (Encouraging compromise or settlement).

When engaged in litigation you need to be alert to your professional obligations to the client, the court, the state and other lawyers. Educating your client about the litigation process is important for managing your client's expectations. Taking the time to explain the ground rules allows the client to understand why you are conducting matters in a certain fashion and lets them know what to expect. Something as simple as the client misunderstanding why you bow to the judge or refer to the opposing lawyer as "my learned friend" can create problems.

Role of the Court

Your client needs to understand the court's role. A client might believe the job of the judge is to pronounce the result the client desires. Another client, perhaps for cultural reasons, might not understand the role of a judge in Canada.

Take the time to demystify the process by explaining the role and powers of a judge in general, and in the client's context in particular. For example, in a custody dispute, explain the procedural role of the judge as well as the court's duty to take into account the best interest of the child. In a divorce proceeding, explain the court's duty under s. 10 of the *Divorce Act*.

Some clients need to understand that a judge has the jurisdiction to govern conduct before the court, including contempt and conflicts of interest before the court.

Your client also needs to understand that the duty to act fairly and honourably extends to proceedings before administrative tribunals, even though proceedings are less formal than courts.

Communicating in Court

In addition to your duties under the *BC Code*, here are some simple rules for communicating professionally in court.

- Unless you are physically unable, stand when you are addressing the court.
- Stay seated when opposing counsel is addressing the court.
- If you have an objection, rise, state the objection, then sit down.
- Communications between counsels should be directed to the judge; it is bad form to turn to opposing counsel and engage in a conversation.
- Don't make personal attacks upon your opponents.

7 - References & Resources

The following references and resources provide additional guidance:

- *BC Code*
  - section 5.1 (The lawyer as advocate) including rule 5.1-2 which reminds lawyers of what they must not do when acting as an advocate
  - section 5.2 (The lawyer as witness)
  - section 5.3 (Interviewing witnesses)
  - section 5.4 (Communication with witnesses giving evidence)
  - section 5.5 (Relations with jurors)
  - section 5.6 (The lawyer and the administration of justice)
- Law Society of BC, Discipline Advisory: Lack of civility can lead to discipline (June 10, 2011)

MODULE 8 – ENDING THE LAWYER-CLIENT RELATIONSHIP

8.1 - The End of Legal Services

There are several ways that the lawyer-client relationship may come to an end.

Generally, a retainer ends when the lawyer has completed the contracted work.

However, in some cases the client may discharge the lawyer or a lawyer may withdraw from the representation.

> "Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is a justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds." *BC Code* rule 3.7-1, Commentary [1]

It follows that a lawyer may require cause to terminate the relationship, depending on the timing of the withdrawal and the impact on the client's interests.

Be sure to familiarize yourself with the following provisions in the *BC Code*:

- when you are required to withdraw from your retainer (see rule 3.4 - *Conflicts* and rule 3.7-7 - *Obligatory withdrawal*);
- when you have the discretion to withdraw from your retainer (see *rule 3.7-2 - Optional withdrawal*);
- when you can withdraw for non-payment of fees (see rule 3.7-3);
- the special circumstances surrounding withdrawal from contingent fee agreements (see rule 3.6-2) and from criminal files (see rules 3.7-4 to 3.7-6);
- the guidelines as to the manner of withdrawal (see rules 3.7-8 and 3.7-9); and
- your confidentiality obligations following withdrawal (see rule 3.3-1, Commentary [3] and, rule 3.7-9.1).

IMPORTANT: Be clear about when you are no longer offering legal services since you have an obligation to promptly attend to any remaining funds in trust. Law Society Rule 3-58.1(2) states:

A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the legal services to which the funds relate.

Closing the File: Reporting Letters and, where applicable, the Transfer of the File

When you have completed work on a file and paid outstanding disbursements, send your client a final reporting letter. A final reporting letter should inform your client that the retainer is over and what, if anything, remains to be done. For example, if you were retained to obtain default judgment, a final reporting letter should confirm the result and remind the client that they need to take steps to collect on the judgment.

You have an obligation to take all reasonable steps to assist in the transfer of the client's file (rule 3.7-9). When you transfer a file, be sure to retain copies of the content in the event of a complaint, a claim or in case you need to prove that a bill is fair and reasonable.

Another great resource is the ***Client file opening & closing*** checklist which is available as part of the Law Society's Practice Checklist Manual.

Termination by the Client

If your client terminates the retainer, remember that the client has the right to do so without cause. If a client decides they no longer want you as their counsel it is not a license to ignore their communications or to be rude. Some continuing communication will be required, including transferring the file, refunding money or collecting remaining fees and disbursements. For more information, see *BC Code* section 3.7 , specifically rule 3.7-7 and rule 3.7-9.

Contingency Fee Agreement (CFA)

If you have been engaged in a CFA that is terminated by your client, try to arrange with the client's new counsel for payment of your disbursements, and to secure payment of your fees when the matter settles. Review the case law dealing with a lawyer's right to *quantum meruit* payment in circumstances where the client terminates a CFA.

Termination by You

If you withdraw from a retainer, you must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer (rule 3.7-8). Ensure you follow the guidance in the *BC Code*, in particular section 3.7 which addresses withdrawal. Giving the client reasonable notice allows the client time to make alternate arrangements for representation and reduces the chance that the client will feel abandoned. Follow the *BC Code*'s procedures to make it clear that the lawyer-client relationship has ended.

Contingency Fee Agreement (CFA)

Remember that although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in *BC Code* rule 3.7-1, special circumstances apply when the retainer is pursuant to a CFA (rule 3.6-2, Commentary [2]).

8.2 - Manner of Withdrawal

BC Code rule 3.7-9 specifies the steps to take when a lawyer withdraws or is discharged from a file.

If your former client's matter is ongoing, determine whether they are retaining new counsel and if not, encourage them to do so.

In all cases, you must, as soon as practicable:

- **Provide appropriate written communications:**
    - Notify the client in writing, stating the fact that you are no longer acting; the reasons, if any, for the withdrawal; and in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly. Be sure to remind the former client of important dates that may affect their legal rights or obligations, such as deadlines, limitations, trial or examinations for discovery. If you have already provided the client with a roadmap, this will confirm what you have already told them. If you have not provided the client with a roadmap, advise them of these matters so they can take proper steps to protect their rights or meet obligations.

  - Notify in writing all other parties that you are no longer acting, including the Crown where appropriate.
  - In litigation matters, notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer is no longer acting and comply with the applicable rules of court and any other requirements of the tribunal.
- **Settle your accounts:**
  - Account for all funds of the client then held or previously dealt with, including any remuneration not earned during the representation.
  - Promptly prepare a final bill for the client for outstanding fees and disbursements and determine whether the client owes you money or whether you are required to refund money to the client.
- **Arrange for the transfer of the former client's file to them or their new counsel:**
  - Subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled. Subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter.
  - Co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client.

REMEMBER: Subject to exceptions permitted by law, if your reason for withdrawal from a retainer results from confidential communications between you and your client, your duty of confidentiality means that you must not disclose the reason for the withdrawal unless the client consents (*BC Code* rule 3.7-9.1, and see Commentary [1] regarding an exception).

Considering a Lien?

Lawyers have a common law right of lien over a file to secure payment. The common law lien is different than the statutory charging lien available pursuant to s. 79 of the *Legal Profession Act*. While a lawyer may assert a lien on a file, the court has the jurisdiction to order the file delivered to the client (*Legal Profession Act*, s. 78).

8 - References & Resources

The following references and resources provide additional guidance:

- Law Society, Discipline Advisory: Maintaining privilege and confidentiality when ending the solicitor-client relationship (July 13, 2017)
- ***Client file opening and closing*** checklist in the Law Society's Practice Checklist Manual
- Be sure to review the Law Society's **Practice Management Course** for detailed guidance regarding the steps to take when closing a file
- Law Society Practice Resources:
    - Closed Files: Retention and Disposition (updated August 2017) – see p. 26, Appendix B: Minimum retention and disposition schedule for specific records and files – Rules and Guidelines
    - Closing a file: What documents to keep and for how long, *Benchers' Bulletin*, Winter 2017 (pp. 9-10, 19)
    - Ownership of Documents in a Client's File [formerly Whose File is it Anyway? Who Owns Client File Documents When the Retainer Ends?], updated July 2017.
    - Solicitors' Liens and Charging Orders - Your Fees and Your Clients
- Gordon Turriff, Q.C., *Annotated British Columbia Legal Profession Act* (Canada Law Book)

MODULE 9 – COMMUNICATING WITH THE LAW SOCIETY

9.1 - Communications from the Law Society

BC Code rule 7.1-1 states: "A lawyer must reply promptly and completely to any communication from the Society." The Law Society Benchers regularly reference the importance of this duty.

Law Society of BC v. Cunningham, 2017 LSBC 37:

[31] The substantial harm caused by a failure to respond to Law Society requests for information, including information needed to investigate a client complaint, is obvious when one considers the vital importance of prompt and complete responses to the effective regulation of the profession in the public interest (Law Society of BC v. Ben-Oliel, 2016 LSBC 40 at para. 47). As stated in Dobbin, at para. 20:

> … The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. …

Recently, *Law Society of BC v. Hopkinson*, 2020 LSBC 17 provided lengthier cite from Dobbin:

[68] In Law Society of BC v. Dobbin, 1999 LSBC 27, the majority of the Benchers on Review stated at paras. 20 and 25 that:

> … [the duty to reply] is a cornerstone of our independent, self-governing profession. If the Law Society cannot count on prompt, candid, and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interest of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

> … unexplained persistent failure to respond to Law Society communications will always be prima facie evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct. The circumstances which led the member to fail to respond are peculiarly within his or her means of knowledge. It cannot be a part of the evidentiary burden of the Law Society to show both that the member persistently failed to respond and the reasons for that failure.

Law Society of BC v. Ben-Oliel, 2016 LSBC 40

[48] Similarly, in Law Society of BC v. Hall, 2003 LSBC 11, at para. 2, the panel stated:

> ... it is essential for lawyers to respond to Law Society communications. Otherwise the Society cannot effectively discharge its responsibility of protecting the public interest in the administration of justice. It is simple: lawyers neither have the freedom not to respond nor the freedom to respond according to a schedule that suits them. They certainly cannot put their heads in the sand, as the Respondent said he did.

9.2 - When You Receive a Complaint

As explained in the previous section of this course, ***9.1 - From the Law Society,*** it is important to respond to Law Society communications.

The Law Society has great resources on its website about the complaints process – reviewing these resources can help you better understand how the process is going to unfold.

Remember, as well, not every complaint goes to citation – the Law Society publishes in its Annual Report information about the number of complaints received and how they are resolved.

9.3 - Complaining about another lawyer

Often challenges between lawyers arise due to miscommunication. Lawyers are encouraged to contact a Law Society practice advisor to assist in assessing the situation and exploring options for moving forward.

Unless you are dealing with a situation where you have a mandatory duty to report another lawyer to the Law Society under *BC Code* rule 7.1-3, first assess whether the situation might be better managed through effective communication with the other lawyer. Try to resolve impasses by being constructive. If you decide you might complain, consider whether the complaint will jeopardize your client's position by making the other lawyer antagonistic, obstinate or intentionally cause delay. You may wish to wait until the client matter is resolved.

Also remember that a "lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable" (rule 7.1-4). It is important to advise your client regarding their options, the processes, and any risks involved.

Under no circumstances should you threaten a lawyer or make complaints to the Law Society in an effort to improve your client's position, see rule 3.2-5:

> **3.2-5** A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:
>
> (a) to initiate or proceed with a criminal or quasi-criminal charge; or
> (b) to make a complaint to a regulatory authority.
>
> *Commentary*
>
> [1] It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.
>
> [2] It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system.

Also be sure to review the prohibition on inducements for the withdrawal of criminal or regulatory proceedings set out in rule 3.2-6.

The purpose of making a complaint must be because you reasonably believe the other lawyer has engaged in conduct that falls below the requisite standard of the profession, not to improve your client's position, to settle a grudge or to make life difficult for the other lawyer. In all cases, the report must be made without malice or ulterior motive (rule 7.1-3, Commentary [1]).

9 - References & Resources

The following references and resources provide additional guidance:

- *BC Code*
  - rule 3.2-5 (Threatening criminal or regulatory proceedings)
  - rule 3.2-6 (Inducement for withdrawal of criminal or regulatory proceedings)
  - rule 7.1-1 (Regulatory compliance)
  - rule 7.1-3 (Duty to report), Commentary [1]
  - rule 7.1-4 (Encouraging client to report dishonest conduct)
- Law Society complaints process
- Law Society Annual Report

MODULE 10 – WINDING UP YOUR PRACTICE

This course does not explore exhaustively your obligations on winding-up or moving a practice. When you get to the point of planning to do so, the Law Society has resources to assist you. It is essential that you communicate with existing and former clients as their rights and interests may be affected by your decision. If you have questions, consult a practice advisor at the Law Society.

In addition to referring to the resource material, it is essential that you review and comply with Law Society Rule 3-87, *Disposition of files, trust money and other documents and valuables* regarding the disposition of certain records.

The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes guidance regarding Succession Planning & Practice Coverage, as well as the following resources under the heading *Client files*:

- Closed Files: Retention and Disposition – see p. 26, *Appendix B: Minimum retention and disposition schedule for specific records and files – Rules and Guidelines*
- Closing a file: What documents to keep and for how long, *Benchers' Bulletin*, Winter 2017 (pp. 9-10, 19)
- Ownership of Documents in a Client's File [formerly "Whose File is it Anyway? Who Owns Client File Documents When the Retainer Ends?"], updated July 2017.

***Note**: If you have drafted wills for clients, and you are winding up your practice or moving firms, contact the will makers and tell them about your plans. Don't leave this task to the last minute, as it may take some effort to find the will makers and arrange for them to take possession of their wills. Provide them with your new contact information and the effective date that your contact information will change.*

The standards for communicating with your client regarding winding up your practice are the same as for withdrawing from representation, see *BC Code* section 3.7.

Remember that *BC Code* section 3.5 (Preservation of clients' property) places lawyers under a duty to safeguard client property in the lawyer's possession, subject to a right of lien or agreement to the contrary to return property at the conclusion of the retainer.

- Review the Law Society Closed Files: Retention and Disposition practice resource for suggested retention periods, as well as Law Society Rule 3-75, *Retention of records*.
- You will also want to contact the Law Society's Registration and Licensee Services department regarding making changes to your membership status, and they will be able to provide further guidance including information regarding what retired lawyers can do (see Law Society Rules, Rule 2-4, *Retired members* through Rule 2-6, *Legal services by non-practising and retired members*).

Final Thoughts

Remember that a satisfied client is your best source of future work, both in the form of return business and through referrals. Quite apart from your professional responsibilities, by failing to communicate effectively with your clients you are poisoning the lifeblood of your business. Similarly, lawyers who communicate in an unprofessional manner risk becoming pariahs in a very small community.

In closing, we leave you with the following thoughts to ponder:

> *The art of communication is the language of leadership.*
>
> - James Humes

> *The two words 'information' and 'communication' are often used interchangeably, but they signify quite different things. Information is giving out; communication is getting through.*
>
> - Sydney Harris

> *The greatest problem in communication is the illusion that it has been accomplished.*
>
> - Daniel Davenport