

MINUTES

COMMITTEE: Ethics Committee

DATE: March 1, 2012

CHAPTER 11, RULE 11: WHETHER RULE 11 APPLIES WHERE COUNSEL SENDS ``WILL SAY`` STATEMENT TO OPPOSING CROWN COUNSEL

A lawyer's client was charged on a two count information with impaired driving and driving with a blood alcohol level over .08. In an effort to dispense with calling a defence witness on behalf of his client the lawyer sent a "will say" statement of a prospective witness to Crown counsel on certain conditions. The lawyer's letter sets out those conditions and states as follows:

Further to our other correspondence of today's date, with respect to the potential of calling Mr. X as a witness in this matter, we wish to canvas with you the possibility of admitting Mr. X's evidence. It is for this purpose and this purpose alone that we provide a copy of Mr. X's "will say". This "will say" is provided to you the basis that it is to be used for the purpose of resolving the issue as to whether or not Mr. X will be required to testify or if his evidence may be admitted. The "will say" is not provided for any other purpose, including for the purpose of cross-examining Mr. X.

If the terms under which this "will say" is provided are not agreeable, we would ask you to return the "will say" to our office. (quotation edited for confidentiality)

The Committee noted that Chapter 11, Rule 10 of the *Professional Conduct Handbook* states:

10. A lawyer must not impose on other lawyers impossible, impractical or manifestly unfair conditions of trust.

It was the Committee's view the undertaking the lawyer attempted to impose on Crown Counsel was contrary to Chapter 11, Rule 10. Accepting the undertaking would mean the Crown was restricted in its use of the information contained in the statement in the way the lawyer stipulated. However, rejecting the undertaking and returning the statement to the lawyer puts Crown Counsel in possession of information that it cannot effectively

communicate to its client, the Crown, even though Crown Counsel has an obligation to provide its client with all relevant information.