The Law Society of British Columbia

AGENDA

MEETING: Benchers

DATE: Friday, October 1, 2010

TIME: **7:30 a.m.** Continental breakfast

8:30 a.m. Meeting begins

PLACE: **Bencher Room**

CONSENT AGENDA:
The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.

1	**Minutes of September 2, 2010 meeting** • Minutes of the regular session • Minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
	REGULAR AGENDA	
2	**President's Report** • Written report to be distributed electronically prior to meeting	
3	**CEO's Report** • Written report to be distributed electronically prior to meeting	
4	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	
	GUEST PRESENTATIONS	
5	**The Future Practice of Law: Regulating the Legal Profession** Presentation by Jordan Furlong, Partner, Edge International Consulting • Paper from Mr. Furlong	Tab 5 p. 5000
	2009-2011 STRATEGIC PLAN IMPLEMENTATION *(FOR DISCUSSION AND/OR DECISION)*	
6	**Proposed Discipline Rules Amendments (Strategy 2-5)** Mr. Getz to report • Memorandum from Mr. Hoskins for the Act & Rules Subcommittee	Tab 6 p. 6000

7	**Delivery of Legal Services Task Force Report: Approval of Recommendations** Mr. Vertlieb to report • Report from the Delivery of Legal Services Task Force	Tab 7 p. 7000
OTHER MATTERS *(FOR DISCUSSION AND/OR DECISION)*		
8	**Ethics Committee: Progress Report on Implementation of the Model Code** Mr. Hume to report • Memorandum from the Ethics Committee	Tab8 p. 8000
9	**Report on the Federation Meeting (Sept. 23-25, Saint John, New Brunswick)** Mr. Hunter to report • Memorandum from Alan Treleaven (*in camera*) to be circulated before the meeting	
IN CAMERA SESSION		
10	**Law Society Response to *Family Relations Act* White Paper** Ms. Hickman to report • Memorandum from Mr. Munro and draft letter to be circulated before the meeting	
11	**Credentials Committee: Revised Fitness Question** Ms. Hickman to report, with Mr. Gomery attending • Memorandum from the Credentials Committee	Tab 11 p. 11000
12	**Bencher Concerns**	

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Thursday, September 2, 2010

PRESENT:

Glen Ridgway, QC, President
Gavin Hume, QC, 1st Vice-President
Bruce LeRose, QC, 2nd Vice-President
Haydn Acheson
Rita Andreone
Kathryn Berge, QC
Joost Blom, QC
Patricia Bond
Robert Brun, QC
E. David Crossin, QC
Tom Fellhauer
Leon Getz, QC
Stacy Kuiack
Peter Lloyd, FCA
Benjimen Meisner
David Mossop, QC
Suzette Narbonne
Thelma O'Grady
Lee Ongman
Gregory Petrisor
David Renwick, QC
Claude Richmond
Alan Ross
Richard Stewart, QC
Herman Van Ommen
Art Vertlieb, QC
Kenneth Walker

ABSENT:

Satwinder Bains
Carol Hickman
Jan Lindsay, QC
David Loukidelis, Deputy Attorney General of BC
Catherine Sas, QC

STAFF PRESENT:

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

GUESTS:

Dom Bautista, Executive Director, Law Courts Center
Mark Benton, Executive Director, LSS
Johanne Blenkin, Executive Director, BCCLS
Dean Donna Greschner, Law Faculty, UVIC
Jeremy Hainsworth, Reporter, Lawyers Weekly
Caroline Nevin, Executive Director, CBABC
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Rob Seto, Director of Programs, CLEBC

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on July 9, 2010 were approved as circulated.

Consent Resolutions

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

2. External Appointments: Justice Education Society Board of Directors

BE IT RESOLVED to appoint Leon Getz, QC to the board of directors of the Justice Education Society for a two-year term effective September 1, 2010.

3. Bencher Approval of Agreement: FLS Mobility Defalcation Compensation

BE IT RESOLVED to approve the Law Society's entry into the Federation of Law Societies of Canada's Mobility Defalcation Compensation Agreement, as set out in Appendix 1 to these minutes.

4. Law Society Representatives on the 2010 QC Appointments Advisory Committee

BE IT RESOLVED to appoint President Ridgway and First Vice-President Hume as the Law Society's representatives on the 2010 QC Appointments Advisory Committee.

5. Changes to Chapter 10 of the *Professional Conduct Handbook* (withdrawal by counsel for non-payment of fee): *R v. Cunningham*

BE IT RESOLVED to amend **Chapter 10 of the *Professional Conduct Handbook*** by deleting Paragraphs 6, 7, 8 and 9, and Footnote 2 and substituting the following

Withdrawal for non-payment of fee

6. If a lawyer and client agree that the lawyer will act only if the lawyer's fee is paid in advance, the lawyer must confirm that agreement in writing to the client, specifying a payment date.

7. A lawyer must not withdraw because the client has not paid the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for a hearing or trial.

Procedure for withdrawal

8. Upon withdrawal, the lawyer must immediately:

   (b) notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer has withdrawn and, where applicable, comply with any other requirements of the tribunal,[2]

Confidentiality

9. Subject to exceptions permitted by law, 3 if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.

FOOTNOTES:

2. In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse to allow the withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See R. v. Cunningham, 2010 SCC 10. The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the

decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See Re Leask and Cronin (1985), 66 BCLR 187 (SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the Rules of Court before being relieved of the responsibilities that attach as "solicitor acting for the party." See Luchka v. Zens (1989), 37 BCLR (2d) 127 (CA).

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

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

6. Referendum on amendment of Rule 1-6 [Annual General Meeting] to allow the Audited Financial Statements to be distributed to members electronically

BE IT RESOLVED that a referendum be held this year on the question of whether the Benchers may amend Rule 1-6 to allow distribution of the audited financial statements to members electronically rather than by traditional mail.

7. Changes to Rule 3-3 [Confidentiality of complaints] respecting appointment of special prosecutors

BE IT RESOLVED to amend Law Society Rule 3-3(2) by deleting paragraph (a) and substituting the following:

(a) disclose information referred to in subrule (1), with the consent of the lawyer who is the subject of the complaint;

REGULAR AGENDA – for Discussion and Decision

8. President's Report

Mr. Ridgway referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President during the period of July 10 August 31, 2010.

Mr. Ridgway updated the Benchers on the working process of the BC Public Commission on Legal Aid, advising that the Public Commission will visit 11 communities throughout British Columbia in September and October of this year to gather input from the public and stakeholder groups regarding their views on the future of legal aid. He referred the Benchers to the Commission's recent news

release[1] for a schedule of hearings and directions for making submissions, encouraging them "to spread the word" to lawyers and the public about the upcoming hearing process.

9. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 2 to these minutes), including the following matters:

a. National Standards on Admission to Practice – Federation Project

b. Report on the Canadian Common Law Degree – Implementation Update

c. International Bar Association (IBA) – Vancouver Conference

d. International Institute of Law Association Chief Executives (IILACE) –

e. Vancouver Conference

f. Law Society Annual General Meeting – September 28, 2010

Mr. McGee briefed the Benchers on an upcoming civic policy initiative—called "Public Salons"—being organized by former-Mayor Sam Sullivan. He advised that on September 23 Chief Justice Finch is scheduled to speak at a salon being held at the Vancouver Playhouse.

Mr. Brun expressed appreciation to Mr. McGee for his advice and guidance on strategic planning, the subject of a recent Canadian Bar Association support mission to Uganda.

10. Report on Outstanding Hearing and Review Reports

The Benchers received and reviewed a report on outstanding hearing decisions.

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

11. Proposed Amendments to Section 3 of the *Legal Profession Act*

Mr. Ridgway reminded the Benchers that proposed amendments to section 3 of the *Legal Profession Act* were discussed in detail at the July Benchers meeting, separately from the package of proposed legislative amendments approved for submission to the provincial government for consideration in 2011.

Mr. Ridgway referred to the following passage in the Executive Committee's memorandum to the Benchers (page 11001 of the meeting materials) for the wording of the current proposed amendment of section 3, noting that subparagraph (e) has been added to address concerns raised at the July Benchers meeting:

Public interest paramount

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

(a) preserving and protecting the rights and freedoms of all persons,
(b) ensuring the independence, integrity, honour and competence of lawyers,
(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and applicants for call and admission,

[1] Available on the Commission's website at http://www.publiccommission.org/About/news/news_08_03_10.aspx

(d) regulating the practice of law, and
(e) supporting and assisting lawyers in fulfilling their responsibilities in the practice of law.

Mr. Vertlieb moved (seconded by Mr. Crossin) that the proposed language for section 3 of the *Legal Profession Act*—as set out at page 11001 of the meeting materials—be approved for submission to the provincial government for consideration in amending section 3 of the Act in 2011.
Points covered in the ensuing discussion included:

- the Executive Committee's view is that the re-draft addresses concerns about continuing programs that support and assist lawyers, while also addressing the concern over the current language about "protecting" the interests of lawyers
- replacement of "upholding and protecting the interests of its members" with "supporting and assisting lawyers in fulfilling their responsibilities in the practice of law"
    - does not change the work done by the staff, Benchers and volunteers of the Law Society
    - enhances public confidence in the legal profession and its regulation by the Law Society
- the Law Society's public interest mandate is already clear and strong, so there is no pressing need for change
- effective regulation requires that the Law Society have the confidence of the legal profession

The motion was carried.

17. Discipline Guidelines Task Force: Revised Abeyance Policy

Mr. Van Ommen briefed the Benchers on the Discipline Guidelines Task Force's review of the abeyance principles set out in the Task Force report presented at the July 9 Benchers meeting. The Task Force considers that those principles accurately describe the basis upon which the Discipline Committee is to exercise its discretion when making a decision on a request by a lawyer under investigation to hold the matter in abeyance. The rationale for that approach is that broad policy considerations should be determined by the Benchers as a whole, and applied by the operating committees when exercising their discretion.

Mr. Van Ommen noted that the task force report at Tab 17 of the meeting materials presents the task force's current and complete proposed abeyance policy (the Abeyance Policy): combining general principles with the guidelines already approved by the Benchers at their July meeting.

Mr. Van Ommen moved (seconded by Mr. Kuiack) that the Abeyance Policy be adopted.

Points raised in the ensuing discussion included:

- concerns about the merits of the Abeyance Policy can be addressed in two ways
    - the Benchers will be asked to review the Abeyance Policy in one year
    - the Discipline Committee may ask the Benchers to reconsider aspects of the Abeyance Policy, if that Committee believes that the circumstances of a particular case or cases so warrant
- the discretion built into the guidelines is always subject to the general principles

- reconsideration of aspects of the Abeyance Policy by the Benchers
    - would be for the purpose of contemplating the potential for future improvements to the Abeyance Policy
    - would not be for the purpose of substituting their judgment for that of the Discipline Committee in particular cases, whether past or pending

The motion was carried.

OTHER MATTERS – Other Matters for Discussion and/or Decision

12. Law Society Response to Family Relations Act White Paper

Mr. Munro briefed the Benchers on the Ministry of Attorney General invitation to comment on its White Paper proposing overhaul of the *Family Relations Act*. He referred to the memorandum at page 12000 of the meeting materials for the amended mandate requested by the Family Law Task Force:

> The Family Law Task Force will review the Ministry of the Attorney General's "White Paper on *Family Relation Act* Reform: Proposals for a new Family Law Act", and recommend a response to the Benchers on October 1, 2010. The focus of the analysis will be to provide a concise response from the perspective of the Law Society's public interest mandate.

Ms. Berge moved (seconded by Mr. Stewart) that the mandate of the Family Law Task Force be amended as requested.

The motion was carried.

FOR INFORMATION ONLY

18. Report to the Benchers on the 2010 Canadian Bar Association (National) Annual Meeting and Canadian Legal Conference (August 13 – 18, 2010, Niagara Falls, Ontario)

Mr. LeRose reported briefly on his attendance at the 2010 in Niagara Falls, referring the Benchers to his written report for details. He noted that this was his last attendance at a CBA Annual Meeting on behalf of the Law Society, thanking Past-President Turriff and President Ridgway for that honour over the past two years.

Mr. LeRose concluded by stating his belief that the Law Society's representation at CBA (National) Annual Meetings provides much value to both organizations.

***IN CAMERA* SESSION**

The Benchers discussed other matters *in camera*.

WKM
2010-09-10

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Mobility Defalcation Compensation Agreement

FEDERATION OF LAW SOCIETIES OF CANADA

May 2010
Ottawa, Ontario

Background

Since the adoption of the Inter-Jurisdictional Practice Protocol by several law societies in 1994, and especially since the adoption of the National Mobility Agreement in 2002, most Canadian lawyers have had the ability to practise law on a temporary basis and subject to limited restrictions in almost all of the jurisdictions of Canada. While this can be done in most cases without notifying any law society, so there are no reliable statistics on the usage of this new ability, every indication is that lawyers are exercising their mobility rights.

While all jurisdictions provide coverage to members of the public who have suffered financial losses due to lawyer misappropriation, jurisdictional differences exist with respect to eligibility for coverage and coverage limits.

Purpose

The purpose of this agreement is to bring more consistency, certainty and transparency to the process for compensating the public if funds are misappropriated by lawyers exercising their temporary mobility rights under the National Mobility Agreement. In order to do that, the signatories to the National Mobility Agreement hereby agree to amend the Agreement by adopting new coverage limits for defalcation compensation claims against their members when they provide legal services while practising temporarily in or with respect to the law of another jurisdiction and establishing new procedures for investigating and adjudicating claims.

Mobility Defalcation Compensation Agreement

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this agreement, unless the context indicates otherwise:

"defalcation compensation coverage" means the coverage to be provided by a home governing body to compensate members of the public who sustain a financial loss arising from the misappropriation of monies or property by a lawyer while providing legal services on a temporary basis in a host jurisdiction or with respect to the law of a host jurisdiction;

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

"home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and "home jurisdiction" has a corresponding meaning;

"host governing body" means a governing body of the legal profession in Canada in whose jurisdiction a lawyer practises law without being a member, and "host jurisdiction" has a corresponding meaning;

"Inter-Jurisdictional Practice Protocol" means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;
"lawyer" means a member of a signatory body;

"National Mobility Agreement" or **"NMA"** means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada, as amended from time to time;

"practice of law" has the meaning with respect to each jurisdiction that applies in that jurisdiction;

"providing legal services" means engaging in the practice of law: in a Canadian jurisdiction or with respect to the law of a Canadian jurisdiction;

"reciprocating governing body" means a governing body that has signed and implemented the provisions of this Agreement.

General

2. The signatory governing bodies will:

(a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

(b) amend their own rules, by-laws, insurance or other policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

(c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

(d) work co-operatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this Agreement alone,

(a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

(b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

Defalcation Compensation Coverage for Mobile Lawyers

5. The signatories adopt the "Principles for Uniform Compensation Fund Coverage for Mobile Lawyers" adopted by the Council of the Federation of Law Societies of Canada (the "Federation) in March 2009, particularized as follows:

(a) The defalcation compensation coverage in place in a lawyer's home jurisdiction must respond to a claim made against one of its lawyers arising from the lawyer providing legal services on a temporary basis in a host jurisdiction;

(b) A home governing body must provide defalcation compensation fund coverage of at least $250,000 per claimant, with an annual limit per lawyer of at least $2 million, subject to the annual aggregate limit in place in the home jurisdiction;

(c) No classes of claimants may be excluded from coverage;

(d) Claimants must contact the lawyer's home governing body and comply with the claims process in place in the home jurisdiction;

(e) Subject to paragraphs (b) and (c) above, the home jurisdiction will follow its local payment guidelines, rules, policies and procedures;

(f) When a claim is made, the home governing body must:

(i) notify the host governing body,

(ii) discuss with the host governing body the manner in which the investigation of the claim will be handled, and

(iii) keep the host governing body informed on the progress of the investigation;

(g) When a claim is made, the home governing body may:

(i) ask the host governing body, on the basis of the public interest, convenience and cost, to assume conduct of the investigation of the claim, and

(ii) agree with the host governing body as to the share of the costs of the investigation to be borne by each;

(h) Where the identity of a home jurisdiction is not obvious because a lawyer is a member and entitled to practise law in more than one jurisdiction, the governing body of the jurisdiction that has the closest and most real connection to the claim will be responsible for responding to the claim;

(i) The factors that must be considered in order to determine which jurisdiction has the closest and most real connection to a claim include, but are not limited to, the following:

(i) the jurisdiction whose law was being practised by the lawyer;

(ii) where the lawyer performed the services involved in the claim;

(iii) the ordinary location of the client;

(iv) the location of the subject matter of the services provided, or the source of the subject matter;

(v) the jurisdiction in which proceedings are commenced or are likely to be commenced;

(vi) where the trust funds were, or ought to have been, deposited; (j) If the identity of a host jurisdiction is not obvious, the host will be determined by applying the criteria set out in clauses (h) and (i).

Dispute Resolution

6. If a dispute arises with a governing body concerning any matter under this Agreement, a signatory to this Agreement may do one or both of the following:

(a) agree with a governing body to refer the matter to a single mediator;

(b) submit the dispute to arbitration under Appendix 5 of the Inter-Jurisdictional Practice Protocol.

Claimants' rights preserved

7. Governing bodies that refer a dispute to mediation or arbitration under clause 7 must make their best efforts to ensure that the ability of a rightful claimant to receive compensation in a timely fashion is not prejudiced.

Implementation

8. Provisions implementing the terms of this Agreement apply immediately with respect to claims for compensation arising when a lawyer who is a member of a reciprocating governing body provides legal services with respect to the jurisdiction of a different reciprocating governing body. The provisions previously in force under the National Mobility Agreement continue to apply with respect to all other claims.

9. Clause 22 of the NMA and the provisions in clause 42 of the NMA that apply to defalcation compensation coverage are of no effect with respect to claims involving only reciprocating governing bodies. When all signatory governing bodies have implemented this agreement, those provisions are hereby rescinded.

National Excess Plan

10. The signatories agree that the Federation of Law Societies of Canada will

(a) maintain the National Excess Plan established under the Inter-Jurisdictional Practice Protocol until all signatory governing bodies have implemented this agreement, and

(b) decide on the future use or disposition of the funds in the plan.

SIGNED as of the dates indicated below.

LAW SOCIETY OF ALBERTA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF BRITISH COLUMBIA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF MANITOBA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEW BRUNSWICK

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR

Per: _____ _____
Authorized Signatory Date

NOVA SCOTIA BARRISTERS' SOCIETY

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF UPPER CANADA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF PRINCE EDWARD ISLAND

Per: _____ _____
Authorized Signatory Date

BARREAU DU QUÉBEC

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF SASKATCHEWAN

Per: _____ _____
Authorized Signatory Date

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

September 2, 2010

Introduction

My report to the Benchers this month focuses on two major initiatives of the Federation of Law Societies and also updates the Benchers on several additional items of interest.

1. National Standards on Admission to Practice – Federation Project

At its June 2009 meeting, Council of the Federation authorized the preparation of a detailed proposal for a project to develop national standards for admission to the legal profession. The goal of the project will be to develop consistent standards for admission and to provide law societies with an objective mechanism to ensure every applicant admitted to the bar meets the national standards.

The impetus for this project comes from recognition that a number of factors reinforce the desirability of each law society having reasonably similar standards for the admission of applicants to the bar.

Probably the most compelling of these factors is national mobility. The National Mobility Agreement (the "NMA") and the Territorial Mobility Agreement reinforced by the recent amendments to the Agreement on Internal Trade (the "AIT") permit lawyers to transfer from one common law jurisdiction to another with ease.

That the standards for admission were reasonably comparable was one of the underlying premises of the NMA. The existence of common standards eliminates concerns about the qualifications of transferring lawyers. This has become even more important with the imposition of mandatory mutual recognition of credentials under the AIT. The reality, however, is that significant differences exist in the admission standards and processes employed by each law society. These differences can no longer be justified.

Finally, the establishment of national admission standards would eliminate the considerable duplication of effort and expense that is inevitable in the current system in which each law society is called upon to develop its own processes and standards to evaluate applicants.

The goal of this project is:

> "To develop consistent, defensible standards for admission to the legal profession and to ensure every applicant admitted to the bar meets these standards."

The admission process is intended to ensure that everyone admitted to the bar has the necessary competencies and other qualifications to practice law. To

gain entry to the profession, applicants must demonstrate that they possess the knowledge, skills and character necessary to fulfill their role as lawyers.

Drafting a profile of those competencies, defining and articulating the required elements of good character and developing a mechanism to assess whether applicants possess the necessary competencies and good character will be the central tasks of this project.

Once drafted and validated through a consultation process, the admission standards will be submitted to Council and to the members of the Federation for approval. Adoption and implementation of the standards by individual law societies is a key component of this project.

A Steering Committee has been appointed by the Executive of the Federation to provide overall direction for the project. The Steering Committee membership is:

Don Thompson, QC (Chair, Alberta)
Tim McGee (British Columbia)
Alan Treleaven (British Columbia)
Allan Fineblit, QC (Manitoba)
Darrel Pink (Nova Scotia)
Mike Milani (Saskatchewan)
Malcolm Heins (Ontario)
Jonathan Herman (Federation)

The Steering Committee will be responsible for the operation and supervision of the project and, through the Executive will provide regular reports to Council of the Federation. The Steering Committee will also be responsible for working with the law societies to ensure that their views and interests are reflected in the standards and that law societies are kept well informed of the progress of the project. Members of the Steering Committee will also work directly with the law societies to assist with implementation of the standards once they have been approved and adopted.

The work of the project will be divided into three distinct streams:

i. drafting and validation of the competencies profile
ii. drafting of the good character standard
iii. development of assessment mechanism

Following the drafting and validation of the competency and character standards and the development of a suitable assessment mechanism, the final standards and proposed assessment mechanism will be submitted to Council for its approval following which member law societies will be asked to adopt and implement the standard. Details of the process for adoption and

implementation will be determined by the Steering Committee in consultation with member law societies.

The tentative target for completion of the final report to Council is the end of 2011.

The Law Society of BC will play an integral role in this project through our involvement on the Steering Committee and through the expertise we will contribute by making Lynn Burns, Director, PLTC, and Lesley Small, Manager, Members Services and Credentials, available for the competencies and good character streams, respectively.

Alan Treleaven and I would be happy to speak to any Benchers about this project in greater detail at your convenience.

In addition, under the Chair of Thelma O'Grady, the Lawyer Education Advisory Committee will receive regular progress reports and provide feedback to Alan Treleaven and me.

2. Report on the Canadian Common Law Degree – Implementation Update

On March 18, 2010, Federation President John Campion reported that the Final Report of the Task Force on the Canadian Common Law Degree (known as the Hunter Report) had been approved by all law societies and that the implementation process must be complete by 2012 for the law students who begin their first year of studies that year and graduate in 2015. Council approved the Federation Executive appointing a Working Group to make recommendations to Council at its June 7, 2010 meeting on the establishment of a Task Force Report Implementation Committee.

The following was the process recommended to Council by the Working Group:

1. An Implementation Committee known as the Federation of Law Societies of Canada's Common Law Degree Implementation Committee ("the Implementation Committee") should be established .

2. The Implementation Committee's mandate should be:

    a. to determine how compliance with the recommendations of the Task Force on the Canadian Common Law Degree will be measured. Its mandate may include clarifying or elaborating on the recommendations, where appropriate, to ensure their effective implementation, but will not include altering the substance or purpose of them;

b. to make recommendations as to the establishment of a monitoring body to assume ongoing responsibility for compliance measurement, including an evaluation of the compliance measurement program and the required competencies and for maintaining the Federation's relationship with Canadian law schools. The Implementation Committee should consider any role the National Committee on Accreditation might play in that monitoring process; and

c. that the Committee include two representatives from academe.

John Hunter, QC, the Chair of the Task Force, and John Campion, President of the Federation, are finalizing arrangements for participation in and a process for the work of the Implementation Committee.

3. International Bar Association (IBA) – Vancouver Conference

As you know, the IBA is holding its Annual Conference in Vancouver on October 3 – 8, 2010. The Law Society has been active in assisting the local organizing committee in a variety of ways. The Law Society is formally involved as a co-sponsor or host of three specific events during the conference. These events were chosen after consultation with the Executive Committee on the basis of the connection to legal regulation and relevance to our mandate. A chart providing details on these events and other events during the conference that involve Bencher or staff involvement is attached to this report. If you have any questions regarding the Law Society's involvement in the IBA Conference, please contact me or Bill McIntosh, Manager Executive Support

4. International Institute of Law Association Chief Executives (IILACE) – Vancouver Conference

I am a member of IILACE, an international organization that brings together chief executives from law regulatory and representative bodies from around the world each year to review and discuss matters of interest and concern. This year the conference is being held in Vancouver immediately before the IBA Annual Conference. As the local Law Society for this year's conference we have played a lead role in helping to set the agenda and to make the necessary arrangements.

I am attaching a copy of the current IILACE conference program for your information. Please don't hesitate to let me know if you have any thoughts or ideas on the program topics. As usual, I will be reporting to the Benchers on the results of the conference at the Bencher meeting in October.

5. Law Society Annual General Meeting – September 28, 2010

This is a reminder that the Law Society's 2010 Annual General Meeting will be held at the Pan Pacific Hotel in Vancouver and in 10 different satellite locations around the province on Tuesday, September 28, 2010. Registration begins at 11:30 a.m. with call to order at 12:30 p.m.

There is one member resolution this year proposing a reduced CPD requirement for lawyers working on a part time basis. The Benchers have spoken against this proposal in the materials recently distributed as part of the second and final meeting notice.

If you have any questions about arrangements for the AGM, please do not hesitate to contact Bill McIntosh.

Timothy E. McGee
Chief Executive Officer

Appendix 1

APPENDIX 2

International Bar Association Annual Conference October 3 – 8, 2010

LSBC Event Participation or Attendance

Date	Time/Location	Event	Notes
Sunday, October 3	6 PM – 10:30 PM Vancouver Trade & Exhibition Centre West	Opening Ceremony & Welcome Party	• Glen and Tim will attend.
Monday, October 6	3 PM – 6 PM Vancouver Trade & Exhibition Centre	Anti-Money Laundering Legislation Implementation Working Group	• Stu Cameron is participating in this panel
Tuesday, October 5	9 AM – 11:30 AM Vancouver Law Courts	Law Courts Tour	• Bill McIntosh is working with Johanne Blenkin (BC Courthouse Library Society and Public Legal Education and Information Working Group) to organize this tour for a maximum of 60 delegates. • Proposed schedule is (pending Chief Justice's approval): o 9 AM – Great Hall – photo op and greeting o 9:30 AM – visit Courtroom 20 (high security court) o 10:00 AM – 3 groups – attend proceeding in civil, criminal or appellate o 10:30 AM – Clicklaw and SHISH (self-help centre) demos o 11:15 AM – coffee at Law Courts Inn with Chiefs or delegates in attendance (cost of refreshments to be split between LSBC, CBA and Federation)
Thursday, October 7	10 AM – 1 PM Vancouver Trade & Exhibition Centre West	Multidisciplinary Practices Committee Working Session: "Alternative business structures – advancing an international perspective"	• Gavin Hume, QC will be speaking at this working session • The 'Commission on Ethics 20/20', recently created by the American Bar Association, is charged with re-examining the regulation of the legal profession in view of globalisation and technological advances. One issue to be addressed is whether American lawyers should be permitted, contrary to current US law, to engage in multidisciplinary practices, in law practices with non-lawyer managers/owners, or to work in incorporated or publicly traded law firms. The IBA Multidisciplinary Practices Committee will be researching the global landscape regarding such alternative business structures for lawyers and expects to prepare a report to the commission. At this working session, the committee will present its work and gather additional international experience for inclusion

Bill McIntosh is assisting with invitations to dignitaries - LSBC agreed to publicize conference in Benchers' Bulletin and by posting it on the LSBC online calendar

Updated: August 13, 2010

Appendix 1

Date	Time/Location	Event	Notes
			in its final report.
	1 PM – 3 PM Vancouver Trade & Exhibition Centre West	Public and Professional Interest Division Lunch	• Jointly sponsored by LSBC and FLS. • Bill McIntosh is assisting with booking the keynote speaker (most likely the AG) • Arrangements by IBA (Elaine Owen)
	8 PM Zefferelli's - 1136 Robson Street	Bar Issues Commission Dinner	• Jointly sponsored by LSBC, FLS, CBABC & CBA National • Arrangements by IBA (Elaine Owen)
Friday, October 8	9 AM - 4 PM Vancouver Trade & Exhibition Centre West	Rule of Law Symposium	• LSBC not actively involved (Glen and Tim have tickets to attend); however this event is likely to be attended by a variety of law-related non-profit organizations as they can attend free of charge. Some Law Society staff lawyers are planning to attend. • CJ Beverley McLachlin and Justice Sandra Day O'Connor will be speaking at the morning session "The state of the rule of law in Canada and the US".
	1 PM – 3 PM LSBC Bencher's Room /914	Bar Executives Lunch Workshop - "The media, government and public perception – what you don't know can hurt you"	• LSBC is hosting this lunch workshop in the Bencher Room. The session will be led by Kimanda Jarzebiak of Ascent Public Affairs.

IILACE

vancouver2010

Annual Conference of the International Institute of Law Association Chief Executives

September 30 - October 2, 2010
Vancouver, Canada

Supported by LexisNexis® & Willis

IILACE vancouver2010

Wednesday, September 29

2:00 pm - 4:00 pm IILACE Executive Committee meeting
Westin Bayshore Hotel

5:30 pm - 6:30 pm Welcome reception
Sponsored by the Canadian Bar Association
Marine Room, Westin Bayshore Hotel

6:45 pm Bus departs Westin Bayshore Hotel for dinner venue

7:00 pm Dinner - Joe Fortes Seafood and Chop House
Sponsored by Canadian Law Societies

Return to Westin Bayshore Hotel (by walking or by taxi)

Thursday, September 30

9:00 am - 10:30 am PLENARY SESSION
Topic #1: Core values of the profession
What are they? Are they the same everywhere? Are they changing everywhere? Who really cares? What worms are eating our core values?

Plenary Speaker – Paul D. Paton, Professor of Law & Director, Ethics Across the Professions Initiative, University of the Pacific, McGeorge School of Law
Session Chair – Tim McGee, Law Society of British Columbia
Ken Murphy – Law Society of Ireland
Heidi Chu – Law Society of Hong Kong
Lorna Jack – Law Society of Scotland

10:30 am - 10:45 am Break

10:45 am - 11:15 am Initial breakout groups

11:15 am - 12:45 pm Topic #2: The growing divide between large and small firms

'E Unum Pluribus'? Should we not just acknowledge the fact that large and small firms now constitute two separate legal professions? Should separate ethical and regulatory rules be developed for, and applied to, large and small firms? Are Law Societies and Bar Associations in fact completely irrelevant for today's large firms?

Session Chair – Cord Brügmann, German Bar Association
Michael Brett Young – Law Institute of Victoria
Malcolm Heins – Law Society of Upper Canada
Caroline Nevin – British Columbia Bar Association

12:45 pm - 1:45 pm Lunch
Marine Room

1:45 pm - 3:30 pm Topic #3: A practical approach to strategic planning

What is a 'strategic plan'? Is it just optics or can there be a real value to a Law Society or Bar Association in having a strategic plan? How can you bridge the aspiration gap so that your strategic plan is truly a driving force and not just a dead document in your drawer?

Session Chair – John Hoyles, Canadian Bar Association
Interactive Presentation – Ron Knowles, Principal, Western Management Consultants, and author of *Strategic Planning for Associations and Not-for-Profit Organizations*

3:30 pm - 4:15 pm Breakout groups reconvene on Topic #1

5:15 pm Bus departs Westin Bayshore Hotel for Museum of Anthropology

5:30 pm - 7:00 pm Cocktail reception and guided tours - Museum of Anthropology
Sponsored by Australian Law Associations & Bar Societies
University of British Columbia, Point Grey Campus

7:00 pm - 7:15 pm Walk from Museum of Anthropology to Cecil Green Park House

7:15 pm Champagne toast - Cecil Green Park House

Dinner - Cecil Green Park House
Sponsored by LexisNexis
With special dinner guests and speaker

9:30 pm Bus departs for Westin Bayshore Hotel

9:45 pm Hospitality Suite – Westin Bayshore Hotel

Friday, October 1

9:00 am - 10:00 am Topic # 4: Impact of recession on law societies and bar associations including challenges of generating alternate revenue sources

How badly has your members' income been hit by 'the Great Recession'? How badly has your Law Society or Bar Association's income been hit by it? Have you had to 'downsize' staff numbers and, if so, how have you gone about it? What practical cost-cutting measures

have you taken and how? What steps have you taken to generate alternate revenue and how? How can you commercialise without selling your soul?

Session Chair – Ken Murphy, Law Society of Ireland
Cord Brügmann – German Bar Association
Jan Martin – Law Society of South Australia
Allan Fineblit – Law Society of Manitoba

10:00 am - 10:15 am Break

10:15 am - 11:00 am Continuance of Topic #4: Impact of recession on law societies and bar associations including challenges of generating alternate revenue sources

11:00 am - 11:45 am Drawing the Strands Together: Discussion of core values of the profession

Session Chair – Tim McGee, Law Society of British Columbia

11:45 am - 12:45 pm Lunch
Marine Room

12:45 pm - 2:00 pm Topic # 5: Communicate or Die
How can you get the attention of your members whether you are a regulatory or representative body? How can you stop yourself being boring and irrelevant? Who should be the judge of what's important - you or your members? Your message is often complex but your members have a short memory attention span - how can modern communication - from direct mail to twitter - help? Which is more important, the medium or the message?

Guest speaker – Tod Maffin, Strategist, Consultant, Author, Speaker, and Social Media Expert
Session Chair – Retha Steinmann, Law Society of Namibia
Merete Smith – Norwegian Bar Association
Bill Grant – Law Council of Australia
Raj Daya – Law Society of South Africa
Jonathan Herman – Federation of Law Societies of Canada

2:00 pm - 2:15 pm Break

2:15 pm - 3:30 pm Continuance of Topic #5: Communicate or Die

6:00 pm Bus departs Westin Bayshore Hotel for Grouse Mountain

6:30 pm - 6:45 pm Skyride to Peak Chalet

6:45 pm Reception - Timber Room, Grouse Mountain
Sponsored by British & European Law Societies & Bar Associations

7:30 pm Dinner - Timber Room, Grouse Mountain
Sponsored by Willis

9:30 pm - 9:45 pm Skyride to base of Grouse Mountain

9:45 pm Bus departs for Westin Bayshore Hotel

10:00 pm Hospitality Suite – Westin Bayshore Hotel

Saturday, October 2

9:00 am - 9:30 am Update: The insurance world post-recession

Presenter: Andrew Fryer, Willis

9:30 am - 9:45 am Distribution and review of Communiqué on core values of the profession

9:45 am - 10:45 am Topic #6: The CEO and the Board: The relationship and effective management structures

How to create a proper understanding and mutual respect for the different roles of the CEO and of the political masters in a Law Society or Bar Association - what works and what doesn't? What parts of the relationship should be defined in writing and what parts shouldn't? How can trust be generated? How can we stop the supposedly permanent becoming transient?

Session Chair – John Hoyles, Canadian Bar Association
Don Deya – East African Law Society
David Hobart – Bar Council of England and Wales
Tim McGee – Law Society of British Columbia
Hank White

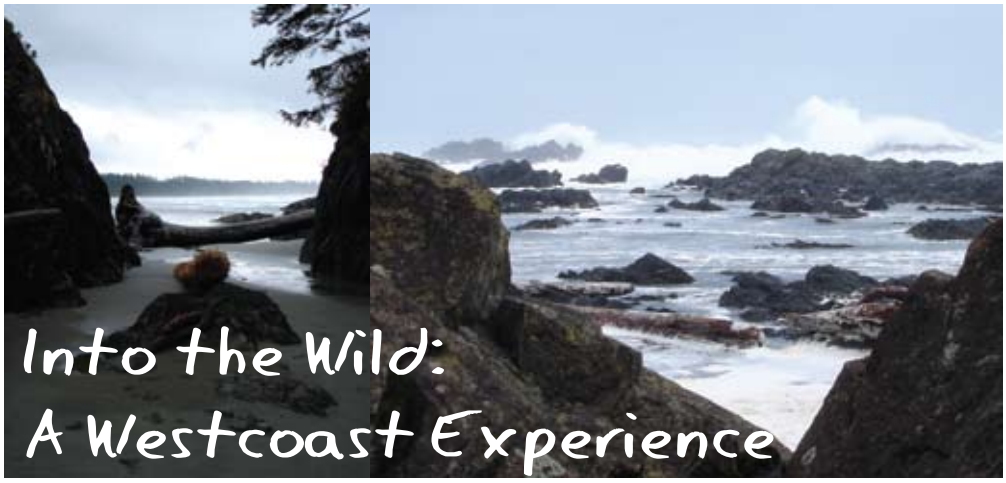
10:45 am - 11:00 am Break

11:00 am - 11:45 am Continuance of Topic #6: The CEO and the Board

11:45 am - 12:15 pm IILACE Annual General Meeting

12:15 pm - 1:15 pm Lunch
Marine Room

Saturday Afternoon OPTIONAL
Into the Wild: A Westcoast Experience, Vancouver Island, British Columbia



This will be a unique overnight opportunity that will be priced separately for those that wish to participate after the formal 2010 conference proceedings end. Please see the information form. Participants will return to Vancouver by 4pm on Sunday.

Registration Form

September 30- October 2, 2010

Name of Chief Executive _____ Title _____

Name of Law Association _____ E-mail _____

Address _____ Telephone _____

_____

☐ I will attend the IILACE Vancouver 2010 Conference.
US $625 registration fee. Includes all meetings and educational sessions, receptions, lunches on Thursday, Friday, and Saturday, and dinners on Thursday and Friday.

☐ I will be accompanied. The name of my guest is _____
US $375 guest registration fee. Includes all receptions, and dinners on Thursday and Friday.

Payment Information

Send a cheque to:
John Hoyles, Chief Executive Officer
Canadian Bar Association
865 Carling Avenue, Suite 500
Ottawa, ON, K1S 5S8 Canada
Please make cheques payable to IILACE

Pay by Credit Card: ☐ VISA ☐ MasterCard ☐ American Express Name on card: _____

Card Number: _____ Expiry: _____

Wire your money to:
IILACE Account
Bank Account number: 400 181 4
Bank Transit number: 01326
Bank Number: #003 1309
Bank Swift Code: ROYCCAT2

Royal Bank of Canada
Westgate Shopping Centre
Carling Avenue
Ottawa, ON H1Z 7L3

IMPORTANT: Once you have wired your money, please send an email to info@iilace.org confirming the day the money was wired for our tracking purposes.

Send your registration form by email to info@iilace.org or by fax to 613-237-0185 (Canada), attention of John Hoyles.

Hotel Accommodations

The IILACE 2010 conference will take place at the **Westin Bayshore** in Vancouver. IILACE has secured a **special conference rate** of $274 (+ tax) single occupancy and $299 (+ tax) double occupancy which **includes a full breakfast**, and is **available until September 3, 2010**. To book, please click here to visit the Starwood Meetings site.

Transformation

Five Catalysts Now At Work in the Canadian Legal Services Marketplace

A paper to accompany the
Presentation to the Benchers
Law Society of British Columbia
Vancouver, B.C., October 1, 2010

By Jordan Furlong
Partner, Edge International Consulting

Part I: Where We've Been

Before it slips away into the historical record, let's take a moment to remember what the legal services marketplace used to look like, way back in 2000.

- The marketplace was dominated by lawyers, who enjoyed what amounted to a monopoly on legal services delivery thanks to regulatory restrictions on the practice of law.
- Corporate clients declined to place any downward pressure on lawyers' fees, while consumer clients were not sufficiently sophisticated to challenge lawyers' prices or practices.
- Aside from routine work like house purchases, business incorporations and straightforward wills, lawyers billed most of their time by the hour, with no pre-set limit on the final amount.
- Within law firms, most lawyers were assessed and rewarded on the basis of work billed by the hour to clients; failure to meet billing targets was considered poor performance.
- Law schools paid scant attention to law practice skills training, while law firms recruited new graduates using law school grades, CVs, a few interviews and cocktail parties, and little else.
- Foreign countries were places where ambitious large firms opened new offices to serve global clients, not a source of new clients and certainly not a source of competition to lawyers.
- Lawyers used the internet mostly to host static law firm websites, with some early adopters conducting conversations on message boards.

It's hard to believe that was just ten years ago — but, aside from the final bullet point on technology, that list could just as easily have come from 1990, 1970 or even 1950. And even technology was comparatively simple. Consider: in 2000, only 39% of Canadian lawyers had a website, and most of those without a website had no intention of creating one. Only 54% of lawyers owned a cell phone, none of which were what we now call smartphones. In 2000, Google was just two years old and the BlackBerry was essentially a two-way pager.

In 1999, the Canadian Bar Association polled its members and found that their top concern was the image of the profession — not because lawyers' poor image affected their business, but because lawyers felt slighted by the lack of public respect for the profession. There was visceral opposition to legal service providers from outside the legal profession, including paralegals, B.C. notaries, and a new arrival in the Canadian marketplace, title insurers. The Law Society of Upper Canada, which would soon find itself regulating paralegals, was prosecuting them for the unauthorized practice of law.

The picture that emerges is a legal profession in unchallenged command of the legal services marketplace, not especially pressured by the marketplace, secure in its position, and toying with new technology tools. “Entitlement” would not be too strong a word here. Calls for change, both within and outside the profession, had been heard before and undoubtedly would be heard again, but the machine rolled on nonetheless. There was no serious reason to expect things would change anytime soon.

Part II: Where We Are

Now let’s take a picture of the profession today, in 2010.

1. Lawyers still dominate the legal marketplace, but competitors have carved off huge chunks of lower-level work. Some are large-scale corporate entities, especially title insurers that have eviscerated the residential real estate bar. Others are technology-driven, the descendants of the do-it-yourself will kit: free, customizable, downloadable contracts, or business-process advances such as document assembly. And still others are global, primarily low-cost but competent lawyers in foreign countries that perform routine legal tasks at massive cost savings. Nobody expects these non-lawyers’ share of the marketplace to shrink in the years to come.

2. Some corporate clients have seized upon the recession and the emergence of alternative sources of legal services to reset the balance of power with their outside counsel and to force lawyers to overhaul their prices and pricing structures. Remarkably, these clients are successfully pushing their lawyers to sell their services at lower, more predictable fees. Consumer clients, meanwhile, can tap into an unprecedented collection of online knowledge and personal experiences about the legal system, and now often approach their lawyers with basic legal information already in hand.

3. Law firms across North America are investing in different and more complex ways of training, assessing and rewarding their lawyers. Lockstep compensation for associates is falling away at numerous firms, to be replaced with ambitious new merit-based assessment and compensation systems that promise both salary savings and better-trained personnel. At the same time, law schools are under an unprecedented amount of pressure to better equip their graduates with skills suited to the practice of law as a career.

4. Globalization has changed the world economy, and lawyers in foreign countries are increasingly viewed as a threat to law firms, primarily through the rapid rise of offshored legal services; the prospect that foreign firms will take away clients completely is still only an uneasy thought. The internet has exploded, with hundreds of thousands of lawyers using Facebook, LinkedIn, Twitter and blogs on a daily basis. Every law firm has a detailed website, and a very small but growing number of lawyers has begun offering services online.

So much upheaval in just one decade is remarkable. In all but the coziest corners of the profession, the sense of ease and entitlement has evaporated, to be replaced by an increasingly sharp focus on financial health and the threat of low-cost competition. There are even concerns about the viability of sustaining a legal business in some areas of law and in some parts of the country.

But even this change is incremental compared to what the next decade, and the one after that, will bring. So far, what we've seen are essentially adjustments to the basic lawyer-driven model — shifts in the power balance, the first signs of a breach in the closed legal marketplace, the first responses by lawyers to a new competitive environment, all accelerated by the financial crisis and recession. The next 20 years will overturn much of what lawyers today still take for granted and will, for the first time in centuries, give rise to a legal services marketplace in which lawyers are not the dominant providers.

Part III: Where We're Going

Taking into account all the usual caveats about the impossibility of predicting the future, as well as the impact of unforeseeable but inevitable black swans that lurch history sideways, here is a reasonable estimate of what the legal services marketplace will look like between 2020 and 2030.

1. **New roles for lawyers.** Lawyers are just one of many providers of legal services, and they no longer the majority provider. Lawyers are the premier suppliers of advocacy, advising clients in online dispute-resolution forums and in trials (which are held in both in traditional public and new privately run court systems). They also specialize in counsel: offering advice, analysis and judgement on significant decisions in the life of a personal or corporate client. While the volume of this work is nowhere near what lawyers once handled, it remains lucrative and satisfying. Not only that, but many lawyers have developed preventive law practices, providing holistic legal-health services that anticipate and avoid clients' legal problems, thereby tapping a vast and previously latent market.

2. **Widespread automation of legal services.** Comparatively few lawyers, on the other hand, sell tangible products at a profit. Most lawyers who draft agreements, produce documents, paper a transaction or otherwise engage in content- or knowledge-focused tasks work for global firms servicing multinational clients or high-volume bulk-delivery firms. This type of work, which used to constitute the majority of many lawyers' offerings, has largely been automated. Even the most complicated tasks have been templated, flowcharted, and delegated to software. Lawyers in this decade no longer try to do what machines can do better, faster and cheaper. Law firms that sell this kind of work make extensive use of this technology — it is a tool, not a revenue source.

3. **Non-lawyer service providers.** Clients have an array of legal services providers from which to choose. For both corporate and consumer clients unable or unwilling to spend much money and content with "good enough" results, there are plenty of cheap-and-cheerful legal service

providers, most of them powered by new technology and based outside the legal profession. Their services are regulated by government regimes similar in nature and scope to modern-day consumer protection laws. The relative affordability of their services means that access to justice, while still far from universal, is greater than it's ever been. These providers are not regulated by law societies, whose responsibilities extend to supervising lawyers rather than the legal services marketplace itself.

4. **Client pricing drives lawyer efficiency.** Lawyers no longer dictate the price of their services as they once did: clients have more options from which to choose, and they use value as the basis of their purchasing decisions. Fixed or predictable fees are the norm for all but the most unusual matters. Accordingly, lawyers working with limited budgets have turned to cost control and internal efficiency to ensure their financial health. A new generation of lawyers has entered the profession versed in project management, business process engineering, collaboration and workflow. Efficiency, once the enemy of profitability in billable-hour law firms, is now virtually the only way to ensure profitability in modern ones.

5. **New law firm models.** Many law firms have abandoned the idea of partnership and now operate essentially as corporate entities, with ownership and management clearly defined and divided (quite a few are owned in whole or in part by entities outside the profession). Those that retain the partnership model have eliminated "non-equity partners," and give the partner title only to full equity investors. Associates are thinner on the ground and no longer grind out billable time in return for a chance at partnership. They are future partners who will enter partnership much sooner than in the past: they are older than they used to be, they have more experience, and they have passed rigorous recruitment processes that demonstrate their unique fitness for the firm. Most of the tasks that associates once did and billed for have been outsourced or automated.

6. **Globalization is ubiquitous.** Indian lawyers still provide cut-rate services for western clients, but "offshored" services can now be found on every populated continent as well as in smaller, lower-cost centers throughout North America. The bigger impact of globalization is in the rise of firms outside North America and Britain that vie for clients worldwide. The gradual deregulation of India's legal profession, the growing centrality of the Chinese economy, and the continued development of Brazil as a regional champion have all powered the rise of non-Western firms up the international rankings.

Lawyers in this era look back 20 years and reflect that much of what they used to sell at a handsome profit is now the nearly exclusive purview of online services delivered free or at low prices. But they also agree that they enjoy the work they now do a lot more: lawyers have rarely been more challenged by their work, but they also have rarely felt more fulfilled by it.

Corporate clients look back 20 years and shake their heads at how much they used to pay for routine services. But they also remember with some fondness how easy it used to be to supervise only one type

of outside provider, a law firm. Purchasing legal services now is every bit the exacting, systematic undertaking that selling those services has become.

Consumer clients look back 20 years and consider themselves fortunate that technology and competition so changed the legal marketplace that they now have easier access to a wider range of products and services than they could once afford. Access to justice no longer has to mean access to a lawyer, and consumer clients are the main beneficiaries.

Part IV: How We'll Get There

That's an ambitious agenda for change in just 10 to 20 years, especially in a marketplace that has resisted change about as steadfastly as one could ask. What catalysts within and outside the system are now in a sufficient state of dynamism to drive this change forward? Casting an eye over all the upheaval currently underway, five trends can be discerned that are pushing the legal services marketplace, and the legal profession that has long dominated it, irreversibly forward in new directions. In ascending order of importance, here they are.

5. Education and Training

Over the next decade, a series of developments is going to bring into sharp relief the profession's failure to adequately train its new lawyers. On one hand, law firms will have fewer positions for new graduates, especially as fixed-fee regimes become more widespread, skilled experience becomes a more valuable commodity within firms, and new business models require fewer associates billing hours. Public-sector hiring might increase, as governments continue to expand their regulatory scope, but the massive public debts incurred over the past few years will also require tightened belts, and hiring more lawyers is rarely a popular job-creation strategy. Many observers expect the North American economy to spend much of the next several years in the relative doldrums, and the demand for new lawyers figures to decline or at best flat-line along with it.

The supply of new lawyers, however, is expected to increase. In both Canada and the United States, existing law schools continue to expand their classes, while new law schools continue to seek and receive certification. Overseas law schools that offer Canadian-compatible degrees are also producing new law graduates every year. This misalignment between supply and demand means many new graduates (assuming they have found articling positions) will either give up on a legal career or try to open up their own practices, a risky undertaking for any new professional. All such graduates, however, will be staring at tens of thousands of dollars in debt no matter what road they choose.

At the heart of these problems is the absence of a comprehensive lawyer training system. Law schools, the old complaint goes, "don't train lawyers in practical skills" — but that is not their job. Law schools are in the business of granting law degrees to their students, not of preparing students for careers at the bar. Law schools are not obliged to report to the bar or to take its priorities into consideration. Nor, it

could be argued, should they: according to the National Association of Law Placement, fewer than 60% of U.S. law graduates found their first job in the private practice of law, a percentage that has not varied much for several years now. The onus for training lawyers lies and will continue to lie on the practicing bar.

The legal profession is mandated, through its regulatory function, to oversee the training of new lawyers, and law societies have taken steps to improve that training in recent years. But although the articling and bar admission processes are more skills-oriented than in the past, both the processes and the results vary widely across the country. It is increasingly difficult to pretend that low-skilled law graduates with only a year's experience as quasi-lawyers are viable practitioners. Unless they can hit the ground running as reasonable contributors of client value, new graduates will be hard-pressed to find work as lawyers. At that point, the familiar vicious circle by which people needing experience cannot get the experience they need asserts itself.

The fundamental problem is that our professional admission system still believes that law firms (especially large ones) and their clients are willing to effectively subsidize the new lawyer training process over the first several years of a lawyer's career. Firms and their clients, who are essentially the "purchasers" of what law schools and bar admission programs produce, are trying to send a clear message otherwise; rising new lawyer unemployment rates will be one way in which that message will be sent. Both the sellers and the buyers of legal services need new lawyers to start off with a higher base of competence from which they can grow as professionals.

The issue here is not what law schools do and don't teach; it is that lawyers' governing bodies have decided that law degrees are a sufficient qualifying step towards bar admission and a legal career. If that system is not working to the bar's satisfaction, then the onus lies on the bar to rethink its training and admission process, not on law schools to rearrange their affairs on orders from an industry to which they don't report and whose interests they weren't created to serve.

Over the coming decade, it seems increasingly likely that the legal profession will tire of hoping that law schools will start offering the kind of training the bar itself should have been offering for years now. There will be pressure on law societies to sponsor or endorse — or even introduce and operate themselves — parallel legal education and training programs designed specifically for students who definitely wish to practise law. These programs will effectively compete with LL.B. and J.D. degree programs in law schools, and it is quite likely that many of the latter will suffer substantial enrolment declines once it appears likely that graduates of the practice-focused programs, readier to practise law upon matriculation, are more attractive to employers.

At the same time, law firms will continue to improve their own associate training and mentoring programs, putting into practical form the widespread informal understanding that lawyers in their first three years of call are still learning their trade — "legal interns," if you will. The idea of the seven-year law degree — three years of education, one years of apprenticeship, three years of "practice" in the traditional sense of the word — will become more popular, as the profession comes to accept that it has

been credentialing its new lawyers too early in their careers. This process is already underway in the U.S., where a handful of pioneering firms are essentially following the Canadian articling model for their first-year lawyers: paying and billing these lawyers less while providing practical skills and training to shorten their learning curves and accelerate their development into productive lawyers.

The changing demands of the legal marketplace are going to disrupt the traditional legal education nd training model to such a degree that its shortcomings will be exposed and the case for and urgency of reform will be apparent. Law societies will be called upon to take a leading role in the construction of a better system for qualifying lawyers.

4. Collaboration

Collaboration, by many accounts, will be the key to successful business initiatives in the 21st century, and the law should prove no exception. There are three types of collaboration that should manifest themselves in this marketplace over the next several years.

One type will see lawyers collaborating with other lawyers to further client goals and increase their efficiency, a development to be welcomed in almost all cases (assuming measures to protect confidential information are respected). Another type will see lawyers collaborating with their clients in real time as partners, a refreshing change in approach from a fiduciary (some might say paternalistic) relationship between lawyers and their clients and towards a fully informed and transparent partnership. Neither of these developments should present particular challenges to the marketplace in general. But a third type of collaboration, client-to-client (C2C), does represent such a challenge.

In the world of client collaboration, buyers of legal services share information with each other, and lawyers need not be part of the equation. The internet has enabled people with legal questions and problems to speak with and learn from each other on a massive scale, far beyond what was possible in the days before email and online social networks. As a result, they are turning less frequently to their lawyers and more frequently to each other to acquire the legal information they need.

Take the example of Legal OnRamp, an online invitation-only community of corporate counsel and their outside lawyers that has been active since 2007. Members seek and obtain documents, precedents and general assistance from each other through posts on message boards. Member groups, many of them private, are devoted to sharing data and perspectives among in-house lawyers in various industries.

Users can upload files for others to use, while a wiki contains documents, forms, and sample letters in subjects ranging from corporate governance to e-discovery to employee dismissal. Private-law lawyers are welcome to join in the effort — but as often as not, their presence isn't really necessary, because clients share their own legal work product they have already purchased from their outside counsel. Similar collaboration initiatives exist or are underway with in-house counsel organizations like the U.S.-based Association of Corporate Counsel and the Canadian Corporate Counsel Association.

Consumer clients, who comprise the bulk of the client base for the bulk of law practices in North America, have been sharing their legal experiences and anecdotes informally for years with friends and relatives. But when they start finding formal mechanisms to collaborate with a wider pool of fellow clients, perhaps through LinkedIn, Facebook, or other free online applications, they will naturally have less need to call on their lawyers.

Imagine the emergence of hundreds or even thousands of online social micro-networks, each devoted to a single specific legal matter — laid-off blue-collar workers in British Columbia, divorcing spouses with children in New Brunswick, small-enterprise startups in Quebec, business immigrants in Saskatchewan, and countless more. If these networks follow the Legal OnRamp model and become virtually self-sustaining legal knowledge communities, many lawyers could find themselves in the unhappy position of irrelevance to the legal marketplace, needed far less frequently to mediate between a legal client and a legal solution.

Unfortunately, lawyers bear some of the blame for this potential disintermediation. It has long bothered clients that lawyers, at substantial cost in their own time and clients' money, tend to reinvent wheels that have been invented many times before. Clients think the amount of time a given lawyer spends to complete a task should be inversely proportional to that lawyer's experience and expertise. Lawyers' failure to implement this marketplace rule, thanks in large part to the influence of the billable hour, has only served to encourage clients to look elsewhere for more affordable and accessible sources of legal help. In growing numbers, thanks to the collaboration-enabling power of the internet, they will turn to each other.

Client collaboration will not render lawyers irrelevant, of course — there are extremely few areas of law where even the best-informed clients can go it alone, and lawyers are still required to produce most of the valuable legal resources that clients will eventually trade among themselves. But collaboration among clients will serve to narrow the range of profitable services lawyers can sell, and not incidentally, will be a big step in practical terms towards greater access to justice for many people. For law societies charged with regulating the provision of legal services, an emerging question will be: does that regulatory jurisdiction extend to clients giving each other legal advice?

3. Globalization

If you've read *The World is Flat* by Thomas Friedman, then the nature and impact of globalization on professional services will already be clear. The chapter about telemarketers in Mumbai could be overlaid on legal process outsourcing companies without too much difficulty

The outsourcing of legal services to low-cost foreign jurisdictions has had a number of effects on how law firms conduct business, such as helping to instigate what figures to be a long decline in associate hiring in large firms. But LPO's most significant impact is that it effectively breaks the monopoly that law firms have long held over the delivery and pricing of legal services. Because only lawyers can offer

most legal services in North America, and because lawyers don't tend to compete with each other on price, legal fees tend to be high and to go higher year over year. Offshore legal services providers, however, do compete on price. For example, LPO giant CPA Global picked up a substantial amount of work from mining multinational Rio Tinto last year in part because it charged approximately 85% less than Rio's large Western law firms for the same services.

Offshore legal service providers have already been proclaimed ethically acceptable by organizations such as the American Bar Association (given certain preconditions regarding adequate supervision). Corporate clients in particular have welcomed their arrival, using LPOs as a means to drive down the prices local firms charge for basic work even or to bypass the local firms altogether and have the work done offshore. Many client assessments of LPOs' work are positive, and some are glowing.

Globalization's impact doesn't end there, however. Today's Western law firms might dislike and oppose low-cost Indian competition, much as North American automakers once feared "cheap" Japanese imports. But as those automakers soon found out, Japanese car companies weren't satisfied with owning the lower end of the car market — they wanted to dominate all market segments. Over the last decade or so, they went a long way to achieving that goal. The same fate awaits Western law firms that mistakenly think offshore lawyers will be content to keep taking low-level work from the United States, Canada, and England indefinitely.

There is little reason to think that law firms in the BRIIC countries (Brazil, Russia, India, Indonesia and China) cannot eventually grow into world-class high-end legal service providers themselves. These are the markets where new wealth is being produced and new deals are being made. In the wake of the financial crisis and the damage inflicted on the western economy, "developing" nations are poised to ratchet up their global presence. London firms, as a general rule, have figured this out faster than North American ones, striking up numerous alliances and opening offices throughout southeast Asia. LPO is only the starting point for offshore legal providers. These lawyers give nothing away to their Western counterparts on acumen, and they seem to be considerably ahead of them on efficiency and business process.

Globalization has only begun to change the legal services marketplace. Law societies will have to address the fact that lawyers situated outside their jurisdictions are delivering services to clients inside their jurisdiction, and to square that fact with their regulatory mandates. Even if "unauthorized practice of law" provisions as we know them remain in place, the practical challenges of enforcing those provisions in a wired, globalized legal marketplace appear to be considerable.

2. Regulation

In practical terms, lawyers have regulatory control or direct influence over the governance of the legal profession and the delivery of legal services to the public. These two categories are sometimes inaccurately grouped together under the term "self-regulation," but they are different creatures. Lawyer self-governance is a centuries-old tradition that can trace its lineage back to the Tudor period and that

can be defended on a number of grounds, including the rule of law and the danger of unfettered state power. Lawyer control of legal service delivery is more of an accident of history, one that came about because only lawyers were qualified to provide legal services. Self-governance, in a circular way, evolved into marketplace governance.

Whether and to what degree lawyer self-governance prospers throughout the next few decades is outside the scope of this paper. But lawyers' regulatory control over the entire legal services marketplace will struggle to maintain its position in the years to come. The time is passing when most of the competent providers of legal services within a jurisdiction are locally licenced lawyers. And if locally licenced lawyers are only one of a number of competing service providers in a jurisdiction, on what basis can those lawyers claim fitness to regulate their competition?

The provision of "legal services" in Canadian jurisdictions has not been the exclusive purview of lawyers for at least a decade now. Title insurance policies and do-it-yourself will kits, innovations dating from the end of the 1990s, can both reasonably be called legal services and are unremarkable features of the marketplace today. They have recently been joined by online divorce form generators and the earliest iterations of intelligent legal document assembly programs. Legal knowledge companies have developed templates that allow users to create customized legal documents themselves, with no intervention by a lawyer. These interactive programs are perhaps designed in part by lawyers, but rarely are they directly administered by lawyers, and in any event, they usually compete with lawyers for client business. The scope and sophistication of these programs figures to accelerate in the years to come – clients will come to use them more and to rely on them more.

The challenge extends beyond forms and software, however. Recently, the Law Society of Upper Canada has taken over regulatory authority for independent paralegals and considers them "licensees," along with lawyers. Other provinces and territories might follow suit – here in British Columbia, where most paralegals do not operate independently, the Delivery of Legal Services Task Force is grappling with questions of lawyer supervision of paralegals and the enhancement of their permissible duties. Then there is the rising challenge of legal process outsourcing (LPO) which moves certain legal tasks to lawyers in India, the Philippines, Finland, South Africa, Israel, and elsewhere around the globe. These offshore lawyers are doing work for Canadian clients but are admitted and regulated by no Canadian law society.

The fact is that we already function in a multi-player legal services marketplace, and that the number and sophistication of players is set to rise rapidly over the next decade. That these service providers should be closely monitored and regulated to ensure their clients are receiving competent service (especially since many of these clients will not be sophisticated) seems irrefutable. That lawyers, who will be competing with these service providers for business, should also be the monitors and regulators of such a diverse marketplace will not be as immediately apparent to those outside the profession, and it can be safely assumed that these new competitors will bring this fact to governments' attention. The pieces are coming into place for a serious challenge to the traditional regulation by lawyers of legal services.

We have already begun to see new models of lawyer regulation emerge in other jurisdictions. The 2007 *Legal Services Act* in England and Wales is noteworthy for many reasons, not least its re-engineering or creation of a number of lawyer governance institutions and the imposition of a government oversight body over all these institutions. But the LSA also authorized non-lawyer investment in and ownership of law firms by 2011. In the result, smaller consumer-focused firms could be swept away or bought up by large consumer businesses such as grocery stores — hence the now-famous "Tesco Law" hypothetical of legal services sold by a supermarket chain. Moreover, law firms could float shares on the stock market or invite private-equity investment (or even full-scale ownership). Management of legal services delivery in England and Wales is set to become the partial domain of private-sector businesses starting next year, changing the face of the profession there completely.

Radical change on the scale of the *Legal Services Act* is difficult to contemplate in Canada and the United States, owing to the federal nature of these countries and the resulting fragmentation of lawyer governance (14 law societies and 50 state bars, respectively). But it should not be discounted altogether.

Law society benchers will be familiar with the 2007 report of the federal Competition Bureau into self-governing professions, which raised concerns about current regulations on lawyer qualification, mobility, advertising, multi-disciplinary practices, and contingency fees. In particular, the Bureau disapproved of lawyer regulation of independent paralegals and recommended that "law societies should neither prohibit related service providers (such as paralegals and title insurers) from performing legal tasks, nor limit their ability to do so, unless there is compelling evidence of demonstrable harm to the public." The Bureau's report was criticized by some within the profession, not without reason in some respects. But the fact remains that the Bureau is the federal regulator of competition, and its recent decision to recommend anti-competitive proceedings against the Canadian Real Estate Association has been widely interpreted as signalling a new and tougher approach to enforcing competitive marketplaces.

If the Bureau and other entities have concerns about the accessibility of legal services for Canadians under the current regime, that concern seems well-founded. Both empirical and anecdotal evidence support the conclusion that most Canadians cannot afford legal services (beyond basic transactions like house purchases and wills) without severe economic difficulty; family courts in which half of all litigants appear self-represented are the most dramatic example. Then there is the acknowledged greying of the bar in smaller and rural communities, established by law society studies here in British Columbia and in Ontario: a wave of older practitioners approaching retirement and without younger lawyers to take over their practices or otherwise replace them in the community. Within ten years, many of these communities are at serious risk of being without a lawyer, and as it stands, without access to the legal system. If these are the outcomes of lawyer regulation of legal services delivery, it will be difficult for lawyers to show cause why that regulation should not be conducted by someone else.

In summary, the reality of a multi-player legal marketplace in which lawyers are only one player is already discernible and will become more obvious every year. This will have a profound impact on lawyers' business models, as our profession will have to compete in a marketplace unprecedented in its openness. But this reality will also have a profound impact on law societies, which seem certain to face serious challenges to their role as regulators of the marketplace governors and, conceivably, of the profession itself. Access to justice, in future, will not necessarily mean access to a lawyer, and both lawyers and their governors need to prepare for that.

1. Systematization

For decades, law firms of all sizes have tackled client issues in much the same way: by creating a file and giving it to a lawyer to complete (simpler tasks sometimes made their way to secretaries and paralegals). The lawyer's process often looked something like this: (a) identify the legal issue and work out a legal process or solution to answer it, (b) using a pen, a legal pad, and whatever precedents are on hand, (c) taking as long as required and docketing time spent along the way. Clients invariably didn't know enough to question this process, and in any event, many tools by which more efficiency could be introduced into the didn't yet exist. This was never an efficient model to start with, but in the 21st century, its inefficiency has become glaring.

On top of that, a fair amount of what law firms have traditionally sold is what the market is coming to regard as fairly routine work: the dissemination of knowledge, the construction of documents, the review of transactional data, and so forth. Lawyers, however, generally conduct and price this work in ways that do not reflect its routine nature. In many law firms, partners do work that associates could do, associates do work that professional staff or outsourced lawyers could do, staff members do work that programs and algorithms could do, and everyone bills accordingly. From due diligence to document review to legal research and more, many law firms assign knowledge- and process-heavy work to people higher in the talent and experience chain than those tasks require, keep that work a safe distance away from knowledge management and other workflow efficiencies, and sell that work at rates higher than those at which they would otherwise be priced.

Lawyers traditionally have dismissed concerns about this inefficiency with reasoning best summed up by the line, "We'll pass the cost on to the client." In business models predicated on the billable hour, this had the benefit of being not just convenient, but also profitable. Now, however, clients (especially on the corporate and institutional side) are flexing their muscles and gaining a more powerful role in the way lawyers sell their services. The best current example is the emphasis clients are placing on fixed fees and predictable pricing — in some cases, a non-negotiable emphasis. This presents problems for traditional law firms, chief among them the fact that most legal services of even modest sophistication are priced based on the number of billable hours taken to perform those tasks, multiplied by the billable rates of the lawyers doing the work. In law firms, internal cost is often the driver of external price. In most marketplaces, it's the other way around: external price — what the market is willing to pay — drives internal costs. Law is now poised to become like most other marketplaces.

We are now entering an era in which whatever it costs a lawyer or law firm to render a service has at best a tangential relationship with the price that service commands. “Price” is what the ever-more sophisticated market will bear; “cost” is whatever the firm incurs to deliver its services. In order to make or increase profit, therefore, firms will be forced to streamline their costs of production. And that brings us to the imminent systematization of legal service delivery.

The tools are now appearing — technological advances, business processes, logistics and more — to enable the more efficient completion of legal tasks. From workflow analysis to project management, from business process outsourcing to just-in-time delivery, systematization has revolutionized enterprise by removing inefficiencies from and reducing the cost of manufacture and delivery, generating more profit for the manufacturer and lower prices for consumers. Modern clients, especially on the corporate side, understand these systems very well and believe they can apply to what law firms sell. Modern lawyers, to respond, will find they need to compete on cost.

Competing on cost means you spend less to get the same results as your law firm competitors, and puts you on an even footing with the non-firm competitors currently storming the gates. No matter what happens in the marketplace, one rule never changes: profit = revenue – expenses. Even if your revenue is down, you’ll still turn a profit if your expenses are down further: the lawyer who charges $500 for services that cost him $200 is doing better than the lawyer who charges $1,000 for services that cost him $900. You can’t control what the market will pay you; but you can control, to a large extent, what you spend to compete in that market. If you ever expect to offer fixed fees to the marketplace, you absolutely must start by competing on cost.

Here are some examples of how lawyers can compete on cost:

1. Install a legal project management system. From a basic back-of-the-envelope process for doing certain tasks systematically all the way up to a full-scale Lean Six Sigma re-engineering of an entire firm, the result is clearer goals, more explicit processes, more efficient systems and increased productivity.

2. Automate anything repetitive that moves. If the same basic task occurs more than occasionally in a firm and rarely if ever varies, it should be converted into a template, a checklist, a document assembly system, or some other means by which completion is made faster, variation is made more difficult, and fewer resources are expended needlessly.

3. Move work up (and down) the talent chain. Move dictation and transcription from secretaries down to voice-recognition devices. Move legal research to freelance specialists across town or outside the country. Move administrative tasks to virtual assistants. Then train the people who used to do low-value work in high-value skills like project management, business development, human resources and so forth. Same people, same resources, but better allocated and with new capabilities.

4. Use technology wherever feasible. Practice management software, on a server or in the cloud, delivers huge efficiency gains. Specialized accounting software for law offices reduces errors and

improves productivity. Lawyers who take advantage of low-cost, internet-based contact management systems and give serious thought to going paperless, or at least paper-less, are on this curve

5. Give serious thought to outsourcing. Large law firms have struck deals with LPOs and BPOs firms to move millions of dollars worth of business and back-office functions to smaller centers for one reason: efficiency gains that help them compete on cost.

6. Come up with a non-time-based billing and compensation system. The single biggest inefficiency in most law firms is the fact that tasks are worth more the longer they take and the more resources they consume. Hourly billing — and more importantly in this context, hourly compensation — is a productivity hemorrhage that's becoming far more damaging to firms than to clients. And it is not sustainable.

Lawyers have rarely needed to worry about process or efficiency before, because they could generally take as long as they liked to do their work and could carry it out in whatever fashion pleased them. That is coming to an end. *How* lawyers work is becoming at least as important as the work itself.

Conclusion

These five catalysts — education and training, regulation, globalization, collaboration and systematization — are transforming the legal services marketplace and will continue to do so for at least another decade. These forces are the drivers of change in the legal profession; the global financial crisis, the subsequent recession, and the long recovery ahead are the accelerators. Together, they describe the arc of change from 2010 to 2020 and the increasingly sharp curve that rises beyond.

The legal profession might or might not harness these forces and use them to maintain or improve its position in the future legal marketplace. But there is no chance that lawyers will be unaffected by what's coming, no possibility that the legal services marketplace in 2020 will look like it did in 2000. Adaptability, flexibility and openness to innovation can help lawyers get through this — but nothing will matter so much as keeping our eyes locked firmly and permanently on the interests and actions of the client.

What role will law societies play in this great transformation? The answer to that question will probably not be given by law societies alone: governments will have a speaking part, and so will clients. To my mind, the likeliest eventual outcome is that within 10 to 20 years, law societies will still exist, but will have seen their mandates limited to governance of the legal profession alone, not the regulation of legal services generally.

There is no guarantee that that will be the eventual outcome. Part of the uncertainty lies in the question of whether law societies, like the lawyers they govern, will keep the interests of clients and of real access to justice foremost in all their deliberations. The outcome will depend in part on law societies' own decision about their destiny: which potential future role —mere governors of lawyers or full-scale regulators of legal services — do law societies want? And which can they realistically achieve?

Biography

Jordan Furlong is a partner with Edge International, providing consulting services to law firms on strategic planning and practice management matters. He also provides media and communications advisory services as a Senior Consultant with Stem Legal and chronicles the extraordinary changes underway in the legal services marketplace at the award-winning blog *Law21: Dispatches from a Legal Profession on the Brink (http://law21.ca)*.

A graduate of Queen's University Faculty of Law who articled with Blake Cassels & Graydon LLP in Toronto, Jordan spent more than a dozen years leading three top Canadian legal periodicals. He served as Editor-in-Chief of the Canadian Bar Association's flagship *National* magazine for a full decade, during which time the publication earned nine awards for journalistic excellence. He also founded and served as Executive Editor of the Canadian Corporate Counsel Association's *CCCA Magazine* and held the position of Managing Editor with *The Lawyers Weekly* newspaper.

Jordan is an Honourary Fellow of the College of Law Practice Management and Chair of the College's InnovAction Awards. He has previously delivered presentations to the American Bar Association's Bar Leaders Institute, the Federation of Law Societies of Canada, the Canadian Bar Association's Managing Partners' Conference, the National Association of Law Placement, the Law Society of Upper Canada, the Chief Justice of Ontario's Colloquium on Professionalism, the Isaac Pitblado Lectures, the State Capital Group, and a Symposium on Law Firm Evolution at Georgetown University's Centre for the Study of the Legal Profession. He lives in Ottawa, Canada with his wife and two children.

Memo

The Law Society of British Columbia

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To Benchers

From Jeffrey G. Hoskins, QC for Act and Rules Subcommittee

Date September 15, 2010

Subject **Proposed Discipline Rule amendments**

For the last several months, the Act and Rules Subcommittee has been working on amendments intended to make the process of approving, issuing and running a hearing on a discipline citation more efficient and effective. This is intended to contribute to current efforts to ensure that the Law Society complaints and discipline process operates in a more timely fashion. We have benefited greatly from a report developed by Discipline counsel, led by Jaia Rai, which was reviewed in 2009 by the Discipline Committee.

This memorandum reviews the various changes that the Subcommittee now recommends to the Benchers. Attached is a document explaining the proposed amendments individually, as well as the usual drafts in redlined and clean versions and a suggested resolution to give effect to the changes. The Subcommittee expects that the Benchers may want to consider these changes at this time by reviewing them and discussing them, if desired, at the Benchers meeting on October 1, with the actual decision on whether or not to adopt the changes to follow at the November 5 meeting.

Terminology to more closely reflect the *Legal Profession Act*

In the current Rules, the terminology around citations is based on an analogy to the criminal process. For example, the hearing panel reaches a "verdict" on the allegations in the citation and, if appropriate, it imposes a "penalty".

Since the Law Society disciplinary process is a form of administrative law, and not criminal, many Benchers and others over the years have advocated moving away from that terminology. In fact, the *Legal Profession Act* refers to a "determination" on the allegations in a citation and taking "disciplinary action" when that is appropriate.

The proposed amendments use the language of the *Legal Profession Act* throughout.

Discipline Committee to authorize citations

Under the current Rules, only the Chair of the Discipline Committee "or any 3 Benchers" can authorize the issuance of a citation against a lawyer. In practice, except under the new summary hearing rules, the Chair very rarely authorizes a citation on his or her own.

Normally, the Discipline Committee considers the staff report and, when it considers it appropriate, it decides that a citation should be issued. But the minutes say that the Committee recommended to the Chair that a citation be issued and the Chair so ordered.

In the interests of a clearer and more transparent procedure, the Subcommittee recommends amending the Rules to give the authority to order a citation issued to the Discipline Committee. This includes authorizing additional allegations in a citation already authorized and rescinding individual allegations.

Recognizing that there are occasionally urgent situations, the proposed amendments would allow the Chair to order a citation alone when there is "a need to act before a meeting of the [Discipline] Committee can be arranged."

Issuing a citation is separated from notice of the hearing

Under the current Rules, before a citation may be formally issued and served on a Respondent, a date must be fixed for the hearing so that that information can be included on the face of the citation document. That tends to delay the process for several weeks, which does not allow the terms of the allegations to be available in a timely fashion to the Respondent in order to prepare a defence, or to public in the form of the website posting.

The proposed amendments separate the issuance of the citation from the notice of the hearing date, time and place. This will allow for the issuance and service of the citation to take place at a much earlier stage and in advance of scheduling the hearing date. A new notice of hearing form will be used to notify the Respondent of the actual hearing.

Panel membership open to non-lawyers

At the September meeting, the Benchers approved a change that would allow more non-lawyers to serve on hearing panels. In order to permit that to happen, the Rule restricting panel members to Benchers, Life Benchers and lawyers is replaced by one requiring that all panel members be adult permanent residents of British Columbia.

Resolution of preliminary questions before hearing

The current rules provide some procedure for prehearing conferences and for resolving an application for an adjournment prior to the hearing date. However, there is no overall procedure for settling most questions that arise before the hearing commences. In the proposed amendments, procedures similar to the current adjournment application are specified to allow a party to apply for severance of allegations in a single citation or joinder of two or more citations or for the determination of other questions before the hearing begins.

Prehearing conference procedures

The proposals amend the procedures for the prehearing conference to require notice be given to the respondent and remove the requirement that the respondent attend in person or through counsel. The Chambers Bencher would be permitted to proceed in the absence of the respondent if satisfied that notice has been given and make any orders the Bencher could have made had the respondent been present. A similar change is proposed in respect of pre-review conferences.

As well, the list of matters to be discussed in a prehearing conference is made discretionary in the hands of the Chambers Bencher. The order-making power of the Bencher presiding in a prehearing is enhanced and more completely enumerated.

Summary hearing for breach of any order

Currently, the summary hearing rules apply when the allegation in the citation is a breach of the order of a hearing panel. It is proposed to extend the availability of the simpler procedure when breach of any order made under the *Legal Profession Act* or Law Society Rules is in issue, including orders of Committees, the Benchers or the Executive Director.

Panels to review agreed facts in advance of hearing

Currently, the hearing panel on a citation is not permitted to view any evidence in advance of the oral hearing. The Act and Rules Subcommittee recommends a change so that, with the agreement of both parties, the hearing panel can receive and review a copy of the Agreed Statement of Facts, as well as the citation, in advance of the hearing.

Some rules are corrected or improved

- confidentiality of consideration of complaints extended to Chair's consideration;
- rules dealing with the content of citations are moved ahead to improve the flow of the Rules;
- oral and affidavit evidence are added to the list of evidence that a hearing panel may consider;
- electronic service of documents is expressly permitted.

JGH
C:\MyDocs\memo to Benchers on citation rules Sept 10.docx
Attachments: drafting notes
draft rule amendment
suggested resolution

PROPOSED AMENDMENTS TO CITATION PROCESS RULES

1. Rules 3-6(4), 3-12(3.1), 3-14(6.1) and 4-24.1(1)(d) are amended to allow a breach of any order made under the Law Society Rules or *Legal Profession Act* to be streamed into the summary hearing process.

2. Rule 4-3 is amended to add a subrule that allows the Executive Director and Chair of Discipline to agree that there is "a need to act before a meeting of the [Discipline] Committee can be arranged," for the complaint concerned to be referred to the Chair for action under Rule 4-4.1. This does not invoke the summary hearing process, but allows the Chair to order a citation on an urgent basis.

3. Rules 4-4 (1)(c), 4-9(6)(c) and 4-13(1) are amended to assign to the Discipline Committee itself the power to order a hearing by directing that a citation be issued.

4. The language of Rule 4-4.1(2)(a) is simplified and reference is made to Rule 4-13, which governs the issuance of citations.

5. Rule 4-6(1) is amended to extend the rules governing the confidentiality of the consideration of a complaint by the Discipline Committee to the consideration by the Chair alone.

6. Rule 4-6(4)(b) is amended to change the reference from "crime" to "offence".

7. Rule 4-13(1.1) is added to require a process parallel to the original order to cite when a new allegation is added to the existing citation.

8. Rule 4-13(2) is amended to expressly allow the Discipline Committee to rescind one or more allegations in a citation without rescinding the whole of the citation.

9. Rule 4-15(1) is amended to separate the service of the citation, including the allegations against the respondent, from notice of the time and place of the hearing. The time limit in subrule (1)(b) is reduced to 45 days.

10. New Rule 4-16.1 is added to deal with the issue of amending the citation at an earlier point in the Rules than the current Rule 4-31.

11. Rule 4-16.2 is proposed to prescribe a process by which allegations in a single citation can be severed and heard in separate hearings or separate citations can be joined and heard in a single hearing.

    Also, beginning with this rule, the reference to when a hearing "commences" or "starts" is changed to "begins" so that the language is consistent throughout.

12. Rules 4-17(1.19), 4-27(6), 4-29(5) and 5-18(6) are amended to allow a panel or Bencher to adjourn a matter generally, rather than always to a specific date.

13. Rule 4-24 is amended to require written notice of a hearing date to be made to the respondent separately from (but possibly at the same time as) service of the citation itself. This may be done in a "Notice of Hearing" form, but the rule does not require that.

14. Several rules are amended to institute changes in terminology to take the language away from the criminal model and closer to the language of the *Legal Profession Act*.

15. Rules 4-26, 4-29 and 5-19, allowing parties to apply for orders in advance of a hearing, are amended to make them more consistent and to require service of the application to be made in writing and delivered to the opposing party. In addition, the President is permitted to refer the application to a prehearing conference.

16. Rule 4-26.1 is added to provide for a process for preliminary questions to be brought and determined. The President has the discretion as to the appropriate adjudicator on preliminary applications. That discretion would presumably be exercised based on a number of factors, including the complexity and contentiousness of the issues.

17. Rule 4-27, Pre-hearing conference, is amended to specifically require notice of the time and place of the conference to be delivered to the respondent. It would not be mandatory for the respondent to attend in person or through counsel, but the conference may proceed in the absence of a respondent who was properly notified.

18. The items enumerated in Rule 4-27(5) become optional. It is therefore no longer necessary to include Rule 4-24.1(2), which made that list optional only for the purpose of summary hearings.

19. A new Rule 4-27(5.1) is proposed to enumerate the orders that the Bencher presiding at a pre-hearing conference may make, including in paragraph (f) orders "concerning any other matters that may aid in the disposition of the citation," which is parallel to subrule (5)(g) enumerating the matters that can be considered at the pre-hearing conference.

20. Subrule (6) is expanded to expressly give the pre-hearing conference Bencher power to make orders of various kinds.

21. A new subrule is added to Rule 4-29 to clarify that adjournments and re-setting of hearing dates do not require notification under Rule 4-24.

22. A new subrule is added to Rule 4-30 to allow counsel to agree that the panel should see and consider an Agreed Statement of Facts before the hearing begins, provided that the requirements for service of the citation is acknowledged or waived.

23. Rule 4-31 is rescinded and replaced by new Rules 4-16.1 and 4-16.2.

24. Rule 4-32(2) is rescinded as unnecessary and self-evident.

25. Rule 4-36(1) is amended to require notice to be sent to other governing bodies of which a respondent is a member when an admission is accepted by the Discipline Committee under Rule 4-21. Reference to notice of Discipline Committee decisions other than citation being given to other governing bodies is removed as inconsistent with other rules requiring confidentiality.

26. Rule 4-36(4) is amended to allow action to be taken against a lawyer who is the subject of discipline in another jurisdiction that is resolved by an admission under a provision similar to BC Rule 4-21.

27. Rule 4-43(1) is amended to refer only to the Chair of the Discipline Committee having power under that provision and removing reference to the Vice-Chair and other Bencher

members of the committee because those alternatives are provided for in the current Rule 4-2(4).

28. Rule 5-2(2)(b.2) is added to allow a single Bencher panel to consider a preliminary question.

29. Rule 5-2(4) is amended to reflect the Benchers' recent decision to require a non-lawyer on most panels, which requires the recruitment of more members of the community to fill those appointments. The only requirement is now to be a resident of British Columbia and of the age of majority. The Benchers will, of course, be asked to adopt criteria for the guidance of the President in making appointments.

30. Rule 5-2(5) and (6), which now allows a person who ceases to be a Bencher or a lawyer to continue on a hearing panel, is amended since being a Bencher or a lawyer will no longer be necessary to be appointed to a panel. Since one will need to be a Bencher and a lawyer to chair a panel, the provision is amended to continue departing Benchers who are Chairs.

31. The heading of Rule 5-4 is changed to more accurately reflect the content of the Rule.

32. Rule 5-5(2) is amended to allow a court reporter to affirm rather than swear, and to allow one oath or affirmation for more than one day of reporting the same matter.

33. Rule 5-5(6) is amended to add oral evidence and affidavit evidence to make the list of types of evidence that can be accepted more complete.

34. Rule 5-18 is amended to allow a pre-review conference to proceed in the absence of the respondent or applicant and to give the Bencher presiding express authority to make orders consistent with the Rule.

35. Rule 10-1(1) is amended to allow service of documents by email.

36. Rule 10-1(1.1) is added to include as an address at which a respondent may be served with documents relating to a citation an address given to discipline counsel for that purpose.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Action after investigation

3-6 (3) Unless subrule (1) applies or the Executive Director takes no further action under subrule (2), the Executive Director must refer the complaint to the Practice Standards Committee or to the Discipline Committee.

(4) Despite subrule (3), the Executive Director may refer a complaint to the Chair of the Discipline Committee if the complaint concerns only allegations that the lawyer has done one or more of the following:

(a) breached a Rule;

(b) breached an undertaking given to the Society;

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

(d) breached an order made under the Act or these Rules.

Division 2 – Practice Standards

Consideration of complaints

3-12(3.1) Despite subrule (3)(e), the Practice Standards Committee may refer a complaint to the Chair of the Discipline Committee if the complaint concerns only allegations that the lawyer has done one or more of the following:

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

(d) breached an order made under the Act or these Rules.

Action by the Practice Standards Committee

3-14(6.1) Despite subrule (6), the Practice Standards Committee may refer a report to the Chair of the Discipline Committee with respect to allegations that the lawyer has done one or more of the following:

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

(d) breached an order made under the Act or these Rules.

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Consideration of complaints by Committee

4-3 (1) The Discipline Committee must consider any complaint referred to it under these Rules and may instruct the Executive Director to make or authorize further investigation that the Discipline Committee considers desirable.

(2) If, in the view of the Executive Director and the Chair of the Discipline Committee, there is a need to act before a meeting of the Committee can be arranged, the Executive Director may refer a complaint to the Chair for consideration under Rule 4-4.1.

Action on complaints

4-4 (1) After its consideration under Rule 4-3, the Discipline Committee must

(a) decide that no further action be taken on the complaint,

(a.1) authorize the chair or other Bencher member of the Discipline Committee to send a letter to the lawyer concerning the lawyer's conduct,

(a.2) require the lawyer to attend a meeting with one or more Benchers or lawyers to discuss the conduct of the lawyer,

(b) require the lawyer to appear before the Conduct Review Subcommittee, or

(c) ~~recommend~~ direct that the Executive Director issue a citation ~~be issued~~ against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*.

(4) At any time before the Discipline Committee makes a decision under Rule 4-9(6)(a) to (c) *[Conduct Review Subcommittee report]*, the Committee may resolve to rescind a decision made under subrule (1)(b) to require a lawyer to appear before the Conduct Review Subcommittee and substitute another decision under subrule (1).

Consideration of complaints by Chair

4-4.1 (1) The Chair of the Discipline Committee must consider any complaint referred to him or her under these Rules and may instruct the Executive Director to make or authorize further investigation that the Chair considers desirable.

(2) After considering a complaint under subrule (1), the Chair of the Discipline Committee must

(a) ~~order a hearing into the conduct or competence of a lawyer by~~ direct~~ing~~ that the Executive Director issue a citation against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*, or

LAW SOCIETY RULES

(b) refer the complaint to the Discipline Committee.

Confidentiality of Discipline Committee deliberations

4-6 (1) No one is permitted to disclose any of the following information except for the purpose of complying with the objects of the Act or with these Rules:

(a) all of the information and documents that form part of the ~~Discipline Committee's~~ consideration of a complaint under Rule 4-4 or 4-4.1;

(b) the result of a consideration ~~Discipline Committee's determination~~ under Rule 4-4.

(4) Despite subrule (3), the Executive Director may disclose to the public a direction to issue a citation, its subject matter and its status before the respondent is notified if

(b) the citation is in respect of ~~a crime~~an offence to which the respondent has pleaded guilty or of which the respondent has been found guilty, or

Conduct Review Subcommittee report

4-9 (6) After considering the Conduct Review Subcommittee's report, the Discipline Committee must do one or more of the following:

(a) decide to take no further action on the complaint;

(b) refer the lawyer to the Practice Standards Committee;

(c) ~~recommend~~ direct that a citation be issued against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*;

(d) rescind the decision under Rule 4-4(1)(b) *[Action on complaints]* to require the lawyer to appear before the Conduct Review Subcommittee, and substitute another decision under Rule 4-4(1).

Privilege and confidentiality

4-10 In complying with Rule 4-9, the Discipline Committee and the Conduct Review Subcommittee must not disclose to the complainant information subject to the solicitor and client privilege of a client other than the complainant or other confidential information that the complainant is not entitled to receive.

Direction to issue, expand or rescind citation

4-13 (1) The Discipline Committee or the chair of the ~~Discipline~~ Committee ~~or any 3 Benchers~~ may order a hearing into the conduct or competence of a lawyer by directing that the Executive Director issue a citation against the lawyer.

(1.1) After a hearing has been ordered under subrule (1), the Discipline Committee may direct the Executive Director to add an allegation to a citation.

(2) At any time before a panel makes a determination under Rule 4-35 *[Disciplinary action]*, the Discipline Committee may rescind a citation or an allegation in a citation and substitute another decision under Rule 4-4(1) *[Action on complaints]*.

~~Service~~ Notice of citation

4-15 (1) A citation must be served on the respondent

(a) personally, or by mailing it by registered mail to the respondent's last known address, and

(b) not more than ~~90~~ 45 days after the direction that it be issued, unless the Discipline Committee or the chair~~, vice-chair or another Bencher member~~ of the Committee otherwise directs~~, and~~.

~~(c) not less than 30 days before the date set for the hearing, unless the respondent consents in writing to a shorter period.~~

(2) If it is impractical for any reason to serve a citation as set out in subrule (1)(a), the President may order substituted service, whether or not there is evidence that the citation will probably reach the respondent or will probably come to the respondent's attention or that the respondent is evading service.

(3) The President may designate another Bencher to act under subrule (2).

Disclosure of citation

4-16 (1) Once the respondent has been notified of a direction to issue a citation, the Executive Director may disclose to the public the citation and its status.

(2) The Executive Director may disclose the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.

(3) Disclosure under this Rule may be made by means of the Society's website.

(4) This Rule must not be interpreted to permit the disclosure of any information subject to solicitor and client privilege or confidentiality.

Amending an allegation in a citation

4-16.1 (1) Discipline counsel may amend an allegation contained in a citation

(a) before the hearing begins, by giving written notice to the respondent and the Executive Director. and

(b) after the hearing has begun, with the consent of the respondent.

(2) The panel may amend a citation after the hearing has begun

(a) on the application of a party, or

(b) on its own motion.

LAW SOCIETY RULES

(3) The panel must not amend a citation under subrule (2) unless the respondent and discipline counsel have been given the opportunity to make submissions respecting the proposed amendment.

Severance and joinder

4-16.2 (1) Before a hearing begins, the respondent or discipline counsel may apply in writing to the Executive Director for an order that

(a) one or more allegations in a citation be determined in a separate hearing from one or more other allegations in the same citation, or

(b) two or more citations be determined in one hearing.

(2) An application under subrule (1) must

(a) be copied to the party not making the application, and

(b) state the grounds for the order sought.

(3) The Executive Director must promptly notify the President of an application under subrule (1).

(4) The President may

(a) allow the application with or without conditions,

(b) designate another Bencher to make a determination, or

(c) refer an application to a prehearing conference.

Interim suspension, practice conditions or medical examination

4-17 (1) If there has been a direction under Rule 4-13(1) *[Direction to issue, expand or rescind citation]* to issue a citation, any 3 Benchers may do one or more of the following:

(d) require the respondent to

(i) submit to an examination by a qualified medical practitioner named by the 3 Benchers or to be named by the Chair ~~or Vice-Chair~~ of the Discipline Committee, and

(1.19) After a proceeding has ~~commenced~~begun, the Benchers present may adjourn the proceeding, with or without conditions, generally or to a specified date, time and place.

Appointment of discipline counsel

4-20 The Executive Director must appoint a lawyer employed by the Society or retain another lawyer to represent the Society when

(a) a direction to issue a citation is made under Rule 4-13 *[Direction to issue, expand or rescind citation]*,

(b) a respondent or a suspended lawyer appeals to the Court of Appeal under section 48 of the Act *[Appeal]*, or

(c) the Society is a respondent in any other action involving the investigation of a complaint against a lawyer or the discipline of a lawyer.

~~Setting a date for the~~Notice of hearing

4-24 (1) The date, time and place for the hearing to begin must be set

(a) by agreement between discipline counsel and the respondent, or

(b) failing agreement, by the Executive Director or by the Bencher presiding at a prehearing conference.

(2) When a date is set under subrule (1), ~~The~~ the Executive Director must notify the ~~following~~ respondent and the complainant in writing of the date, time and place of the hearing at least 30 days before the date set for the hearing to begin, unless the respondent consents to a shorter notice period.~~:~~

~~(a) the respondent, when the hearing has been scheduled under subrule (1)(b);~~

~~(b) the complainant.~~

(3) Written notification under subrule (2) may be made at the same time that the citation is served under Rule 4-15 *[Notice of citation]*, or at a later time.

Summary hearing

4-24.1 (1) This Rule may be applied in respect of the hearing of a citation comprising only allegations that the respondent has done one or more of the following:

(a) breached a Rule;

(b) breached an undertaking given to the Society;

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

(d) breached an order made under the Act or these Rules~~by a hearing panel~~.

(2) **[rescinded]**~~Despite Rule 4-27(5), the Bencher presiding at a pre-hearing conference may order that the conference not consider any or all of the matters referred to in that subrule.~~

(3) Unless the panel rules otherwise, the respondent and discipline counsel may adduce evidence by

(a) affidavit, or

(b) an agreed statement of facts.

(4) Despite Rules 4-34 *[Submissions and determination]* and 4-35 *[Disciplinary action]*, the panel may consider facts, ~~verdict~~determination, ~~penalty~~ disciplinary action and costs and ~~make one~~issue a decision respecting all aspects of the proceeding.

Demand for disclosure of evidence

4-25 (1) In this Rule, **"evidence"** does not include any information or document about any discussion or other communication with the Ombudsperson in that capacity.

(2) At any time after a citation has been issued and before the hearing ~~commences~~begins, a respondent may demand in writing that discipline counsel disclose the evidence that the Society intends to introduce at the hearing.

(3) On receipt of a demand for disclosure under subrule (2), discipline counsel must provide the following to the respondent by a reasonable time before the ~~start~~ beginning of the hearing:

(a) a copy of every document that the Society intends to tender in evidence;

(b) a copy of any statement made by a person whom the Society intends to call as a witness;

(c) if documents provided under paragraphs (a) and (b) do not provide enough information, a summary of the evidence that the Society intends to introduce;

(d) a summary of any other relevant evidence in discipline counsel's possession or in a Society file available to discipline counsel, whether or not counsel intends to introduce that evidence at the hearing.

Application for details of the circumstances

4-26 (1) ~~At any time b~~Before ~~the~~ a hearing ~~commences~~begins, ~~a~~ the respondent may apply ~~in writing to the Executive Director~~ for disclosure of the details of the circumstances of misconduct alleged in a citation by delivering to the Executive Director and discipline counsel written notice setting out the substance of the application and the grounds for it.

(2) The Executive Director must promptly notify the ~~following~~ President of an application under subrule (1).~~:~~

~~(a) discipline counsel;~~

~~(b) the President.~~

(3) If the President is satisfied that an allegation in the citation does not contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proved, and to identify the transaction referred to, the President must order discipline counsel to disclose further details of the circumstances.

(4) Details of the circumstances disclosed under subrule (3) must be

(a) in writing, and

(b) delivered to the respondent or respondent's counsel.

(5) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

Preliminary questions

4-26.1 (1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the Executive Director and to the other party written notice setting out the substance of the application and the grounds for it,

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) When an application is made under subrule (1), the President must do one of the following as appears to the President to be appropriate:

(a) appoint a panel to determine the question;

(b) refer the question to a prehearing conference;

(c) refer the question to the panel at the hearing of the citation.

(4) The President may designate another Bencher to exercise the discretion under subrule (3).

(5) A panel appointed under subrule (3)(a) is not seized of the citation or any question pertaining to the citation other than that referred under that provision.

Pre-hearing conference

4-27 (1) The President may order a pre-hearing conference at any time before the hearing on a citation ~~commences~~begins, at the request of the respondent or discipline counsel, or on the President's own initiative.

(2) When a conference has been ordered under subrule (1), the President must

(a) set the date, time and place of the conference, and

(b) designate a Bencher to preside at the conference.

(2.1) The Executive Director must notify the respondent and discipline counsel of the time and place of the conference.

(3) Discipline counsel~~, and the respondent or respondent's counsel or both,~~ must be present at the conference.

(3.1) The respondent may attend the conference in person, through counsel or both.

(3.2) If the respondent fails to attend the conference, the Bencher presiding may proceed with the conference in the absence of the respondent and may make any order under this Rule, if the Bencher is satisfied that the respondent had notice of the conference.

(4) Any person may participate in a conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present ~~under subrule (3).~~for the purpose of this Rule.

(5) The conference ~~must~~may consider

(a) the simplification of the issues,

(b) the necessity or desirability of amendments to the citation,

(c) the possibility of obtaining admissions that might facilitate the hearing,

(d) the discovery and production of documents,

(d.1) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public, or that exhibits and other evidence be excluded from public access,

(e) setting a date for the hearing to begin, and

(f) **[rescinded]**~~any application by discipline counsel to withhold the identity or locating particulars of a witness, and~~

(g) any other matters that may aid in the disposition of the citation.

(5.1) The respondent or discipline counsel may apply to the Bencher presiding at the conference for an order

(a) for discovery and production of documents,

(b) to withhold the identity or contact information of a witness,

(c) to adjourn the hearing of the citation,

(d) for severance of allegations or joinder of citations under Rule 4-16.2 *[Severance and joinder]*,

(e) for disclosure of the details of the circumstances of misconduct alleged in a citation under Rule 4-26 *[Application for details of the circumstances]*, or

(f) concerning any other matters that may aid in the disposition of the citation.

(6) The Bencher presiding at a pre-hearing conference may

(a) adjourn the conference generally or to a specified date, time and place,

(b) **[rescinded]**~~order discovery and production of documents,~~

(c) set a date for the hearing to begin, and

(d) allow or dismiss an application made under subrule (5.1)~~(f)~~ or referred to the conference under this Part.

Appointment of panel

4-28 When a citation is issued under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*, the President must establish a panel to conduct a hearing, make a determination under Rule 4-34 *[Submissions and determination]* and take action, if appropriate, under Rule 4-35 *[Disciplinary action]*.

Adjournment

4-29 (1) Before ~~the~~ a hearing ~~commences~~begins, the respondent or discipline counsel may ~~request~~ apply for an order that the hearing be adjourned by delivering to the Executive Director and the other party ~~a~~ written notice ~~in writing that sets~~setting out the ~~reasons~~ grounds for the ~~request~~application.

(2) The Executive Director must promptly notify the ~~following~~ President of ~~a request~~an application under subrule (1) ~~and the reasons for it:~~ .

~~(a) the party not making the request;~~

~~(c) the President;~~

~~(d) anyone else who, in the Executive Director's opinion, should be notified.~~

(3) Before the hearing ~~commences~~begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.

(4) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

(5) After a hearing has ~~commenced~~begun, the chair of the panel may adjourn the hearing, with or without conditions, generally or to a specified date, time and place.

(6) When an adjournment is granted under this Rule, the Executive Director must notify the complainant.

(7) Rule 4-24 *[Notice of hearing]* does not apply when a hearing is adjourned and re-set for another date.

LAW SOCIETY RULES

Preliminary procedures

4-30 (1) Before hearing any evidence on the allegations set out in the citation, the panel must determine whether

(a) the citation was served in accordance with Rule 4-15 *[Notice of citation]*, or

(b) the respondent waives any of the requirements of Rule 4-15.

(2) If the requirements of Rule 4-15 have been met, or have been waived by the respondent, the citation or a copy of it must be filed as an exhibit at the hearing, and the hearing may proceed.

(3) Despite subrule (1), before the hearing begins, the panel may receive and consider.

(a) the citation, and

(b) an agreed statement of facts.

~~Citation~~

4-31 **[rescinded]**~~(1) A panel may consider at one hearing a citation that contains one or more allegations.~~

~~(2) A citation may be amended by~~

~~(a) discipline counsel before the hearing begins, and~~

~~(b) the panel after the hearing has begun.~~

Evidence ~~at the hearing~~of respondent

4-32 ~~(1)~~ Discipline counsel must notify ~~give reasonable notice to~~ the respondent of an application for an order that the respondent give evidence at the hearing**.**

(2) **[rescinded]**~~Unless the panel orders otherwise, witnesses called by discipline counsel testify first, followed by witnesses called by the respondent.~~

Submissions and determination~~verdict~~

4-34 (1) Following completion of the evidence, the panel must invite submissions from discipline counsel and the respondent on ~~the facts and verdict on~~ each allegation in the citation.

(2) After submissions under subrule (1), the panel must

(a) ~~determine~~ find the facts and make a determination~~verdict~~ on each allegation, and

(b) prepare written reasons for its findings on each allegation.

(3) The Executive Director must promptly deliver a copy of the panel's reasons prepared under subrule (2)(b) to each party.

LAW SOCIETY RULES

Disciplinary action~~Penalty~~

4-35 (1) Following a determination~~verdict~~ under Rule 4-34 adverse to the respondent, the panel must

(a) invite the respondent and discipline counsel to make submissions as to disciplinary action~~penalty~~,

(b) take one or more of the actions referred to in section 38(5) or (6) of the Act [*Discipline hearings*],

(c) include in its decision under this Rule

(i) any order, declaration or imposition of conditions under section 38(7) of the Act, and

(ii) any order under Rule 5-9 *[Costs of hearings]* on the costs of the hearing, including any order respecting time to pay,

(d) prepare a written record, with reasons, of its action taken under subrule (b) and any action taken under subrule (c),

(e) if it imposes a fine, set the date by which payment to the Society must be completed, and

(f) if it imposes conditions on the respondent's practice, set the date by which the conditions must be fulfilled.

(1.1) If a panel gives reasons orally for its decision under Rule 4-34(2)(a), the panel may proceed under subrule (1) before written reasons are prepared under Rule 4-34(2)(b).

(2) Despite subrule (1)(b), if the respondent is a member of another governing body and not a member of the Society, the panel may do one or more of the following:

(a) reprimand the respondent;

(b) fine the respondent an amount not exceeding $20,000;

(c) prohibit the respondent from practising law in British Columbia permanently or for a specified period of time;

(d) declare that, had the respondent been a member of the Society, the panel would have

(i) disbarred the respondent,

(ii) suspended the respondent, or

(iii) imposed conditions on the practice of the respondent.

(3) The Executive Director must promptly deliver a copy of the panel's reasons prepared under subrule (1)(d) to each party.

(4) The panel may consider the professional conduct record of the respondent in determining a disciplinary action~~penalty~~ under this Rule.

(5) Regardless of the nature of the allegation in the citation, the panel may ~~impose a penalty~~take disciplinary action based on the ungovernability of the respondent by the Society.

(6) The panel must not take disciplinary action~~impose a penalty~~ under subrule (5) unless the respondent has been given at least 30 days notice that ungovernability may be raised as an issue at the ~~penalty~~ hearing on disciplinary action.

(7) The panel may adjourn the ~~penalty~~ hearing on disciplinary action to allow compliance with the notice period in subrule (6).

Discipline proceedings involving members of other governing bodies

4-36 (1) The Executive Director must send written notice of the action to every governing body of which the person is known to be a member when

(a) ~~-~~a citation is authorized under Rule 4-13 *[Direction to issue, expand or rescind citation]*,

(b) **[rescinded]**~~action is taken under Rule 4-4(1)(b) or (c), or~~

(c) a disciplinary action~~penalty~~ is imposed under Rule 4-35~~.~~, or

(d) a conditional admission tendered under Rule 4-21 *[Conditional admissions]* is accepted by the Discipline Committee.

(4) The Discipline Committee may take action under Rule 4-4 *[Action on complaints]* against a lawyer who

(a) has failed or refused to pay to a governing body a fine or other monetary order arising out of the lawyer's inter-jurisdictional practice,

(b) has violated a prohibition against practice imposed by a governing body, ~~or~~

(c) is the subject of a declaration by a governing body under a provision similar to Rule 4-35(2)(d~~).~~), or

(d) made an admission that is accepted under a provision similar to Rule 4-21.

Public notice of suspension or disbarment

4-37 (1) When a person is suspended under this Part or Part 5 *[Hearings and Appeals]* or becomes a disbarred lawyer, the Executive Director must immediately give effective public notice of the suspension, disbarment or resignation by means including but not limited to the following:

(a) publication of a notice in

(i) the *British Columbia Gazette*,

(ii) a newspaper of general circulation in each municipality and each district referred to in Rule 1-20 *[Regional representation by Benchers]*, in which the person maintained a law office, and

(iii) the Society website, and

(b) notifying the following:

(i) the Registrar of the Supreme Court;

(ii) the Public Guardian and Trustee.;

(iii) every governing body of which the person is known to be a member.

(2) When a person is suspended under Part 2 *[Membership and Authority to Practise Law]* or 3 *[Protection of the Public]*, the Executive Director may take any of the steps referred to in subrule (1).

(3) A lawyer who is suspended under this Part or Part 5 must inform all clients who reasonably expect the lawyer to attend to their affairs during the period of the suspension and clients or prospective clients who inquire about the availability of the lawyer's services during the suspension period of the following:

(a) the period the lawyer will not be practising;

(b) the arrangements the lawyer has put in place to protect the clients' interests during the time the lawyer will not be practising;

(c) the fact that the lawyer is not practising during the relevant period because of the suspension.

(4) A panel that suspends a lawyer may relieve the lawyer of any of the obligations set out in subrule (3) if the panel is satisfied that it is consistent with the public interest and imposing the obligation would be unreasonable in the circumstances.

Publication of disciplinary action

4-38 (1) The Executive Director must publish and circulate to the profession a summary of the circumstances and of any decision, reasons and action taken

(a) at the conclusion of the facts and determination~~verdict~~ portion of a hearing on a citation,

(a.1) at the conclusion of the disciplinary action~~penalty~~ portion of a hearing on a citation,

(4) When the Executive Director publishes a document under this Rule by means of the Society's website, the Executive Director must remove the publication from the part of the website for current decisions and may relocate it to an archive part of the website when

(b) all aspects of the disciplinary action~~penalty~~ imposed have been completed.

LAW SOCIETY RULES

Anonymous publication

4-38.1 (3) On an application under subrule (4) or on its own motion, the panel may order that publication not identify the respondent if

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

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

Investigation of books and accounts

4-43 (1) If the chair~~, vice-chair or another Bencher member~~ of the Discipline Committee believes that a lawyer or former lawyer may have committed a discipline violation, ~~that Bencher~~the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer.

(2) When an order is made under subrule (1),

(a) the Executive Director must designate one or more persons to conduct the investigation, and

(b) the lawyer or former lawyer concerned must immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence and must provide any explanations that the persons designated by the Executive Director under paragraph (a) require for the purpose of the investigation.

PART 5 – HEARINGS AND APPEALS

Application of Part

5-1 This Part applies to

(a) a hearing on an application for enrolment, call and admission or reinstatement,

(b) a hearing on a citation, and

(c) unless the context indicates otherwise, a review by the Benchers of a hearing decision.

Hearing panels

5-2 (1) A panel must consist of an odd number of persons but, subject to subrule (2), must not consist of one person.

(2) A panel may consist of one Bencher who is a lawyer if

(a) no facts are in dispute,

(b) the hearing is to consider a conditional admission under Rule 4-22 *[Consent to disciplinary action]*,

(b.1) the hearing proceeds under Rule 4-24.1 *[Summary hearing]*,

(b.2) the hearing is to consider a preliminary question under Rule 4-26.1 *[Preliminary questions]*,

(c) it is not otherwise possible, in the opinion of the President, to convene a panel in a reasonable period of time, or

(d) one or more of the original panel members cannot complete a hearing that has been ~~commenced~~begun.

(3) A panel must be chaired by a Bencher who is a lawyer.

(4) ~~All Benchers, all Life Benchers and all lawyers~~Panel members must be permanent residents of British Columbia over the age of majority ~~are eligible to be appointed to a panel~~.

(5) ~~A member~~The chair of a panel who ceases to be a Bencher may, with the consent of the President ~~and with or without the consent of the applicant or respondent, continue to be a member of the panel and, if that member is the chair of the panel~~, may continue to chair the panel, and the panel may complete any hearing or hearings already scheduled or ~~commenced~~begun.

(6) ~~A member of a panel who ceases to be a lawyer may, with the consent of the President and with or without the consent of the applicant or respondent, continue to be a member of the panel and the panel may complete any hearing or hearings already scheduled or commenced~~**[rescinded]**.

(7) Two or more panels may proceed with separate matters at the same time.

(8) The President may refer a matter that is before a panel to another panel, fill a vacancy on a panel and, on the advice of the Executive Committee, may terminate an appointment to a panel.

(9) Unless otherwise provided in the Act and these Rules, a panel must decide any matter by a majority, and the decision of the majority is the decision of the panel.

~~Powers of hearing panels~~Compelling witnesses and production of documents

5-4 A panel may

(a) compel the applicant or respondent to give evidence under oath, and

(b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that are in the applicant's or respondent's possession or control that may be relevant to the matters raised in the citation.

LAW SOCIETY RULES

Procedure

5-5 (1) Subject to the Act and these Rules, the panel may determine the practice and procedure to be followed at a hearing.

(2) ~~At the beginning of the hearing~~Before a court reporter begins reporting the proceedings of a hearing, the chair of the panel must ensure that the reporter ~~swear~~takes an oath or makes a solemn affirmation ~~the court reporter~~ to faithfully and accurately report and transcribe the proceedings.

(3) The applicant, respondent or counsel for the Society may call witnesses to testify.

(4) All witnesses, including a respondent ordered to give evidence under section 41(2)(a) *[Panels]* of the Act,

(a) must take an oath or make a solemn affirmation, if competent to do so, before testifying, and

(b) are subject to cross-examination.

(5) The panel may make inquiries of a witness as it considers desirable.

(6) The hearing panel may accept any of the following as evidence:

(a) an agreed statement of facts;

(a.1) oral evidence;

(a.2) affidavit evidence;

(b) evidence tendered in a form agreed to by the respondent or applicant and Society counsel;

(c) any other evidence it considers appropriate.

Costs of hearings

5-9 (3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(c) the citation is rescinded after the hearing has ~~commenced~~begun.

Reviews and appeals

Initiating a review

5-13(1.1) A respondent may initiate a review by delivering a Notice of Review under Rule 5-15 to the Executive Director within 30 days after the respondent is notified of the decision of the panel with respect to disciplinary action~~penalty~~.

LAW SOCIETY RULES

Pre-review conference

5-18 (3) Counsel representing the Society ~~The following~~ must be present at the conference.~~:~~

~~(a) the applicant or the respondent, as the case may be, or his or her counsel;~~

~~(b) counsel representing the Law Society.~~

(3.1) The Executive Director must notify the applicant or the respondent, as the case may be, or his or her counsel, of the time and place of the conference.~~;~~

(3.2) The applicant or the respondent, as the case may be, may attend the conference, in person, through counsel or both.

(3.3) If the applicant or the respondent, as the case may be, fails to attend the conference, the Bencher presiding may proceed with the conference in the absence of that party and may make any order under this Rule, if the Bencher is satisfied that the party had been notified of the conference.

(4) If the Bencher presiding at a pre-review conference considers it appropriate, he or she may allow any person to participate in the conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present ~~under subrule (3)~~for the purpose of this Rule.

(5) The conference ~~must~~ may consider

(a) the simplification of the issues,

(b) any issues concerning the record to be reviewed,

(c) the possibility of agreement on any issues in the review,

(d) the exchange of written arguments or outlines of argument and of authorities,

(d.1) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public or that exhibits and other evidence be excluded from public access,

(e) setting a date for the review, and

(f) any other matters that may aid in the disposition of the review.

(6) The Bencher presiding at a pre-review conference may

(a) adjourn the conference generally or to a specified date, time and place,

(b) order the exchange of written arguments or outlines of argument and of authorities, and set deadlines for that exchange, ~~and~~

(c) set a date for the review~~.~~, and

(d) make any order or allow or dismiss any application consistent with this Rule.

Adjournment

5-19 (1) Before ~~the~~ a hearing on a review commences, the applicant, respondent or counsel for the Society may ~~request~~ apply for an order that the hearing be adjourned by delivering to the Executive Director and to the other party written ~~a~~ notice ~~in writing that sets~~setting out the ~~reasons~~ grounds for the ~~request~~application.

(2) The Executive Director must promptly notify the ~~following~~ President of ~~a request~~ an application under subrule (1). ~~and the reasons for it:~~

~~(a) the party not making the application;~~

~~(b) the President;~~

~~(c) anyone else who, in the Executive Director's opinion, should be notified.~~

(3) Before the hearing ~~commences~~begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.

(4) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a pre-review conference.

(5) After a hearing has commenced, the President or other Bencher presiding may adjourn the hearing, with or without conditions, to a specified date, time and place.

PART 10 – GENERAL

Service and notice

10-1 (1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally or by

(a) ~~mailing~~ sending it by registered mail or electronic mail to his or her last known address, or

(b) serving it as directed by the Supreme Court.

(1.1) In subrule (1), **"last known address"** includes an address given to discipline counsel for delivery of documents relating to a citation.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Action after investigation

3-6 (3) Unless subrule (1) applies or the Executive Director takes no further action under subrule (2), the Executive Director must refer the complaint to the Practice Standards Committee or to the Discipline Committee.

(4) Despite subrule (3), the Executive Director may refer a complaint to the Chair of the Discipline Committee if the complaint concerns only allegations that the lawyer has done one or more of the following:

(a) breached a Rule;

(b) breached an undertaking given to the Society;

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

(d) breached an order made under the Act or these Rules.

Division 2 – Practice Standards

Consideration of complaints

3-12(3.1) Despite subrule (3)(e), the Practice Standards Committee may refer a complaint to the Chair of the Discipline Committee if the complaint concerns only allegations that the lawyer has done one or more of the following:

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

(d) breached an order made under the Act or these Rules.

Action by the Practice Standards Committee

3-14(6.1) Despite subrule (6), the Practice Standards Committee may refer a report to the Chair of the Discipline Committee with respect to allegations that the lawyer has done one or more of the following:

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

(d) breached an order made under the Act or these Rules.

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Consideration of complaints by Committee

4-3 (1) The Discipline Committee must consider any complaint referred to it under these Rules and may instruct the Executive Director to make or authorize further investigation that the Discipline Committee considers desirable.

(2) If, in the view of the Executive Director and the Chair of the Discipline Committee, there is a need to act before a meeting of the Committee can be arranged, the Executive Director may refer a complaint to the Chair for consideration under Rule 4-4.1.

Action on complaints

4-4 (1) After its consideration under Rule 4-3, the Discipline Committee must

(a) decide that no further action be taken on the complaint,

(a.1) authorize the chair or other Bencher member of the Discipline Committee to send a letter to the lawyer concerning the lawyer's conduct,

(a.2) require the lawyer to attend a meeting with one or more Benchers or lawyers to discuss the conduct of the lawyer,

(b) require the lawyer to appear before the Conduct Review Subcommittee, or

(c) direct that the Executive Director issue a citation against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*.

(4) At any time before the Discipline Committee makes a decision under Rule 4-9(6)(a) to (c) *[Conduct Review Subcommittee report]*, the Committee may resolve to rescind a decision made under subrule (1)(b) to require a lawyer to appear before the Conduct Review Subcommittee and substitute another decision under subrule (1).

Consideration of complaints by Chair

4-4.1 (1) The Chair of the Discipline Committee must consider any complaint referred to him or her under these Rules and may instruct the Executive Director to make or authorize further investigation that the Chair considers desirable.

(2) After considering a complaint under subrule (1), the Chair of the Discipline Committee must

(a) direct that the Executive Director issue a citation against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*, or

(b) refer the complaint to the Discipline Committee.

Confidentiality of Discipline Committee deliberations

4-6 (1) No one is permitted to disclose any of the following information except for the purpose of complying with the objects of the Act or with these Rules:

(a) all of the information and documents that form part of the consideration of a complaint under Rule 4-4 or 4-4.1;

(b) the result of a consideration under Rule 4-4.

(4) Despite subrule (3), the Executive Director may disclose to the public a direction to issue a citation, its subject matter and its status before the respondent is notified if

(b) the citation is in respect of an offence to which the respondent has pleaded guilty or of which the respondent has been found guilty, or

Conduct Review Subcommittee report

4-9 (6) After considering the Conduct Review Subcommittee's report, the Discipline Committee must do one or more of the following:

(a) decide to take no further action on the complaint;

(b) refer the lawyer to the Practice Standards Committee;

(c) direct that a citation be issued against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*;

(d) rescind the decision under Rule 4-4(1)(b) *[Action on complaints]* to require the lawyer to appear before the Conduct Review Subcommittee, and substitute another decision under Rule 4-4(1).

Privilege and confidentiality

4-10 In complying with Rule 4-9, the Discipline Committee and the Conduct Review Subcommittee must not disclose to the complainant information subject to the solicitor and client privilege of a client other than the complainant or other confidential information that the complainant is not entitled to receive.

Direction to issue, expand or rescind citation

4-13 (1) The Discipline Committee or the chair of the Committee may order a hearing into the conduct or competence of a lawyer by directing that the Executive Director issue a citation against the lawyer.

(1.1) After a hearing has been ordered under subrule (1), the Discipline Committee may direct the Executive Director to add an allegation to a citation.

(2) At any time before a panel makes a determination under Rule 4-35 *[Disciplinary action]*, the Discipline Committee may rescind a citation or an allegation in a citation and substitute another decision under Rule 4-4(1) *[Action on complaints]*.

Notice of citation

4-15 (1) A citation must be served on the respondent

(a) personally, or by mailing it by registered mail to the respondent's last known address, and

(b) not more than 45 days after the direction that it be issued, unless the Discipline Committee or the chair of the Committee otherwise directs.

(2) If it is impractical for any reason to serve a citation as set out in subrule (1)(a), the President may order substituted service, whether or not there is evidence that the citation will probably reach the respondent or will probably come to the respondent's attention or that the respondent is evading service.

(3) The President may designate another Bencher to act under subrule (2).

Disclosure of citation

4-16 (1) Once the respondent has been notified of a direction to issue a citation, the Executive Director may disclose to the public the citation and its status.

(2) The Executive Director may disclose the outcome of a citation, including dismissal by a panel, rescission by the Discipline Committee or the acceptance of a conditional admission.

(3) Disclosure under this Rule may be made by means of the Society's website.

(4) This Rule must not be interpreted to permit the disclosure of any information subject to solicitor and client privilege or confidentiality.

Amending an allegation in a citation

4-16.1 (1) Discipline counsel may amend an allegation contained in a citation

(a) before the hearing begins, by giving written notice to the respondent and the Executive Director. and

(b) after the hearing has begun, with the consent of the respondent.

(2) The panel may amend a citation after the hearing has begun

(a) on the application of a party, or

(b) on its own motion.

(3) The panel must not amend a citation under subrule (2) unless the respondent and discipline counsel have been given the opportunity to make submissions respecting the proposed amendment.

LAW SOCIETY RULES

Severance and joinder

4-16.2 (1) Before a hearing begins, the respondent or discipline counsel may apply in writing to the Executive Director for an order that

(a) one or more allegations in a citation be determined in a separate hearing from one or more other allegations in the same citation, or

(b) two or more citations be determined in one hearing.

(2) An application under subrule (1) must

(a) be copied to the party not making the application, and

(b) state the grounds for the order sought.

(3) The Executive Director must promptly notify the President of an application under subrule (1).

(4) The President may

(a) allow the application with or without conditions,

(b) designate another Bencher to make a determination, or

(c) refer an application to a prehearing conference.

Interim suspension, practice conditions or medical examination

4-17 (1) If there has been a direction under Rule 4-13(1) *[Direction to issue, expand or rescind citation]* to issue a citation, any 3 Benchers may do one or more of the following:

(d) require the respondent to

(i) submit to an examination by a qualified medical practitioner named by the 3 Benchers or to be named by the Chair of the Discipline Committee, and

(1.19) After a proceeding has begun, the Benchers present may adjourn the proceeding, with or without conditions, generally or to a specified date, time and place.

Appointment of discipline counsel

4-20 The Executive Director must appoint a lawyer employed by the Society or retain another lawyer to represent the Society when

(a) a direction to issue a citation is made under Rule 4-13 *[Direction to issue, expand or rescind citation]*,

(b) a respondent or a suspended lawyer appeals to the Court of Appeal under section 48 of the Act *[Appeal]*, or

(c) the Society is a respondent in any other action involving the investigation of a complaint against a lawyer or the discipline of a lawyer.

LAW SOCIETY RULES

Notice of hearing

4-24 (1) The date, time and place for the hearing to begin must be set

(a) by agreement between discipline counsel and the respondent, or

(b) failing agreement, by the Executive Director or by the Bencher presiding at a prehearing conference.

(2) When a date is set under subrule (1), the Executive Director must notify the respondent and the complainant in writing of the date, time and place of the hearing at least 30 days before the date set for the hearing to begin, unless the respondent consents to a shorter notice period.

(3) Written notification under subrule (2) may be made at the same time that the citation is served under Rule 4-15 *[Notice of citation]*, or at a later time.

Summary hearing

4-24.1 (1) This Rule may be applied in respect of the hearing of a citation comprising only allegations that the respondent has done one or more of the following:

(a) breached a Rule;

(b) breached an undertaking given to the Society;

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

(d) breached an order made under the Act or these Rules.

(2) **[rescinded]**

(3) Unless the panel rules otherwise, the respondent and discipline counsel may adduce evidence by

(a) affidavit, or

(b) an agreed statement of facts.

(4) Despite Rules 4-34 *[Submissions and determination]* and 4-35 *[Disciplinary action]*, the panel may consider facts, determination, disciplinary action and costs and issue a decision respecting all aspects of the proceeding.

Demand for disclosure of evidence

4-25 (1) In this Rule, **"evidence"** does not include any information or document about any discussion or other communication with the Ombudsperson in that capacity.

(2) At any time after a citation has been issued and before the hearing begins, a respondent may demand in writing that discipline counsel disclose the evidence that the Society intends to introduce at the hearing.

(3) On receipt of a demand for disclosure under subrule (2), discipline counsel must provide the following to the respondent by a reasonable time before the beginning of the hearing:

(a) a copy of every document that the Society intends to tender in evidence;

(b) a copy of any statement made by a person whom the Society intends to call as a witness;

(c) if documents provided under paragraphs (a) and (b) do not provide enough information, a summary of the evidence that the Society intends to introduce;

(d) a summary of any other relevant evidence in discipline counsel's possession or in a Society file available to discipline counsel, whether or not counsel intends to introduce that evidence at the hearing.

Application for details of the circumstances

4-26 (1) Before a hearing begins, the respondent may apply for disclosure of the details of the circumstances of misconduct alleged in a citation by delivering to the Executive Director and discipline counsel written notice setting out the substance of the application and the grounds for it.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) If the President is satisfied that an allegation in the citation does not contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proved, and to identify the transaction referred to, the President must order discipline counsel to disclose further details of the circumstances.

(4) Details of the circumstances disclosed under subrule (3) must be

(a) in writing, and

(b) delivered to the respondent or respondent's counsel.

(5) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

Preliminary questions

4-26.1 (1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the Executive Director and to the other party written notice setting out the substance of the application and the grounds for it,

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) When an application is made under subrule (1), the President must do one of the following as appears to the President to be appropriate:

(a) appoint a panel to determine the question;

(b) refer the question to a prehearing conference;

(c) refer the question to the panel at the hearing of the citation.

(4) The President may designate another Bencher to exercise the discretion under subrule (3).

(5) A panel appointed under subrule (3)(a) is not seized of the citation or any question pertaining to the citation other than that referred under that provision.

Pre-hearing conference

4-27 (1) The President may order a pre-hearing conference at any time before the hearing on a citation begins, at the request of the respondent or discipline counsel, or on the President's own initiative.

(2) When a conference has been ordered under subrule (1), the President must

(a) set the date, time and place of the conference, and

(b) designate a Bencher to preside at the conference.

(2.1) The Executive Director must notify the respondent and discipline counsel of the time and place of the conference.

(3) Discipline counsel must be present at the conference.

(3.1) The respondent may attend the conference in person, through counsel or both.

(3.2) If the respondent fails to attend the conference, the Bencher presiding may proceed with the conference in the absence of the respondent and may make any order under this Rule, if the Bencher is satisfied that the respondent had notice of the conference.

(4) Any person may participate in a conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present for the purpose of this Rule.

(5) The conference may consider

(a) the simplification of the issues,

(b) the necessity or desirability of amendments to the citation,

(c) the possibility of obtaining admissions that might facilitate the hearing,

(d) the discovery and production of documents,

(d.1) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public, or that exhibits and other evidence be excluded from public access,

(e) setting a date for the hearing to begin, and

(f) **[rescinded]**

(g) any other matters that may aid in the disposition of the citation.

(5.1) The respondent or discipline counsel may apply to the Bencher presiding at the conference for an order

(a) for discovery and production of documents,

(b) to withhold the identity or contact information of a witness,

(c) to adjourn the hearing of the citation,

(d) for severance of allegations or joinder of citations under Rule 4-16.2 *[Severance and joinder]*,

(e) for disclosure of the details of the circumstances of misconduct alleged in a citation under Rule 4-26 *[Application for details of the circumstances]*, or

(f) concerning any other matters that may aid in the disposition of the citation.

(6) The Bencher presiding at a pre-hearing conference may

(a) adjourn the conference generally or to a specified date, time and place,

(b) **[rescinded]**

(c) set a date for the hearing to begin, and

(d) allow or dismiss an application made under subrule (5.1) or referred to the conference under this Part.

Appointment of panel

4-28 When a citation is issued under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*, the President must establish a panel to conduct a hearing, make a determination under Rule 4-34 *[Submissions and determination]* and take action, if appropriate, under Rule 4-35 *[Disciplinary action]*.

Adjournment

4-29 (1) Before a hearing begins, the respondent or discipline counsel may apply for an order that the hearing be adjourned by delivering to the Executive Director and the other party written notice setting out the grounds for the application.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) Before the hearing begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.

(4) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

(5) After a hearing has begun, the chair of the panel may adjourn the hearing, with or without conditions, generally or to a specified date, time and place.

(6) When an adjournment is granted under this Rule, the Executive Director must notify the complainant.

(7) Rule 4-24 *[Notice of hearing]* does not apply when a hearing is adjourned and re-set for another date.

Preliminary procedures

4-30 (1) Before hearing any evidence on the allegations set out in the citation, the panel must determine whether

(a) the citation was served in accordance with Rule 4-15 *[Notice of citation]*, or

(b) the respondent waives any of the requirements of Rule 4-15.

(2) If the requirements of Rule 4-15 have been met, or have been waived by the respondent, the citation or a copy of it must be filed as an exhibit at the hearing, and the hearing may proceed.

(3) Despite subrule (1), before the hearing begins, the panel may receive and consider.

(a) the citation, and

(b) an agreed statement of facts.

4-31 [rescinded]

Evidence of respondent

4-32 Discipline counsel must notify the respondent of an application for an order that the respondent give evidence at the hearing**.**

(2) **[rescinded]**

Submissions and determination

4-34 (1) Following completion of the evidence, the panel must invite submissions from discipline counsel and the respondent on each allegation in the citation.

(2) After submissions under subrule (1), the panel must

(a) find the facts and make a determination on each allegation, and

(b) prepare written reasons for its findings on each allegation.

(3) The Executive Director must promptly deliver a copy of the panel's reasons prepared under subrule (2)(b) to each party.

Disciplinary action

4-35 (1) Following a determination under Rule 4-34 adverse to the respondent, the panel must

(a) invite the respondent and discipline counsel to make submissions as to disciplinary action,

(b) take one or more of the actions referred to in section 38(5) or (6) of the Act [*Discipline hearings*],

(c) include in its decision under this Rule

(i) any order, declaration or imposition of conditions under section 38(7) of the Act, and

(ii) any order under Rule 5-9 *[Costs of hearings]* on the costs of the hearing, including any order respecting time to pay,

(d) prepare a written record, with reasons, of its action taken under subrule (b) and any action taken under subrule (c),

(e) if it imposes a fine, set the date by which payment to the Society must be completed, and

(f) if it imposes conditions on the respondent's practice, set the date by which the conditions must be fulfilled.

(1.1) If a panel gives reasons orally for its decision under Rule 4-34(2)(a), the panel may proceed under subrule (1) before written reasons are prepared under Rule 4-34(2)(b).

(2) Despite subrule (1)(b), if the respondent is a member of another governing body and not a member of the Society, the panel may do one or more of the following:

(a) reprimand the respondent;

(b) fine the respondent an amount not exceeding $20,000;

(c) prohibit the respondent from practising law in British Columbia permanently or for a specified period of time;

(d) declare that, had the respondent been a member of the Society, the panel would have

(i) disbarred the respondent,

(ii) suspended the respondent, or

(iii) imposed conditions on the practice of the respondent.

(3) The Executive Director must promptly deliver a copy of the panel's reasons prepared under subrule (1)(d) to each party.

(4) The panel may consider the professional conduct record of the respondent in determining a disciplinary action under this Rule.

(5) Regardless of the nature of the allegation in the citation, the panel may take disciplinary action based on the ungovernability of the respondent by the Society.

(6) The panel must not take disciplinary action under subrule (5) unless the respondent has been given at least 30 days notice that ungovernability may be raised as an issue at the hearing on disciplinary action.

(7) The panel may adjourn the hearing on disciplinary action to allow compliance with the notice period in subrule (6).

Discipline proceedings involving members of other governing bodies

4-36 (1) The Executive Director must send written notice of the action to every governing body of which the person is known to be a member when

(a) a citation is authorized under Rule 4-13 *[Direction to issue, expand or rescind citation]*,

(b) **[rescinded]**

(c) a disciplinary action is imposed under Rule 4-35, or

(d) a conditional admission tendered under Rule 4-21 *[Conditional admissions]* is accepted by the Discipline Committee.

(4) The Discipline Committee may take action under Rule 4-4 *[Action on complaints]* against a lawyer who

(a) has failed or refused to pay to a governing body a fine or other monetary order arising out of the lawyer's inter-jurisdictional practice,

(b) has violated a prohibition against practice imposed by a governing body,

(c) is the subject of a declaration by a governing body under a provision similar to Rule 4-35(2)(d), or

(d) made an admission that is accepted under a provision similar to Rule 4-21.

LAW SOCIETY RULES

Public notice of suspension or disbarment

4-37 (1) When a person is suspended under this Part or Part 5 *[Hearings and Appeals]* or becomes a disbarred lawyer, the Executive Director must immediately give effective public notice of the suspension, disbarment or resignation by means including but not limited to the following:

(a) publication of a notice in

(i) the *British Columbia Gazette*,

(ii) a newspaper of general circulation in each municipality and each district referred to in Rule 1-20 *[Regional representation by Benchers]*, in which the person maintained a law office, and

(iii) the Society website, and

(b) notifying the following:

(i) the Registrar of the Supreme Court;

(ii) the Public Guardian and Trustee;

(iii) every governing body of which the person is known to be a member.

(2) When a person is suspended under Part 2 *[Membership and Authority to Practise Law]* or 3 *[Protection of the Public]*, the Executive Director may take any of the steps referred to in subrule (1).

(3) A lawyer who is suspended under this Part or Part 5 must inform all clients who reasonably expect the lawyer to attend to their affairs during the period of the suspension and clients or prospective clients who inquire about the availability of the lawyer's services during the suspension period of the following:

(a) the period the lawyer will not be practising;

(b) the arrangements the lawyer has put in place to protect the clients' interests during the time the lawyer will not be practising;

(c) the fact that the lawyer is not practising during the relevant period because of the suspension.

(4) A panel that suspends a lawyer may relieve the lawyer of any of the obligations set out in subrule (3) if the panel is satisfied that it is consistent with the public interest and imposing the obligation would be unreasonable in the circumstances.

Publication of disciplinary action

4-38 (1) The Executive Director must publish and circulate to the profession a summary of the circumstances and of any decision, reasons and action taken

(a) at the conclusion of the facts and determination portion of a hearing on a citation,

(a.1) at the conclusion of the disciplinary action portion of a hearing on a citation,

(4) When the Executive Director publishes a document under this Rule by means of the Society's website, the Executive Director must remove the publication from the part of the website for current decisions and may relocate it to an archive part of the website when

(b) all aspects of the disciplinary action imposed have been completed.

Anonymous publication

4-38.1 (3) On an application under subrule (4) or on its own motion, the panel may order that publication not identify the respondent if

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

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

Investigation of books and accounts

4-43 (1) If the chair of the Discipline Committee believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer.

(2) When an order is made under subrule (1),

(a) the Executive Director must designate one or more persons to conduct the investigation, and

(b) the lawyer or former lawyer concerned must immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence and must provide any explanations that the persons designated by the Executive Director under paragraph (a) require for the purpose of the investigation.

PART 5 – HEARINGS AND APPEALS

Application of Part

5-1 This Part applies to

(a) a hearing on an application for enrolment, call and admission or reinstatement,

(b) a hearing on a citation, and

(c) unless the context indicates otherwise, a review by the Benchers of a hearing decision.

Hearing panels

5-2 (1) A panel must consist of an odd number of persons but, subject to subrule (2), must not consist of one person.

(2) A panel may consist of one Bencher who is a lawyer if

(a) no facts are in dispute,

(b) the hearing is to consider a conditional admission under Rule 4-22 *[Consent to disciplinary action]*,

(b.1) the hearing proceeds under Rule 4-24.1 *[Summary hearing]*,

(b.2) the hearing is to consider a preliminary question under Rule 4-26.1 *[Preliminary questions]*,

(c) it is not otherwise possible, in the opinion of the President, to convene a panel in a reasonable period of time, or

(d) one or more of the original panel members cannot complete a hearing that has been begun.

(3) A panel must be chaired by a Bencher who is a lawyer.

(4) Panel members must be permanent residents of British Columbia over the age of majority.

(5) The chair of a panel who ceases to be a Bencher may, with the consent of the President, may continue to chair the panel, and the panel may complete any hearing or hearings already scheduled or begun.

(6) **[rescinded].**

(7) Two or more panels may proceed with separate matters at the same time.

(8) The President may refer a matter that is before a panel to another panel, fill a vacancy on a panel and, on the advice of the Executive Committee, may terminate an appointment to a panel.

(9) Unless otherwise provided in the Act and these Rules, a panel must decide any matter by a majority, and the decision of the majority is the decision of the panel.

Compelling witnesses and production of documents

5-4 A panel may

(a) compel the applicant or respondent to give evidence under oath, and

(b) at any time before or during a hearing, order the applicant or respondent to produce all files and records that are in the applicant's or respondent's possession or control that may be relevant to the matters raised in the citation.

Procedure

5-5 (1) Subject to the Act and these Rules, the panel may determine the practice and procedure to be followed at a hearing.

(2) Before a court reporter begins reporting the proceedings of a hearing, the chair of the panel must ensure that the reporter takes an oath or makes a solemn affirmation to faithfully and accurately report and transcribe the proceedings.

(3) The applicant, respondent or counsel for the Society may call witnesses to testify.

(4) All witnesses, including a respondent ordered to give evidence under section 41(2)(a) *[Panels]* of the Act,

(a) must take an oath or make a solemn affirmation, if competent to do so, before testifying, and

(b) are subject to cross-examination.

(5) The panel may make inquiries of a witness as it considers desirable.

(6) The hearing panel may accept any of the following as evidence:

(a) an agreed statement of facts;

(a.1) oral evidence;

(a.2) affidavit evidence;

(b) evidence tendered in a form agreed to by the respondent or applicant and Society counsel;

(c) any other evidence it considers appropriate.

Costs of hearings

5-9 (3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

(c) the citation is rescinded after the hearing has begun.

Reviews and appeals

Initiating a review

5-13(1.1) A respondent may initiate a review by delivering a Notice of Review under Rule 5-15 to the Executive Director within 30 days after the respondent is notified of the decision of the panel with respect to disciplinary action.

Pre-review conference

5-18 (3) Counsel representing the Society must be present at the conference.

(3.1) The Executive Director must notify the applicant or the respondent, as the case may be, or his or her counsel, of the time and place of the conference.

(3.2) The applicant or the respondent, as the case may be, may attend the conference, in person, through counsel or both.

(3.3) If the applicant or the respondent, as the case may be, fails to attend the conference, the Bencher presiding may proceed with the conference in the absence of that party and may make any order under this Rule, if the Bencher is satisfied that the party had been notified of the conference.

(4) If the Bencher presiding at a pre-review conference considers it appropriate, he or she may allow any person to participate in the conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present for the purpose of this Rule.

(5) The conference may consider

(a) the simplification of the issues,

(b) any issues concerning the record to be reviewed,

(c) the possibility of agreement on any issues in the review,

(d) the exchange of written arguments or outlines of argument and of authorities,

(d.1) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public or that exhibits and other evidence be excluded from public access,

(e) setting a date for the review, and

(f) any other matters that may aid in the disposition of the review.

(6) The Bencher presiding at a pre-review conference may

(a) adjourn the conference generally or to a specified date, time and place,

(b) order the exchange of written arguments or outlines of argument and of authorities, and set deadlines for that exchange,

(c) set a date for the review, and

(d) make any order or allow or dismiss any application consistent with this Rule.

LAW SOCIETY RULES

Adjournment

5-19 (1) Before a hearing on a review commences, the applicant, respondent or counsel for the Society may apply for an order that the hearing be adjourned by delivering to the Executive Director and to the other party written notice setting out the grounds for the application.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) Before the hearing begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.

(4) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a pre-review conference.

(5) After a hearing has commenced, the President or other Bencher presiding may adjourn the hearing, with or without conditions, to a specified date, time and place.

PART 10 – GENERAL

Service and notice

10-1 (1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally or by

(a) sending it by registered mail or electronic mail to his or her last known address, or

(b) serving it as directed by the Supreme Court.

(1.1) In subrule (1), **"last known address"** includes an address given to discipline counsel for delivery of documents relating to a citation.

CITATION RULES AMENDMENTS

SUGGESTED RESOLUTION:

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

1. ***In Rules 3-6(4), 3-12(3.1) and 3-14(6.1), by rescinding paragraph (c) and substituting the following***

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

(d) breached an order made under the Act or these Rules.

2. ***By rescinding Rule 4-3 and substituting the following:***

Consideration of complaints by Committee

4-3 (1) The Discipline Committee must consider any complaint referred to it under these Rules and may instruct the Executive Director to make or authorize further investigation that the Discipline Committee considers desirable.

(2) If, in the view of the Executive Director and the Chair of the Discipline Committee, there is a need to act before a meeting of the Committee can be arranged, the Executive Director may refer a complaint to the Chair for consideration under Rule 4-4.1.

3. ***In Rule 4-4(1), by rescinding paragraph (c) and substituting the following:***

(c) direct that the Executive Director issue a citation against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*.

4. ***In Rule 4-4.1(2), by rescinding paragraph (a) and substituting the following:***

(a) direct that the Executive Director issue a citation against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*, or

5. ***In Rule 4-6,***

(a) by rescinding subrule (1) and substituting the following:

(1) No one is permitted to disclose any of the following information except for the purpose of complying with the objects of the Act or with these Rules:

(a) all of the information and documents that form part of the consideration of a complaint under Rule 4-4 or 4-4.1;

(b) the result of a consideration under Rule 4-4***., and***

(b) by rescinding paragraph (b) of subrule (4) and substituting the following:

(b) the citation is in respect of an offence to which the respondent has pleaded guilty or of which the respondent has been found guilty, or

6. ***In Rule 4-9(6), by rescinding paragraph (c) and substituting the following:***

(c) direct that a citation be issued against the lawyer under Rule 4-13(1) *[Direction to issue, expand or rescind citation]*;

7. ***By rescinding Rule 4-13 and substituting the following:***

Direction to issue, expand or rescind citation

4-13 (1) The Discipline Committee or the chair of the Committee may order a hearing into the conduct or competence of a lawyer by directing that the Executive Director issue a citation against the lawyer.

(1.1) After a hearing has been ordered under subrule (1), the Discipline Committee may direct the Executive Director to add an allegation to a citation.

(2) At any time before a panel makes a determination under Rule 4-35 *[Disciplinary action]*, the Discipline Committee may rescind a citation or an allegation in a citation and substitute another decision under Rule 4-4(1) *[Action on complaints]*.

8. ***By rescinding Rule 4-15(1) and substituting the following:***

Notice of citation

4-15 (1) A citation must be served on the respondent

(a) personally, or by mailing it by registered mail to the respondent's last known address, and

(b) not more than 45 days after the direction that it be issued, unless the Discipline Committee or the chair of the Committee otherwise directs.

9. ***By adding the following Rules:***

Amending an allegation in a citation

4-16.1 (1) Discipline counsel may amend an allegation contained in a citation

(a) before the hearing begins, by giving written notice to the respondent and the Executive Director. and

(b) after the hearing has begun, with the consent of the respondent.

(2) The panel may amend a citation after the hearing has begun

(a) on the application of a party, or

(b) on its own motion.

(3) The panel must not amend a citation under subrule (2) unless the respondent and discipline counsel have been given the opportunity to make submissions respecting the proposed amendment.

Severance and joinder

4-16.2 (1) Before a hearing begins, the respondent or discipline counsel may apply in writing to the Executive Director for an order that

(a) one or more allegations in a citation be determined in a separate hearing from one or more other allegations in the same citation, or

(b) two or more citations be determined in one hearing.

(2) An application under subrule (1) must

(a) be copied to the party not making the application, and

(b) state the grounds for the order sought.

(3) The Executive Director must promptly notify the President of an application under subrule (1).

(4) The President may

(a) allow the application with or without conditions,

(b) designate another Bencher to make a determination, or

(c) refer an application to a prehearing conference.

10. ***In Rule 4-17***

(a) by rescinding subparagraph (i) of subrule (1)(d) and substituting the following:

(i) submit to an examination by a qualified medical practitioner named by the 3 Benchers or to be named by the Chair of the Discipline Committee, and***, and***

(b) by rescinding subrule (1.19) and substituting the following:

(1.19) After a proceeding has begun, the Benchers present may adjourn the proceeding, with or without conditions, generally or to a specified date, time and place.

11. ***By rescinding Rule 4-24 and substituting the following:***

Notice of hearing

4-24 (1) The date, time and place for the hearing to begin must be set

(a) by agreement between discipline counsel and the respondent, or

(b) failing agreement, by the Executive Director or by the Bencher presiding at a prehearing conference.

(2) When a date is set under subrule (1), the Executive Director must notify the respondent and the complainant in writing of the date, time and place of the hearing at least 30 days before the date set for the hearing to begin, unless the respondent consents to a shorter notice period.

(3) Written notification under subrule (2) may be made at the same time that the citation is served under Rule 4-15 *[Notice of citation]*, or at a later time.

12. ***By rescinding Rule 4-24.1(1)(d), (2) and (4) and substituting the following:***

(d) breached an order made under the Act or these Rules.

(4) Despite Rules 4-34 *[Submissions and determination]* and 4-35 *[Disciplinary action]*, the panel may consider facts, determination, disciplinary action and costs and issue a decision respecting all aspects of the proceeding.

13. ***In Rule 4-25***

(a) by rescinding subrule (2) and substituting the following:

(2) At any time after a citation has been issued and before the hearing begins, a respondent may demand in writing that discipline counsel disclose the evidence that the Society intends to introduce at the hearing***., and***

(b) in subrule (3), by striking "the start of the hearing:***" and substituting "***the beginning of the hearing:***".***

14. ***By rescinding Rule 4-26(1), (2) and (5) and substituting the following:***

(1) Before a hearing begins, the respondent may apply for disclosure of the details of the circumstances of misconduct alleged in a citation by delivering to the Executive Director and discipline counsel written notice setting out the substance of the application and the grounds for it.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(5) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

15. ***By adding the following Rule:***

Preliminary questions

4-26.1 (1) Before a hearing begins, the respondent or discipline counsel may apply for the determination of a question relevant to the hearing by delivering to the Executive Director and to the other party written notice setting out the substance of the application and the grounds for it,

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) When an application is made under subrule (1), the President must do one of the following as appears to the President to be appropriate:

(a) appoint a panel to determine the question;

(b) refer the question to a prehearing conference;

(c) refer the question to the panel at the hearing of the citation.

(4) The President may designate another Bencher to exercise the discretion under subrule (3).

(5) A panel appointed under subrule (3)(a) is not seized of the citation or any question pertaining to the citation other than that referred under that provision.

16. ***In Rule 4-27***

(a) by striking "before the hearing on a citation commences***" in subrule (1) and substituting "***before the hearing on a citation begins***", and***

(b) by rescinding subrules (3) to (6) and substituting the following:

(2.1) The Executive Director must notify the respondent and discipline counsel of the time and place of the conference.

(3) Discipline counsel must be present at the conference.

(3.1) The respondent may attend the conference in person, through counsel or both.

(3.2) If the respondent fails to attend the conference, the Bencher presiding may proceed with the conference in the absence of the respondent and may make any order under this Rule, if the Bencher is satisfied that the respondent had notice of the conference.

(4) Any person may participate in a conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present for the purpose of this Rule.

(5) The conference may consider

(a) the simplification of the issues,

(b) the necessity or desirability of amendments to the citation,

(c) the possibility of obtaining admissions that might facilitate the hearing,

(d) the discovery and production of documents,

(d.1) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public, or that exhibits and other evidence be excluded from public access,

(e) setting a date for the hearing to begin, and

(g) any other matters that may aid in the disposition of the citation.

(5.1) The respondent or discipline counsel may apply to the Bencher presiding at the conference for an order

(a) for discovery and production of documents,

(b) to withhold the identity or contact information of a witness,

(c) to adjourn the hearing of the citation,

(d) for severance of allegations or joinder of citations under Rule 4-16.2 *[Severance and joinder]*,

(e) for disclosure of the details of the circumstances of misconduct alleged in a citation under Rule 4-26 *[Application for details of the circumstances]*, or

(f) concerning any other matters that may aid in the disposition of the citation.

(6) The Bencher presiding at a pre-hearing conference may

(a) adjourn the conference generally or to a specified date, time and place,

(c) set a date for the hearing to begin, and

(d) allow or dismiss an application made under subrule (5.1) or referred to the conference under this Part.

17. ***In Rule 4-29***

(a) by rescinding subrules (1) to (5) and substituting the following:

(1) Before a hearing begins, the respondent or discipline counsel may apply for an order that the hearing be adjourned by delivering to the Executive Director and the other party written notice setting out the grounds for the application.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) Before the hearing begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.

(4) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a prehearing conference.

(5) After a hearing has begun, the chair of the panel may adjourn the hearing, with or without conditions, generally or to a specified date, time and place**.,** ***and***

(b) by adding the following subrule:

(7) Rule 4-24 *[Notice of hearing]* does not apply when a hearing is adjourned and re-set for another date.

18. ***In Rule 4-30, by adding the following subrule:***

(3) Despite subrule (1), before the hearing begins, the panel may receive and consider

(a) the citation, and

(b) an agreed statement of facts.

19. ***By rescinding Rule 4-31.***

20. ***By rescinding Rule 4-32 and substituting the following:***

Evidence of respondent

4-32 Discipline counsel must notify the respondent of an application for an order that the respondent give evidence at the hearing.

20. ***By rescinding Rule 4-34(1) and (2) and substituting the following:***

Submissions and determination

4-34 (1) Following completion of the evidence, the panel must invite submissions from discipline counsel and the respondent on each allegation in the citation.

(2) After submissions under subrule (1), the panel must

(a) find the facts and make a determination on each allegation, and

(b) prepare written reasons for its findings on each allegation.

21. ***In Rule 4-35***

(a) by rescinding subrule (1)(a) and substituting the following:

Disciplinary action

4-35 (1) Following a determination under Rule 4-34 adverse to the respondent, the panel must

(a) invite the respondent and discipline counsel to make submissions as to disciplinary action***, and***

(b) by rescinding subrules (4) to (7) and substituting the following:

(4) The panel may consider the professional conduct record of the respondent in determining a disciplinary action under this Rule.

(5) Regardless of the nature of the allegation in the citation, the panel may take disciplinary action based on the ungovernability of the respondent by the Society.

(6) The panel must not take disciplinary action under subrule (5) unless the respondent has been given at least 30 days notice that ungovernability may be raised as an issue at the hearing on disciplinary action.

(7) The panel may adjourn the hearing on disciplinary action to allow compliance with the notice period in subrule (6).

22. ***In Rule 4-36***

(a) by rescinding subrule (1)(b) and (c) and substituting the following:

(c) a disciplinary action is imposed under Rule 4-35, or

(d) a conditional admission tendered under Rule 4-21 *[Conditional admissions]* is accepted by the Discipline Committee***, and***

(b) by rescinding subrule (4)(b) and (c) and substituting the following:

(b) has violated a prohibition against practice imposed by a governing body,

(c) is the subject of a declaration by a governing body under a provision similar to Rule 4-35(2)(d), or

(d) made an admission that is accepted under a provision similar to Rule 4-21.

22. ***In Rule 4-37 by rescinding subrule (1)(b)(ii) and substituting the following:***

(ii) the Public Guardian and Trustee;

(iii) every governing body of which the person is known to be a member.

23. ***In Rule 4-35***

(a) in subrule (1), by striking "facts and verdict portion of a hearing***" and substituting "***facts and determination portion of a hearing***", and***

(b) in subrules (1) and (4), by striking "penalty portion of a hearing***" and substituting "***disciplinary action portion of a hearing***".***

24. ***In Rule 4-38.1***

(a) in subrule (3), by striking "imposed a penalty***" and substituting "***imposed a disciplinary action***" and***

(b) in subrule (4), by striking "findings of fact and verdict***" and substituting "***findings of fact and determination***".***

25. ***By rescinding Rule 4-43(1) and substituting the following:***

(1) If the chair of the Discipline Committee believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer.

26. ***In Rule 5-2***

(a) in subrule (2), by rescinding paragraphs (b) and (d) and substituting the following:

(b) the hearing is to consider a conditional admission under Rule 4-22 *[Consent to disciplinary action]*,

(b.2) the hearing is to consider a preliminary question under Rule 4-26.1 *[Preliminary questions]*,

(d) one or more of the original panel members cannot complete a hearing that has been begun.***; and***

(b) by rescinding subrules (4) to (6) and substituting the following:

(4) Panel members must be permanent residents of British Columbia over the age of majority.

(5) The chair of a panel who ceases to be a Bencher may, with the consent of the President, may continue to chair the panel, and the panel may complete any hearing or hearings already scheduled or begun.

27. ***By rescinding the title of Rule 5-4 and substituting the following:***

Compelling witnesses and production of documents

28. ***In Rule 5-5***

(a) by rescinding subrule (2) and substituting the following

(2) Before a court reporter begins reporting the proceedings of a hearing, the chair of the panel must ensure that the reporter takes an oath or makes a solemn affirmation to faithfully and accurately report and transcribe the proceedings.***, and***

(b) in subrule (6), by adding the following paragraphs:

(a.1) oral evidence;

(a.2) affidavit evidence;**.**

29. ***In Rule 5-9, by striking*** **"**after the hearing has commenced.**"** ***and substituting*** **"**after the hearing has begun.**".**

30. ***In Rule 5-13, by striking*** **"**with respect to penalty.**"** ***and substituting*** **"**with respect to disciplinary action.**".**

31. ***By rescinding Rule 5-18(3) to (6) and substituting the following:***

(3) Counsel representing the Society must be present at the conference.

(3.1) The Executive Director must notify the applicant or the respondent, as the case may be, or his or her counsel, of the time and place of the conference.

(3.2) The applicant or the respondent, as the case may be, may attend the conference, in person, through counsel or both.

(3.3) If the applicant or the respondent, as the case may be, fails to attend the conference, the Bencher presiding may proceed with the conference in the absence of that party and may make any order under this Rule, if the Bencher is satisfied that the party had been notified of the conference.

(4) If the Bencher presiding at a pre-review conference considers it appropriate, he or she may allow any person to participate in the conference by telephone or by any other means of communication that allows all persons participating to hear each other, and a person so participating is present for the purpose of this Rule.

(5) The conference may consider

(a) the simplification of the issues,

(b) any issues concerning the record to be reviewed,

(c) the possibility of agreement on any issues in the review,

(d) the exchange of written arguments or outlines of argument and of authorities,

(d.1) the possibility that privilege or confidentiality might require that all or part of the hearing be closed to the public or that exhibits and other evidence be excluded from public access,

(e) setting a date for the review, and

(f) any other matters that may aid in the disposition of the review.

(6) The Bencher presiding at a pre-review conference may

(a) adjourn the conference generally or to a specified date, time and place,

(b) order the exchange of written arguments or outlines of argument and of authorities, and set deadlines for that exchange,

(c) set a date for the review, and

(d) make any order or allow or dismiss any application consistent with this Rule.

31. ***By rescinding Rule 5-19(1) to (4) and substituting the following:***

(1) Before a hearing on a review commences, the applicant, respondent or counsel for the Society may apply for an order that the hearing be adjourned by delivering to the Executive Director and to the other party written notice setting out the grounds for the application.

(2) The Executive Director must promptly notify the President of an application under subrule (1).

(3) Before the hearing begins, the President must decide whether to grant the adjournment, with or without conditions, and must notify the parties accordingly.

(4) The President may

(a) designate another Bencher to make a determination under subrule (3), or

(b) refer the application to a pre-review conference.

32. ***By rescinding Rule 10-1(1) and substituting the following:***

(1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally or by

(a) sending it by registered mail or electronic mail to his or her last known address, or

(b) serving it as directed by the Supreme Court.

(1.1) In subrule (1), **"last known address"** includes an address given to discipline counsel for delivery of documents relating to a citation.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Delivery of Legal Services Task Force Final Report
For: The Benchers

Date: October 1, 2010

Art Vertlieb, QC (Chair)
Haydn Acheson
Carol Hickman
Gavin Hume, QC
William Jackson, QC
Bruce LeRose, QC
David Mossop, QC
Gregory Petrisor
Stanley Lanyon, QC
James Vilvang, QC

Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **Delivery of Legal Services Task Force**

Policy and Legal Services Department
Michael Lucas 604-452-5777
Doug Munro 604-605-5313

PREAMBLE

The purpose of this Report is to recommend changes to the model through which legal services are delivered in British Columbia in order to enhance the public's access to competent and affordable legal services. The approach focuses on incremental change, by increasing the roles that paralegals and articled students can perform under the supervision of a lawyer. The delivery of legal services and the history of the profession has never been static. The profession has through its history, attempted, as necessary, to evolve with the needs of the public it serves. This Report represents a further stage in that evolutionary history.

The Task Force makes a series of recommendations in this Report. The rationale for the recommendations is explained in the body of the Report under the various relevant headings, and a Summary of the recommendations is included at the end of the Report for ease of reference.

In working through its mandate and in making its recommendations, the Task Force has tried to find the balance through which the public's access to competent and affordable legal services will be enhanced without introducing an unacceptable level of harm to those who need such services. The Task Force believes, however, that these suggested reforms must be tested in the market place in order to determine whether it has found the right balance.

1. BACKGROUND

The Delivery of Legal Services Task Force was created to advance Strategy 1-1 of the 2009-2011 Strategic Plan:

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

The Task Force issued a preliminary report to the Benchers in December 2009, and an interim report at the Benchers' Retreat in June 2010. The detailed analysis contained in those reports is not duplicated here, but a brief synopsis follows.

The concept for strategy 1-1 had its genesis in the work of the Law Society of British Columbia Futures Committee. After a lengthy analysis, that Committee recognized the time had come to explore broadening the range of people able to provide legal services. The Committee recommended that additional research be performed to assess the best way forward. On the strength of that recommendation the Benchers created the Delivery of Legal Services Task Force. The Task Force's initial mandate involved collecting missing information to assess the need for change. In addition to reviewing numerous reports and surveys, the Law Society commissioned an Ipsos Reid survey to get a better sense of how British Columbians of low, middle, and high income resolved their serious

legal problems. Following its report to the Benchers in December 2010 the Task Force was given a mandate to analyze the substantive issues involved in expanding the range of persons permitted to provide legal services. This stage involved select consultations and additional research and analysis, leading to the report to the Benchers in June 2010.

As a result of its research, the Task Force confirmed that access to justice and to lawyers is a challenge being tackled around the world. There exists a growing body of research and discussion of this topic. In light of this reality the Task Force decided to take an incremental approach to reform, rather than attempt to find a universal solution. This decision led the Task Force to focus on three topics:

1. Expanded roles for paralegals;
2. Expanded roles for articled students;
3. Issues relating to Community Advocates.

The Benchers' discussion in June 2010 focused on paralegals and articled students. The majority of the Benchers concluded that both paralegals and articled students should be able to perform additional duties, but that further details, particularly with respect to paralegals, had to be worked out.

2. PURPOSE OF THIS REPORT

This report contains recommendations of the Task Force for moving forward with the goal of enhancing access to affordable, competent legal services, in light of the Benchers' discussion of the topic on June 11, 2010.

3. ARTICLED STUDENTS

The vast majority of the Benchers were of the view that articled students should be allowed to perform enhanced functions, including acting as Commissioners for Oaths.

The Task Force recommends that the Credentials Committee be directed to explore expanded duties for Articled Students. The referral of matters to the Credentials Committee should include the background material on Articled Students that the Task Force considered.

The Law Society, as part of its request for amendments to the *Legal Profession Act*, has also asked that s. 60 of the *Evidence Act* be amended to allow articled students to act as commissioners for oaths.

4. PARALEGALS

As a result of the discussion and directions given by the Benchers at the June 2010 Retreat the Task Force takes it that a consensus has been reached, and therefore recommends, that it is time to enhance the permitted duties of paralegals acting under the supervision of a lawyer.

Issues relating to the definition of paralegal, as well as the scope of enhanced duties and nature of supervision need to be worked out. This section of the report attempts to synthesize the views of the Benchers and suggest a way forward.

A. *Definition of Paralegal*

The Benchers have recognized that it is important to define "paralegal". Doing so will reduce the risk of public confusion concerning the roles of non-lawyers working at a law office. It will also allow lawyers to identify which employees lawyers can hold out as paralegals. This approach is consistent with earlier reports such as the *Proposal for a Law Society Paralegal Certification Scheme* (May 2003) (**Attachment 1**), although that report ultimately focused on credentialing.

"Legal Assistant" is the term the Law Society uses at present for the services that are permitted under the *Professional Conduct Handbook*. The Law Society does not define the term or set criteria for the application of that term however, so there is a wide range of people providing legal assistant services. In essence, lawyers have been left on their own to determine who is a legal assistant. The Task Force recommends keeping the term "legal assistant" for the category of existing functions in the *Handbook*, and creating a new category of "paralegal" that could perform the expanded functions proposed by the Task Force, as well as the current functions allowed for legal assistants. In order to distinguish between paralegals and legal assistants, at a minimum the term "paralegal" should be defined.

A relatively straightforward approach would be to modify the proposed credentialing criteria detailed in Attachment 1, turning the criteria into guidelines that a lawyer must consider in deciding whether to hold someone out as a paralegal.

The Paralegal Task Force also recognized in 2003 that a paralegal requires knowledge of not only substantive and procedural law but also practical and analytical skills. A definition based on these four pillars might look something like this:

> A paralegal is a trained professional who:
> - works under the supervision of a lawyer;
> - possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
> - possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and

- carries out his or her work in a competent and ethical manner.

This definition might be supplemented by a rule and guidelines that state:

> A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [**refer to guidelines**]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

An alternative approach is to set (objective) criteria in the definition and then provide guidelines for the lawyer to make the subjective determination as to whether a staff member can be held out as a paralegal. Such an approach might look like this:

> A paralegal is a person who is qualified by virtue of education,[1] training and experience to provide services normally performed by a lawyer, provided those services are delivered under the supervision of a lawyer.[2]

The guidelines could then set out factors for a lawyer to take into account, such as the bulleted points above and the list of acceptable schools/education contained in the Paralegal Task Force report.

The Task Force discussed the "training" requirements for paralegals. The Task Force recognized that not all legal assistants have completed a paralegal training course. Many legal assistants will have developed their experience over a number of years working in a firm setting. The Task Force believes that education is an important part of training, but an allowance has to be made for people who have achieved adequate substantive and analytical skills through work experience. One possibility is to set education as a requirement moving forward, and to grandfather in experienced legal assistants as of a certain date. The Task Force considered whether a certain number of years experience should be required, but did not arrive at a conclusion. Ultimately, the Task Force believes the onus will lie on the supervising lawyer to ascertain whether the staff member possesses the requisite skills to function as a paralegal.

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[1] Education could be described in greater detail (e.g. with a degree or diploma in legal studies from a recognized university or college, etc.).

[2] Should "character" also be included?

I. Recommendations regarding definition of "paralegal"

The Task Force recommends that:

a) the term "paralegal", or a new coined term, be defined in the *Professional Conduct Handbook* to make it clear which staff can perform enhanced paralegal functions. Two options for definitions are set out above. Consideration should be given whether to set out criteria for the training of paralegals as well as whether to refer to them as "professionals";

b) a rule or guidelines similar to that set out above accompany the definition in order to assist lawyers in identifying which staff can be held out as paralegals, and to put lawyers on heightened notice of their professional obligations regarding supervising these paralegals.

The Task Force believes that option (b) is the better choice and should be coupled with the bulleted definition on page 4.

B. *What expanded duties should paralegals be allowed to perform?*

At present, the three main prohibitions contained in the *Professional Conduct Handbook* relate to giving undertakings, acting as an advocate, and providing legal advice.

I. *Undertakings*

The consensus view of the Benchers was that paralegals should not be allowed to provide undertakings. A concern relating to undertakings is that they are a personal obligation of the lawyer, and therefore might not easily transfer to the paralegal. Perhaps more significantly, undertakings are often related to monies in trust and that calls for a heightened degree of protection. Lastly, requiring lawyers to provide undertakings creates a mechanism to involve the lawyer in the file, thereby dovetailing with the object of properly supervising the paralegal.

II. *Advocacy*

With respect to advocacy, the Task Force is of the opinion that the extent to which a non-lawyer can appear in court depends on what the courts are prepared to allow. It does not make sense for the Law Society to create a list of permissible advocacy functions at this time only to risk having them rejected by the courts. As the Benchers are aware, the Task Force laid the ground work for future consultations with the British Columbia Supreme Court and the Provincial Court of British Columbia on this subject. The Task Force believes the Law Society should work with the courts to ascertain what advocacy

functions should be permitted, and that the Law Society should adopt the findings from that work.

It is important to realize that working with the courts will require an allocation of resources, and will require both Bencher and staff time, and that this needs to be reflected in the Law Society's Strategic Plan. The Task Force therefore recommends that the Strategic Plan be amended to include the following initiative in furtherance of Strategy 1-1:

> A working group or task force of Benchers and staff will work with the British Columbia Supreme Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.

III. *Giving legal advice*

When the Task Force discussed this topic it decided that the best approach is to allow the supervising lawyer to determine the circumstances under which it is appropriate for the paralegal to give legal advice. The reason for this conclusion is largely pragmatic. To attempt to chart out every conceivable circumstance for providing legal advice (taking into account such matters as the areas of law involved in the retainer, the seriousness of the matter, the complexity of the matter, the implications to the justice system, and the implications to the parties involved), would be to embark on an epic enterprise around which consensus would never be achieved. The more rigid the codification, the less ability there is for a lawyer to recognize the varied skill between individual paralegals. At present there are some lawyers who rely tremendously on the work of a paralegal in certain areas because the paralegal is the "go-to" source at the firm. A rigid codification would almost certainly stifle the level of existing functions being performed in those settings, and apparently being performed without great harm to the public.

Every additional administrative layer will act as a deterrent to the profession in using paralegals to perform enhanced functions. The rules will either be ignored (if they constrict existing practices), or not embraced (if they are perceived to be too cumbersome to learn and apply in practice). The Task Force remains of the opinion that protection of the public is better achieved through properly defining who can perform enhanced functions, providing rules and guidelines for supervision, and ensuring our regulatory process is robust enough to deal with complaints against lawyers about substandard paralegal work.

IV. *Recommendations regarding expanded duties for paralegals*

The Task Force recommends:

a) Paralegals should not be allowed to give or receive undertakings;
b) The Law Society should work with the courts to determine what forms of advocacy paralegals should be permitted to perform;
c) The Strategic Plan should be amended to include as follows: A working group or task force of Benchers and staff will work with the British Columbia Supreme Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.
d) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

C. *Supervision of Paralegals*

Supervision is the critical part of expanding roles for paralegals. The key is to find a balance between rules for supervision, which create safeguards, and flexibility which increases the likelihood lawyers will use paralegals for enhanced roles, thereby enhancing access to justice. If the balance is cast too far in either direction we will either create reforms that will not be embraced and therefore accomplish nothing, or that are too unstructured and therefore introduce a level of risk to the public that is unacceptable. The Benchers considered a number of concepts that are central to the issue of supervision.

When the Task Force discussed supervision it considered a number of concepts that might fit within a general framework of supervision, including:

- A supervising lawyer should be aware of what functions staff are performing, what files are assigned to staff, etc;
- The supervising lawyer must establish effective communication with staff;
- The supervising lawyer should engage in file triage and to determine proper delegation to staff;
- The supervising lawyer should ensure staff are trained and competent to undertake assigned functions;
- The supervising lawyer should engage in periodic file review and debriefing sessions (scaled to the experience and qualifications of the staff being supervised and the nature of the files assigned to staff);
- The supervising lawyer should provide ongoing skills training for staff;
- The supervising lawyer would benefit by asking the clients to give feedback regarding the quality of services received;

- The supervising lawyer would benefit from creating written supervision policy & procedure document.

The Benchers may wish for any, or all, of these concepts to be expressed in guidelines for lawyers' supervision of paralegals.

In addition to these concepts, the Task Force explored whether there should be a limit on the number of paralegals a lawyer can supervise, and whether remote supervision should be permitted. These topics led to a variety of views expressed by the Benchers, and are analyzed in more detail in the following sections.

(i). *Should there be a limit on the number of paralegals a lawyer can supervise?*

When the Benchers discussed the idea of capping the number of paralegals a lawyer can supervise, approximately 60% were in favour of a cap for paralegals performing enhanced roles.

At both the Task Force level, and the Bencher level, the concept of capping the number of paralegals has presented challenges for achieving unanimity. A cap has merit because logic tells us that at some point supervision becomes fraught with risk as the ratio of staff to supervising lawyer grows. The challenge is that a hard cap is inflexible, and fails to recognize that effective supervision is about more than ratios. Some lawyers will be able to competently supervise many paralegals while others will struggle supervising one. Competency to supervise is not dictated by a cap. Recognizing this tension, the challenge becomes identifying the number, or whether to identify a number at all.

Although competency is not dictated by a cap, capacity to supervise is influenced by the number of staff a lawyer is responsible for. As a result there are insurance implications if the number is not capped. This is because for each additional staff providing legal services the risk profile of the lawyer increases without a commensurate increase in insurance fees. The opinion the Task Force received from the Lawyers Insurance Fund recognized that a cap would have a mitigating effect.

One perspective raised by the Benchers was that it is preferable not to institute a cap, and that the decision should be left to lawyers. It was noted that the key would be to make it clear to lawyers that they carried the responsibility for the work performed by the paralegal, and liability for the work performed. The argument is that properly instructed, lawyers will not take on the risk associated with supervising too many paralegals. This approach allows for a case-by-case flexibility.

One suggestion considered by the Task Force was to limit the number of supervised paralegals performing enhanced functions to two, similar to the number of articled students that a principal may supervise. When the Task Force discussed this concept it considered the similarities and differences between the principal/articled student relationship and the lawyer/paralegal relationship. If the theory behind a cap is that the public is at risk if a lawyer supervises too many paralegals, how do we deal with

situations where the lawyer also acts as a principal? If the paralegal cap was set at two, one could envision a situation where the lawyer is acting as principal for one student while supervising two paralegals. This would effectively mean the lawyer was supervising three people who are allowed to provide lawyer-like services. Is the public more at risk in this situation as compared to a lawyer supervising two paralegals? If not, then might we allow a lawyer to supervise three paralegals?

A possible way around this discrepancy would be to say that a lawyer can supervise up to four paralegals and articled students, provided no more than two are articled students. Another possibility is to allow a lawyer who has supervised the maximum number of paralegals for a set period of time without a founded complaint to be able to apply for an expansion of the cap. This would allow lawyers on a case-by-case basis to expand the delivery model, but with a safeguard based on past performance.

While the Task Force was alive to arguments both in favour of and opposed to capping, it ultimately concluded the insurance issues arising from not having a cap, together with the resulting adverse effect on the protection of the public interest, spoke in favour of a cap. The Benchers may wish to consider whether a process for applying for an exemption should be created.

I. Recommendation regarding capping the number of paralegals a lawyer can supervise

There are essentially three options the Task Force considered regarding a cap:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of paralegals performing enhanced functions a lawyer can supervise;
3. Absent obtaining permission from the Law Society, a lawyer can supervise a maximum of four paralegals performing enhanced functions and articled students, with no more than 2 being articled students.

The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need;

(ii). *Should remote supervision be permitted*?

Similar to the issue of capping, neither the Benchers nor the Task Force had unanimity regarding remote supervision. Approximately 56% of the Benchers favoured allowing remote supervisions.

In determining the best approach, it is worth considering the extent to which remote supervision occurs at present. If one considers the amount of communications where instructions are provided by way of phone and/or email to staff, it is clear that a measure of delegation and supervision is already occurring via telecommunication devices.

It is also important to be mindful that people are increasingly communicating through digital technologies. It is becoming the norm, and people are developing greater fluency with the technology.

When the Task Force discussed Community Advocates with Wayne Robertson, QC, Executive Director of the Law Foundation of British Columbia, he explained that there are some communities, such as Haida Gwaii, where the advocate is currently being supervised remotely by lawyers in Vancouver. This is because there are no lawyers in Haida Gwaii. This is similar to the observation, made by Pamela Shields at the Benchers' Retreat, that there are paralegals working in some aboriginal communities where there are no lawyers. An absolute restriction on the ability to remotely supervise paralegals would have a detrimental effect on these important services.

One concern raised by some Benchers is that if remote supervision was allowed, then large firms would set up paralegals in smaller communities, providing lower cost legal services that harm the viability of local lawyers. In determining the weight to be given to this concern, the Benchers need to be guided by the mandate to protect the public interest in the administration of justice. If the conclusion is that the remotely supervised paralegal cannot provide services competently, then the services should not be permitted. If the services can be provided competently, then the services should be allowed. If the Society is seen to be protecting the economic interest of lawyers over the access to justice needs of British Columbians it will create negative optics for the profession and the future of self-regulation.

Predicting the likelihood of harm to practices outside major urban centres is not a scientific enterprise. One may reasonably take the position that remote supervision of paralegals will harm legal practices in smaller communities, but one may equally take a contrary view. The decision to implement a cap would have a mitigating effect on the potential materialization of that risk, however. It is highly unlikely that a lawyer in Vancouver would use his or her limited cap space to seed remote communities with paralegals. The cost of operating the law practice from one office with four paralegals is less than operating five offices (one with the lawyer, and four remote offices). Profit margins would be seriously impacted, and it would not in most cases be a good business decision. Another consideration is that the retainer will continue to be between the lawyer and the client, and if the client lives in a remote community and wants to speak to

the lawyer, odds are they would prefer having the lawyer's office located within (or proximate) to the community where the client lives. The local firm's presence in, and connection to, the community gives it an advantage that the remotely supervised satellite office cannot likely match.

Recognizing, however, that a decision either way is speculative, one possibility is to place an additional cap on the number of remotely supervised offices a lawyer (or law firm) can have.

II. Recommendation regarding remote supervision of a paralegal

The Task Force Recommends that remote supervision of paralegals be permitted, but that the Benchers also consider capping the number of paralegals a lawyer or law firm can supervise through remote supervision.

D. *General issues*

If the Benchers adopt the approach recommended by the Task Force there are several factors to bear in mind:

1. It would be important to make it clear that lawyers remain responsible for the actions of non-paralegal staff. While the wording of Chapter 12, Rule 1 of the *Professional Conduct Handbook* covers this, it is a point worth emphasizing in communications about the changes.
2. The requirements for supervision should be set out in rules (the *Handbook*?), guidelines, or both.
3. The more a paralegal is a proxy for the lawyer, particularly in giving legal advice or appearing in court, the more important good character becomes. Without regulating paralegals directly, how can the good character of a paralegal be assured? One possibility is to require lawyers who use paralegals to require the paralegal to sign an oath or affirmation to subscribe to certain standards of conduct.
4. Because "paralegal" is already in common usage, the Benchers might want to consider whether a new term should be coined. The risk in using an existing term is that some firms will have multiple people using the term already, many of whom might not qualify as paralegals under the new scheme. Using adjectival descriptors might similarly cause problems. For example "Advanced Paralegal" or "Enhanced Paralegal" might have pejorative connotations for ordinary paralegals. Because we don't certify paralegals, "Certified Paralegal" is not an option. "Registered Paralegals" might also require a scheme. One possibility would be to call them "Professional Paralegals" to connote a higher standard.
5. An idea the Task Force approved of, but which was not debated by the Benchers, is the idea of requiring the supervising lawyer to submit a form to the Law Society that sets out important information about the supervision arrangement. If the form were automated through the member login portion of the website, it

would be easier to analyze information than if the form is a paper form. This will likely add administrative functions to the Law Society's operations, and at some point the cost and resource implications for Member Services needs to be considered. The form might include:

a. The names of the paralegals the lawyer is supervising;

b. The areas of law in which the lawyer is using the paralegals;

c. The types of enhanced services the paralegal will perform;

d. The education and experience of the paralegal;

e. A copy of the oath/affirmation of conduct;

f. The location of the office the lawyer & paralegals work in;

g. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;

h. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.

6. It is important to ensure that any changes to the roles of paralegals do not harm existing programs provided by the Legal Services Society or funded agencies, or the community advocate work funded by the Law Foundation. Poverty law services fill an important gap in the access to justice landscape, and it is important to avoid unintended consequences arising from the proposed changes.

I. Recommendations regarding general issues

a) The requirements and restrictions for lawyer supervision should be set out in either the Rules, the *Handbook*, or an appendix to the *Handbook*.

b) [Optional] The supervising lawyer should be required to submit a form to the Law Society electronically that includes:

i. The names of the paralegals the lawyer is supervising;

ii. The areas of law in which the lawyer is using the paralegals;

iii. The types of enhanced services the paralegal will perform;

iv. The education and experience of the paralegal;

v. A copy of the oath/affirmation of conduct;

vi. The location of the office the lawyer & paralegals work in;

vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;

viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.

The Task Force did not determine that the form was required. It is provided as an optional recommendation because the Benchers have not made a determination as to whether it is desirable.

E. *Regulatory Process*

In the past, an allegation of failure by a lawyer to supervise staff has never led to a disciplinary process more severe than a Conduct Review. As the Task Force observed in its June 11, 2010 report:

> If the supervised paralegal engages in activity that would lead to a suspension or disbarment if performed by a lawyer, but the result is never more severe than a conduct review for the supervising lawyer, we have arguably created a weaker regulatory function with respect to those services. (p. 17)

Either the rules (the *Handbook*?) or the guidelines should make it clear that if a paralegal performs a task incompetently the lawyer may be treated, for regulatory purposes, as if the lawyer performed the task incompetently. In other words, our regulatory process must not allow for a two-tiered model of regulation based on whether the services were provided by a lawyer or a paralegal. Such a result cannot be permitted because we have no means to directly sanction the paralegal. Serious errors by a paralegal must have the potential to carry serious consequences for the supervising lawyer. Public confidence in the regulatory system requires this safeguard and lawyers must be made to understand this necessity and the risk associated with it. The disciplinary process must be commensurate with the gravity of the complaint, and the process must be as transparent as possible in order to ensure the public has confidence in the regulatory model.

I. Recommendations regarding the regulatory process

The Task Force recommends that the Discipline Guidelines be amended to make it clear that failure to supervise a paralegal performing enhanced functions is by its nature more serious than a standard finding of failure to supervise, and the full range of discipline actions should be available. A sanction that should be added to the list is a prohibition against a lawyer being able to supervise paralegals performing enhanced functions in the future.

5. EXEMPTIONS

As noted, the intention of the proposed reforms is to enhance access to competent and affordable legal services. The object is not to harm the existing practices of lawyers and law firms, nor to harm important public interest work that is being performed. Because of this the Task Force considered whether exemptions should be permitted.

As the Task Force observed in its June 11, 2010 report, community advocates perform an important function in the access to justice landscape. In particular, they provide legal assistance to the poor and marginalized members of society who will rarely have access to a lawyer. While expanding the permissible duties of paralegals and articled students might allow for a marginal increase of legal services to the poor, the Task Force does not anticipate the recommendations contained in this report will have a meaningful impact on access to justice for the poor. In light of this, it is essential that any reforms do not hinder the important work that is being done by lawyer supervised community advocates.

The Law Foundation has been funding and developing programs for the training of community advocates. To date, the feedback on that work has been very positive. The reality of this niche legal service, however, is that it might not be possible to deliver existing community advocacy services under a model of heightened paralegal services unless the Benchers create exemptions for the community advocate services. The example of direct supervision by a lawyer and the situation in Haida Gwaii is one such example. Care has to be taken to ensure that in our efforts to improve access to legal services for people of moderate and middle-class means, we do not create a supervisory model that extinguishes much needed services for the poor.

In addition, there are clinical programs such as the Law Students' Legal Advice Program and the Aboriginal Law Clinic, that provide valuable legal services to the public. These programs should be exempted, and clinics should be able to apply to a committee as designated by the Benchers for consideration of an exemption. The key components will be that the non-lawyers providing services at the clinic are supervised by a lawyer and properly trained, and that the lawyer is satisfied the staff are able to provide services in a competent and ethical manner. These services must also comply with the restrictions on the practice of law as contained in the *Legal Profession Act.*

I. Recommendation regarding community advocates

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

6. CONCLUSION

Access to justice and legal services challenges are occupying governments, policy-makers, legal professionals and the public in jurisdictions around the world. For a variety of reasons, many people with serious legal problems are unable to secure the services of a

lawyer. For many people the cost of legal services present a barrier. Yet these people are dealing with legal issues that can impact adversely on their private lives as well as their ability to function in society. While the Benchers realize that in a perfect world these people would have recourse to the services of a lawyer, we know as a practical matter this is not always the case. It is therefore incumbent on the profession to examine its delivery model and ask how it can respond to the needs of the public in the 21st Century, while still ensuring that the safeguards of competency and proper regulation are met.

The recommendations in this report are incremental rather than revolutionary, and the Task Force does not purport to hold them out as a cure for all the challenges associated with access to justice. The Task Force does believe, however, that it is an important step in the right direction. The Law Society's mandate requires it to protect the public interest in the administration of justice. This mandate was the focal lens through which the Task Force examined its work. Once the profession embarks down this road the Law Society needs to monitor the changes to ensure the public is being well-served and that the regulatory mechanism is properly protecting the public from harm. This examination may involve an initial survey of the profession, and a follow-up survey of both the profession and the public down the road. It is important for to receive feedback as to what is working and what is not with respect to these changes, in order that the Law Society can ensure the public is well served.

The object of these reforms is to enhance the public's access to competent and affordable legal services. The object is not to constrain existing practices. Similar to the Benchers' decision to provide guidelines for lawyers to provide limited scope legal services, the intention is to enable lawyers to modify their practices to meet the legal service needs of the public, while ensuring that safeguards exist to protect the public from harm. The Task Force believes the recommendations contained in this report are small but important steps the profession should take to better meet the legal needs of the public it serves.

SUMMARY OF RECOMMENDATIONS

Expanded Roles for Articled Students:

Recommendation 1:
The Task Force recommends that the Credentials Committee be directed to explore expanded duties for Articled Students. The referral of matters to the Credentials Committee should include the background material on Articled Students that the Task Force considered.

Expanded Roles for Paralegals:

Recommendation 2:
The Task Force recommends the following definition of paralegal:

> A paralegal is a trained professional who:
> - works under the supervision of a lawyer;
> - possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
> - possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and
> - carries out his or her work in a competent and ethical manner.

The Task Force further recommends that the following instructions supplement the definition, potentially by way of an annotation or footnote:

> A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [**refer to guidelines**]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

Recommendation 3:
The Task Force recommends:

a) Paralegals should not be allowed to give or receive undertakings;
b) The Law Society should work with the courts to determine what forms of advocacy paralegals should be permitted to perform;
c) The Strategic Plan should be amended to include as follows: A working group or task force of Benchers and staff will work with the British Columbia Supreme

Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.

d) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

Recommendation 4:
The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need;

"Enhanced functions" consist of giving legal advice and/or engaging in advocacy functions permitted by courts or tribunals.

Recommendation 5:
The Task Force Recommends that remote supervision of paralegals be permitted, but that the Benchers also consider capping the number of paralegals a lawyer or law firm can supervise through remote supervision.

Recommendation 6:

a) The requirements and restrictions for lawyer supervision should be set out in either the Rules, the *Handbook*, or an appendix to the *Handbook*.
b) **[Optional]** The supervising lawyer should be required to submit a form to the Law Society electronically that includes:
    i. The names of the paralegals the lawyer is supervising;
    ii. The areas of law in which the lawyer is using the paralegals;
    iii. The types of enhanced services the paralegal will perform;
    iv. The education and experience of the paralegal;
    v. A copy of the oath/affirmation of conduct;

vi. The location of the office the lawyer & paralegals work in;

vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals.

viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs

Recommendation 7:

The Task Force recommends that the Discipline Guidelines be amended to make it clear that failure to supervise a paralegal performing enhanced functions is by its nature more serious than a standard finding of failure to supervise, and the full range of discipline actions should be available. A sanction that should be added to the list is a prohibition against a lawyer being able to supervise paralegals performing enhanced functions in the future.

Recommendation 8:

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

ATTACHMENT 1

Proposal for a general certification scheme

The Paralegal Task Force has determined that the curricula of the Capilano College legal assistant diploma and certificate programs should serve as the benchmark for paralegal education in British Columbia. The Task Force anticipates that other colleges in the province will develop curricula to meet specific criteria the Paralegal Task Force expects to develop based on this benchmark.

Categories of applicants for general certification

Subject to the grandparenting certification scheme, the Task Force proposes that the following categories of applicants be eligible to apply for general certification:

- Graduates of Canadian law schools

Graduates of Canadian law schools may apply for certification, provided they have completed one year of legal or paralegal work experience in British Columbia in the preceding five years.

- Graduates of approved Canadian paralegal programs

Graduates of recognized Canadian paralegal programs that meet specified criteria may apply for certification, provided those graduates have completed one year of paralegal work experience in British Columbia in the preceding five years.

At present, the Task Force views the Capilano College Legal Assistant diploma and certicate programs as the benchmark for paralegal education in BC, and graduates of either of those programs who have completed one year of paralegal work experience in BC accordingly may apply for certification.

- Applicants who graduate from Canadian paralegal programs of recognized Canadian institutions but which programs do not meet specified criteria

Graduates of paralegal programs that do not meet specific criteria set by the Law Society may apply for certification provided they successfully pass a challenge exam and have completed one year of paralegal work experience in British Columbia in the preceding five years.

- Graduates of paralegal programs from other common law jurisdictions

Graduates of paralegal programs offered by recognized institutions in other common law countries may apply for certification provided they successfully pass a challenge exam and have completed one year of paralegal work experience in British Columbia in the preceding five years.

- Applicants holding an LL.B or equivalent degree from common law jurisdictions outside Canada

Applicants who hold an LL.B. or equivalent degree from a law school in a common law jurisdiction may apply for certification provided they:

- have completed one year of legal or paralegal work experience in British Columbia in the preceding five years; or
- have completed one year of legal or paralegal work experience outside British Columbia in the preceding five years and have successfully passed a challenge exam.

Proposal for a grandparenting certification scheme

The Paralegal Task Force recognizes that BC paralegals have diverse backgrounds, including those who have graduated from the Capilano College, Selkirk College, Vancouver Community College or other college legal assistant programs, those who have an LL.B from a common law jurisdiction and those who have legal work experience and no formal legal training.

The Paralegal Task Force identified four factors that must be considered when evaluating the different work and educational experience of paralegals for the purpose of certification. The Task Force considers of key importance an applicant's:

- knowledge of procedural law;
- knowledge of substantive law;
- practical skills; and
- analytical skills.

In recognition of the diversity of paralegal backgrounds, the Paralegal Task Force is proposing two categories of applicants who may apply for paralegal certification through special grandparenting provisions, provided they do so within five years of the commencement of a general paralegal certification program. After the five-year period, the grandparenting provisions would expire and applicants would have to meet general certification requirements.

Categories of applicants for certification through grandparenting

- Graduates of the Vancouver Community College or Selkirk College legal assistant programs

Graduates of the legal assistant programs of either Vancouver Community College or Selkirk College who have three years of paralegal work experience in British Columbia in the preceding five years may apply for certification.

- Paralegals with work experience only

Persons who have completed 10 years of legal work experience in British Columbia, including at least five years of paralegal work experience, in the preceding 15 years may apply for certification.

The Law Society of British Columbia

Federation of Law Societies Model Code of Conduct

January 5, 2010

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

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date September 21, 2010

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

January 2010 Briefing

At the January 2010 meeting we briefed you concerning the status of the Model Code of Conduct at that time. We advised at that time:

> We think it is appropriate at this stage, to give you a report on our provisional views on some of the issues raised by the completion of this portion of the Model Code and the process of examination of the completed Code that should take place by us and, ultimately, by you.
>
> It is our view that we ought to recommend adoption of the Code to you, with appropriate changes that are necessary to recognize local issues or improve the rules in some important areas. To the extent that the LSBC makes changes to the Code, we are of the view that those changes should, nevertheless, be done in the style of the Model Code and be consistent with its organization. It may be that where changes are made to the Model Code those changes should be highlighted in some way to draw attention to features that may not be common to other provinces or territories. We have not determined what changes we will recommend to the Code before it can be adopted in place of the current *Professional Conduct Handbook*, but we expect to consider carefully the views Benchers expressed in 2007 concerning various issues raised by the Code and that are set out in the attached letter from John Hunter.
>
> We also think that it may be important to consult with the profession generally before a new Code is actually adopted, but the nature and timing of such a consultation can be considered later in the process.

Current Status of Ethics Committee Consideration of the Model Code

Since we last reported on this matter to you we have completed our review of all parts of the Model Code with the exception of conflicts. A special advisory committee ("the Advisory Committee") of the Federation has conducted a further review of conflicts issues, giving special attention to the views of the Canadian Bar Association which, in 2008, adopted recommendations concerning conflicts from its Conflicts of Interest Task

Force. Although the Advisory Committee concluded its report in the Spring, the CBA has made further representations to the Federation concerning its recommendations. It is likely that the Advisory Committee will reconsider some aspects of the current Model Code conflicts rules, including a review of the most recent CBA submission. Such a reconsideration, if it occurs, will require a further extension of time to complete the conflicts portion of the Code. For that reason, we think it appropriate to report to you on all other aspects of the Code apart from conflicts, and to consult the profession, generally, on the work that has been completed so far. We anticipate that we will want to conduct a similar consultation with the profession when we have had an opportunity of finally reviewing the Federation's work on conflicts.

Code Versions Attached (electronic copy only)

So that you can identify the changes we propose to make to the Federation's Model Code, we attach the following three versions of all the provisions in the Code with the exception of rules that relate to conflicts:

1) The Model Code as adopted by the Federation("the Model Code").

2) The Code that we propose for British Columbia which is based on the Model Code and has many rules in common with it, but amends it in ways we think will improve it for use in British Columbia. We are calling the BC version of the Code "the BC Code."

3) A redlined version of the BC Code that highlights the changes we propose to make to the Federation Model Code.

Further Process

Subject to any different direction you give us with respect to the Code, we intend to consult the profession about the non-conflicts portion of the Code during October and the first part of November 2010. When we have had an opportunity of considering any representations we receive concerning the proposed BC Code from the profession, we will then make a recommendation to you about the adoption of the non-conflicts portion of the Code. We expect to go through a similar process with respect to the conflicts section of the Code later in the year or early next year. Whether we report back to you on both the non-conflicts and conflicts sections of the Code together, or whether we report on them separately, will depend on the progress the Federation makes in completing the conflicts section and the timing of our own review of the Federation's work with respect to conflicts.

The Federation intends to establish a standing committee to monitor the implementation of the Model Code by Law Societies across the country and to review issues on an ongoing basis with the aim of standardizing as many provisions of the Code as possible among the Law Societies over a number of years. The Federation has proposed Mr. Hume to chair that committee.

Major Changes to the Model Code Proposed by Ethics Committee

This section highlights some of the major changes we propose to make to the Model Code and the rationale for those changes. It also identifies issues of professional conduct that we think ought to be considered further by the Federation for possible inclusion in or revision to the Model Code, or by ourselves in the BC Code.

Rules 1.01 to 1.05 Canons of Legal Ethics

The changes to these rules preserve the Canons of Legal Ethics that currently comprise Chapter 1 of our *Professional Conduct Handbook*. These Canons were originally adopted in British Columbia in 1921. As well as having historical significance, we think these rules provide a general overview of the rules of professional conduct and ought to be preserved.

Subrule 2.02(7): Client Dishonesty or Fraud

Subrule 2.02(7) preserves the language of the current Chapter 4, Rule 6 of the *Professional Conduct Handbook* "knows or ought to know." This language may encompass negligence and is arguably a more onerous standard than the Model Code language which simply refers to knowledge. It is our view that such a standard is more appropriate for an ethical code than mere knowledge or willful blindness and, of course, that was the view of the Benchers in 2005 when Rule 6 was enacted. The BC Code also prohibits lawyers from assisting with a fraudulent conveyance, preference or settlement.

Commentary to Subrule 2.02(7) gives specific examples of client requests or promises that should prompt lawyers to make inquiries about the intentions and plans of clients. These examples are also taken from our *Professional Conduct Handbook*.

Subrule 2.02(10) Restricting Further Representation

This rule preserves our current Chapter 4, Rule 7 which was enacted in 2006. It is our view that the prohibition on making an agreement that restricts a lawyer's right to practise as part of a settlement of a client lawsuit should be continued in the BC Code.

We noted in 2006 that making such an offer inevitably raises an issue between the client and the client's lawyer: Will the lawyer exchange the right to act as counsel in some future cases in order to benefit the client? Many clients would readily understand that it may be unreasonable to expect their lawyers to agree to this kind of restriction. However, some clients may not accept that the restriction is unreasonable, or that their lawyers are entitled to refuse it. A lawyer who assists a party in making such an offer may create discord in the relationship between the opposing lawyer and his or her client.

Subrule 2.03(3) Future Harm/Public Safety Exception

Subrule (3) identifies the circumstances when lawyers may disclose confidential information to prevent serious bodily harm or death and is the BC Code equivalent to our current Chapter 5, Rule 12 of the *Professional Conduct Handbook.*

The BC Code Rule eliminates the Model Code provision that permits disclosure of confidential information to prevent financial injury. We will be studying this issue further to determine whether such a provision should be added to the rule in the future and expect to make a recommendation to you concerning such a provision in due course. For the present, we are not satisfied that the kind of potential financial injury that would warrant the disclosure of confidential information can be identified with adequate precision or that the damage to the principle of confidentiality could ever justify the disclosure of such information.

The Federation standing committee will be examining the possibility of modifying subrule (3) of the Model Code to permit disclosure of confidential information that a person has been wrongly incarcerated. We expect to review the Federation's conclusions with respect to this issue to determine whether to recommend to you that the BC Code be amended to deal with it.

Model Code Rule 2.05(6) Commentary: Property Relevant to a Crime

The commentary to Subrule (6) directs lawyers how to deal with property that comes into their possession and is relevant to a crime or offence.

The way in which lawyers may treat such evidence continues to be a matter of controversy, particularly following the *Murray* decision in Ontario in 2000 when lawyer Kenneth Murray retained tapes containing evidence of a crime for 17 months without disclosing the existence of the tapes to the Crown. It is our view that although this is an issue worthy of consideration, it is an issue that is extremely complicated and potentially divisive and it has not received sufficient attention to warrant inclusion in the BC Code at

this time. We have added it to the Ethics Committee agenda for review by the Committee in 2011 and will report to you concerning it when we have completed our review. Unless we deal with the issue through the Code of Professional Conduct the common law rules relating to treatment of evidence prevail.

Subrules 2.06(7) and 2.06(8) Division of Fees and Referral Fees

These subrules preserve the LSBC's current rules in Chapter 9 of the *Professional Conduct Handbook* with respect to fee sharing: lawyers may share fees with lawyers in other jurisdictions provided the arrangement is permitted in the other jurisdiction.

Subrule 2.06(9) Multi-Disciplinary Practice

This Subrule preserves the LSBC's position with respect to multi-disciplinary practice, currently set out in Chapter 9, Rule 6.1 of the *Professional Conduct Handbook.*

Subrule 2.07(1) Commentary: Withdrawal From Representation

The Commentary imports Chapter 3, Rules 6 to 12 of the *Professional Conduct Handbook* dealing with lawyer duties when a lawyer leaves a firm or when the firm divides into smaller units. Issues arising in this context are common and we think it is desirable to have more precise rules to deal with them than the Model Code provides.

Subrules 2.07(3) and 2.07(4) Non-payment of fees and Withdrawal From Criminal Proceedings

The BC Code version of these Subrules implements the provisions in the *Professional Conduct Handbook* approved by the Benchers in September 2010 to take account of the decision of the Supreme Court of Canada in *R. v. Cunningham* 2010 SCC 10.

Rule 3.02 Marketing

Rule 3.02 substitutes what is substantially the current language from Chapter 14 of the *Professional Conduct Handbook* for Rule 3.02 of the Model Code. In 2009 the Ethics Committee and the Benchers concluded an extensive review of the *Professional Conduct Handbook* marketing rules and approved significant amendments to them. While the provisions of the Model Code and the BC Code are not dissimilar, we prefer our current rules to those of the Model Code.

Subrule 4.02(1) Submission of Evidence

As in Chapter 8, Rule 9 of the *Professional Conduct Handbook*, Subrule 4.02(1) preserves the possibility that, in extraordinary circumstances, a lawyer may be required or permitted to continue as counsel after giving evidence if it is in the interests of justice for that to occur.

Subrule 4.04(2) Communication with Witnesses Giving Evidence

Subrule 4.04(2)(c) incorporates the practice approved of in *R. v. Montgomery* (1998) 126 C.C.C. (3d) 251, a decision of the Supreme Court of British Columbia, that requires counsel, before re-examination, to seek leave of the court in order to discuss the evidence in chief or cross examination of counsel's witness. (*R. v. Montgomery* notes that such leave will seldom be refused).

Subrule 4.04(2)(d) recognizes the current practice in British Columbia: during examination for discovery a lawyer may discuss the evidence of a witness during an adjournment in the course of the examination. Subrule 4.04(2)(d) is consistent with the views of McEachern, C.J. expressed when he was Chief Justice of the Supreme Court:

> "Mr. Sopinka in his book, The Trial of an Action (1981), p. 103, says the practice in Ontario prohibits discussions about evidence with a witness during his examination for discovery. I do not think that is the practice in this province. I never hesitated to talk about the evidence given or to be given by my client during an adjournment in the course of examinations for discovery."

The Subrule is not consistent with the more restrictive suggestions made by Wong J. in *Fraser River Pile and Dredge Ltd. v. Can-Dive Services* (1992), 72 B.C.L.R. (2d) 240 (S.C.) and referred to by the authors of "Woodshedding, Interruptions and Objections: How To Conduct and Defend An Examination for Discovery, The Advocate, Vol. 68, Part 5 Sept 2010 at p. 672.

Subrule 6.01(3) Duty to Report

Subrule 6.01(3) recognizes a breach of undertaking or trust condition as requiring a report to the Law Society. While the language of Subrules 6.01(3)(e) and 6.01(3)(f) may be sufficiently wide to encompass breaches of undertaking, it is our view that undertakings are of such importance that they merit separate mention in the duty to report lawyer misconduct to the Law Society.

Subrule 6.02(10) Inadvertent Communication

Subrule 6.02(10) preserves the current rule in Chapter 5, Rule 15 of the *Professional Conduct Handbook* in place of the narrower rule in the Model Code. The Law Society of B.C. has substantial experience with Rule 15 and numerous opinions have been given by us concerning the rule that have led to more certainty about its reach. We think it is important to preserve that experience by preserving the rule.

Subrule 6.02(12) Trust Cheques

Subrule 6.01(12) preserves the current rule in Chapter 11, Rule 8: in most circumstances a lawyer who prepares a trust cheque undertakes that the cheque will be honoured.

Subrule 6.08 Informing Client of Errors or Omission

The commentary to Subrule 6.08(1) makes specific reference to the British Columbia Lawyers' Compulsory Liability Insurance Policy.

Appendix A Affidavits, Solemn Declarations and Officer Certifications

Appendix A preserves the current Appendix 1 of the *Professional Conduct Handbook* which describes the proper procedure for the taking of affidavits, solemn declarations and officer certifications.

Appendix B Family Law Mediation

Appendix B preserves the current Appendix 2 of the *Professional Conduct Handbook* which deals with family law mediation. The Ethics Committee expects to revise Appendix B during 2011 in the light of recommendations made by the Alternative Dispute Resolution Task Force.

Appendix C Real Property Transactions

Appendix C preserves the current Appendix 3 of the *Professional Conduct Handbook* which describes circumstances where lawyers may and may not act for more than one party in a real estate transaction.

Attachments (electronic copy only):

1) The Federation of Law Societies Model Code (without the Conflicts Rules).

2) The BC Code (without the Conflicts Rules).

3) A redlined version of the BC Code that highlights proposed changes to the Federation Model Code the Ethics Committee intends to recommend to the Benchers (subject to consultation with the profession).

[modelcode264benchersoct(5)]

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

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2009

MODEL CODE OF PROFESSIONAL CONDUCT

MODEL CODE OF PROFESSIONAL CONDUCT

Contents

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PREFACE

PREFACE

One of the hallmarks of civilized society is the Rule of Law. Its importance is manifested in every legal activity in which citizens engage, from the sale of real property to the prosecution of murder to international trade. As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to the robust legal system in Canada. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the Justice system and the profession.

The Code sets out statements of principle followed by exemplary subrules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the subrules and commentaries. The Code assists in defining ethical practice and in identifying what is questionable ethically. Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational. The Code in its entirety should be considered a reliable and instructive guide for lawyers that establishes only the minimum standards of professional conduct expected of members of the profession. Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a subrule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Law Society, senior practitioners or the courts for guidance.

A breach of the provisions of the Code may or may not be sanctionable. The decision to address a lawyer's conduct through disciplinary action based on a breach of the Code will be made on a case-by-case basis after an assessment of all relevant information. The rules, subrules and commentaries are intended to encapsulate the ethical standard for the practice of law in Canada. A failure to meet this standard may result in a finding that the lawyer has engaged in conduct unbecoming or professional misconduct.

MODEL CODE OF PROFESSIONAL CONDUCT

The Code of Conduct was drafted as a national code for Canadian lawyers. It is recognized, however, that regional differences will exist in respect of certain applications of the ethical standards. Lawyers who practise outside their home jurisdiction should find the Code useful in identifying these differences.

The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected. This calls for a framework based on ethical principles that, at the highest level, are immutable, and a profession that dedicates itself to practise according to the standards of competence, honesty and loyalty. The Law Society intends and hopes that this Code will be of assistance in achieving these goals.

DEFINITIONS

DEFINITIONS

In this Code, unless the context indicates otherwise,
"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law;

Commentary
A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship.

"conflict of interest" or **"conflicting interest"** means an interest likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client;

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate letter recording the consent;

"**disclosure"** means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of <province or territory>;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

CHAPTER 1 – STANDARDS OF THE LEGAL PROFESSION

1.01 INTEGRITY

1.01 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary
Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be. Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety. Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

1.01 (2) A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Commentary
Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

CHAPTER 2 - RELATIONSHIP TO CLIENTS

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

"Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

2.01 (2) A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is

an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

(a) decline to act;

(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

A lawyer should be wary of bold and over-confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-

discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

2.02 QUALITY OF SERVICE

Quality of Service

2.02 (1) A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

Commentary

This rule should be read and applied in conjunction with Rule 2.01 regarding competence.

A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

Examples of expected practices

The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

(c) responding to a client's telephone calls;

(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

(i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;

(j) informing a client of a proposal of settlement, and explaining the proposal properly;

(k) providing a client with complete and accurate relevant information about a matter;

(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

(m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;

(n) being civil.

A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

Honesty and Candour

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

Commentary
A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer. A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results. Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

When the Client is an Organization

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

Commentary
A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority. In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an

officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (Rule 2.04).

Encouraging Compromise or Settlement

2.02 (4) A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal or Regulatory Proceedings

2.02 (5) A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

Commentary

It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.

It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to use, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

Inducement for Withdrawal of Criminal or Regulatory Proceedings

2.02 (6) A lawyer must not:

(a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

"Regulatory authority" includes professional and other regulatory bodies.

A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.

A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or regulatory authority.

When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or

improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Dishonesty, Fraud by Client

2.02 (7) When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

A bona fide test case is not necessarily precluded by this subrule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Dishonesty, Fraud when Client an Organization

2.02 (8) A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, must do the following, in addition to his or her obligations under subrule (7):

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with Rule 2.07.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (Rule 2.03).

This subrule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 2.07. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization's and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization's responsibilities to its constituents and to the public.

Clients with Diminished Capacity

2.02(9) When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a

disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under Rule 2.03(1) (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the Law Society, or

(d) otherwise permitted by this rule.

Commentary

A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter. (See Rule 2.04 Conflicts.)

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

(a) retained by a person about a particular matter; or

(b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

Sole practitioners who practise in association with other lawyers in cost-sharing, space-sharing or other arrangements should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if the lawyers institute systems and procedures that are designed to insulate their respective practices. The issue may be heightened if a lawyer in the association represents a client on the other side of a dispute with the client of another lawyer in the association. Apart from conflict of interest issues such a situation may raise, the risk of such disclosure may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients' affairs or business.

In some situations, the authority of the client to disclose may be inferred. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent

their disclosing or using any information that the lawyer is bound to keep in confidence.

The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

A lawyer may have an obligation to disclose information under Rules 4.05 (2) and (3) and 4.06 (3). If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

Use of Confidential Information

2.03 (2) A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

Commentary

The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

Future Harm / Public Safety Exception (added June2010)

2.03(3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of:

(a) death or serious bodily harm, and disclosure is necessary to prevent the death or harm; or

(b) substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury.

Proposed Commentary

Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this subrule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

"Unlawful acts" giving rise to substantial financial injury may include criminal, quasi-criminal or fraudulent acts that are contrary to criminal, regulatory or civil law.

In assessing whether disclosure of confidential information is justified to prevent substantial harm, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

How and when disclosure should be made under this subrule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the local law society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

If confidential information is disclosed under Rule 2.03(3), the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication in which the disclosure is made;

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when the lawyer becomes aware that the organization may commit a dishonest, fraudulent, criminal or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the rules make it clear that the lawyer must not knowingly assist or encourage any dishonesty, fraud, crime or illegal conduct (Rule 2.02 (7)) and specify how a lawyer should respond to conduct by an organization that has been, is or may be dishonest, fraudulent, criminal, or illegal (Rule 2.02 (8)), it does not follow that the lawyer should disclose an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer must hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Even if the exceptions do not apply, there are several steps that a lawyer should take when confronted with proposed misconduct by an organization. The lawyer's duties are owed to the organization and not to the officers, employees, or agents of the organization (Rule 2.02 (3)), and the lawyer should comply with Rule 2.02 (8), which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by an organization.

2.03 (4) If it is alleged that a lawyer or the lawyer's associates or employees:

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.

2.03 (5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.

2.03 (6) A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

2.04 CONFLICTS

To follow at a later date

2.05 PRESERVATION OF CLIENT'S PROPERTY

Preservation of Clients' Property

In this rule, **"property"** includes a client's money, securities as defined in [provincial legislation], original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

2.05 (1) A lawyer must:

(a) care for a client's property as a careful and prudent owner would when dealing with like property; and

(b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the [rules/regulations/by-laws of the relevant Law Society].

These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information. A lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them.

Subject to any rights of lien, the lawyer should promptly return a client's property to the client on request or at the conclusion of the lawyer's retainer.

If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 2.07 (Withdrawal from Representation).

Notification of Receipt of Property

2.05 (2) A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Clients' Property

2.05 (3) A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

2.05 (4) A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

2.05 (5) A lawyer must account promptly for clients' property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

2.05 (6) If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the *Income Tax Act* (Canada), the *Charter* and the *Criminal Code*.

A lawyer is never required to take or keep possession of property relevant to a crime or offence. If a lawyer comes into possession of property relevant to a crime, either from a client or another person, the lawyer must act in keeping with the lawyer's duty of loyalty and confidentiality to the client and the lawyer's duty to the administration of justice, which requires, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. Generally, a lawyer in such circumstances should, as soon as reasonably possible:

(a) turn over the property to the prosecution, either directly or anonymously;

(b) deposit the property with the trial judge in the relevant proceeding;

(c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or

(d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.

When a lawyer discloses or delivers to the Crown or law enforcement authorities

property relevant to a crime or offence, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the property.

If a lawyer delivers the property to the court under paragraph (c), he or she should do so in accordance with the protocol established for such purposes, which permits the lawyer to deliver the property to the court without formal application or investigation, ensures that the property is available to both the Crown and defence counsel for testing and examination upon motion to the court, and ensures that the fact that property was received from the defence counsel will not be the subject of comment or argument at trial.

2.06 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

2.06 (1) A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

What is a fair and reasonable fee depends on such factors as:

(a) the time and effort required and spent;

(b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

(h) any relevant agreement between the lawyer and the client;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements,

and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

A lawyer should be ready to explain the basis of the fees and disbursement charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

Contingent Fees and Contingent Fee Agreements

2.06 (2) Subject to subrule (1), a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

Commentary

In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which may require judicial approval under the governing legislation. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee, in all of the circumstances, is fair and reasonable.

Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in Rule 2.07, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in Rule 2.07 (7) (Obligatory Withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

Statement of Account

2.06 (3) In a statement of an account delivered to a client, a lawyer must clearly and separately detail the amounts charged as fees and disbursements.

Commentary
The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed, in writing, to such costs. Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. While an agreement that the lawyer will be entitled to costs is not uncommon, it does not affect the lawyer's obligation to disclose the costs to the client.

Joint Retainer

2.06 (4) If a lawyer acts for two or more clients in the same matter, the lawyer must divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

2.06 (5) If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

2.06 (6) If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(b) the client is informed and consents.

2.06 (7) A lawyer must not:

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for Multi-discipline Practices and Interjurisdictional Law Firms

2.06 (8) Subrule (7) does not apply to;

(a) multi-discipline practices of lawyer and non-lawyer partners if the partnership agreement provides for the sharing of fees, cash flows or profits among the members of the firm; and

(b) sharing of fees, cash flows or profits by lawyers who are:

(i) members of an interprovincial law firm; or

(ii) members of a law partnership of Canadian and non-Canadian lawyers who otherwise comply with this rule.

Commentary

An affiliation is different from a multi-disciplinary practice established in accordance with the rules/regulations/by-laws under the governing legislation, an interprovincial law partnership or a partnership between Canadian lawyers [1] and foreign lawyers. An affiliation is subject to rule 2.06 (7). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

2.06 (9) If a lawyer and client agree that the lawyer will act only if the lawyer's retainer is paid in advance, the lawyer must confirm that agreement in writing with the client and specify a payment date.

2.06 (10) A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

Commentary

The rule is not intended to be an exhaustive statement of the considerations that apply to payment of a lawyer's account from trust. The handling of trust money is generally governed by the rules of the Law Society.

Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

2.06 (11) If the amount of fees or disbursements charged by a lawyer is reduced on a review or assessment, the lawyer must repay the monies to the client as soon as is practicable.

Prepaid Legal Services Plan

2.06 (12) A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the

1 This issue is currently specific to Ontario.

lawyer.

2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.07 (1) A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

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

An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See subrule (8) – Manner of Withdrawal.

Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the

lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.

Optional Withdrawal

2.07 (2) If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

2.07 (3) If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Commentary

When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

Withdrawal from Criminal Proceedings

2.07 (4) If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

Commentary
A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

2.07 (5) If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.

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

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

Obligatory Withdrawal

2.07 (7) A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

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

2.07 (9) On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

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

If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter.

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

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

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

Duty of Successor Lawyer

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

Commentary

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

CHAPTER 3 – MARKETING OF LEGAL SERVICES

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

3.01 (1) A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective client by any means.

Commentary

A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.

Right to Decline Representation - A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.06, without charge.

Restrictions

3.01 (2) In offering legal services, a lawyer must not use means that:

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

Commentary
A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

3.02 MARKETING

Marketing of Professional Services

3.02 (1) A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary
Examples of marketing that may contravene this rule include: (a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases; (b) suggesting qualitative superiority to other lawyers; (c) raising expectations unjustifiably; (d) suggesting or implying the lawyer is aggressive; (e) disparaging or demeaning other persons, groups, organizations or institutions; (f) taking advantage of a vulnerable person or group; and (g) using testimonials or endorsements that contain emotional appeals.

Advertising of Fees

3.02 (2) A lawyer may advertise fees charged for their services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

3.03 ADVERTISING NATURE OF PRACTICE

3.03 (1) A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

Lawyers' advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in [name of jurisdiction] and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

Advocacy

4.01 (1) When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary
Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures. The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case. In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client. A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal. When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent

in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Duty as Defence Counsel - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

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

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

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

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

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

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

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

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

(m) needlessly abuse, hector or harass a witness;

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

(o) needlessly inconvenience a witness; or

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

Commentary

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

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

It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 2.02(5) and (6) and accompanying commentary.

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

Duty as Prosecutor

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

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

Disclosure of Error or Omission

4.01 (4) A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary
If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to rule 2.07 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

4.01 (5) A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary
Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.

Undertakings

4.01 (6) A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary
A lawyer should also be guided by the provisions of Rule 6.02(11) Undertakings and Trust Conditions.

Agreement on Guilty Plea

4.01 (7) Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

4.01 (8) A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

Commentary
The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

4.02 THE LAWYER AS WITNESS

Submission of Evidence

4.02 (1) A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary
A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

Appeals

4.02 (2) A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.02 (6)-(8), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

4.04 (1) A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.

Communication with Witnesses Giving Evidence

4.04 (2) Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination the lawyer may discuss with the witness any matter.

Commentary

The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel.

The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

While any testimony-related discussion is generally prohibited during breaks, there are two qualifications to the rule as it relates to examinations for discovery. First, if the examination for discovery of a witness is adjourned for longer than one week, it is permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer's intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.

This rule is not intended to prevent discussions or consultations that are necessary to fulfill undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in this rule.

This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

This rule applies with necessary modifications to examinations out of court.

4.05 RELATIONS WITH JURORS

Communications before Trial

4.05 (1) When acting as an advocate before the trial of a case, a lawyer must not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary
A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

4.05 (2) Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate must disclose to them any information of which the lawyer is aware that a juror or prospective juror:

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness

4.05 (3) A lawyer must promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

Communication During Trial

4.05 (4) Except as permitted by law, a lawyer acting as an advocate must not communicate with or cause another to communicate with any member of the jury during a trial of a case.

4.05 (5) A lawyer who is not connected with a case before the court must not communicate with or cause another to communicate with any member of the jury about the case.

4.05 (6) A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary
The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it.

Criticizing Tribunals - Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

A lawyer, by training, opportunity and experience, is in a position to observe the

workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

4.06 (2) A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

4.06 (3) A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

Commentary

If possible, the lawyer should suggest solutions to the anticipated problem such as:

(a) further security, or
(b) reserving judgment.

If possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

If client information is involved in those situations, the lawyer should be guided by the provisions of Rule 2.03 (Confidentiality).

4.07 LAWYERS AND MEDIATORS

Role of Mediator

4.07 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary
In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails. Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 (Conflicts) and its commentaries and the common law authorities. If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so. If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

CHAPTER 5 - RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

5.01 SUPERVISION

Direct Supervision Required

5.01 (1) A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

Commentary

A lawyer may permit a non-lawyer to act only under the supervision of a lawyer. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non-lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

A lawyer who practises alone or operates a branch or part-time office should ensure that

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

A lawyer in private practice may permit a non-lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client. A lawyer in a community legal clinic funded by a provincial legal aid plan may do so, so long as the lawyer maintains direct supervision of the client's case in accordance with the supervision requirements of the legal aid plan and assumes full professional responsibility for the work.

Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer generally turns on the distinction

between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Application

5.01 (2) In this rule, a non-lawyer does not include a student-at-law.

Delegation

5.01 (3) A lawyer must not permit a non-lawyer to:

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(k) sign correspondence containing a legal opinion;

(l) sign correspondence, unless

  (i) it is of a routine administrative nature,

  (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,

  (iii) the fact the person is a non-lawyer is disclosed, and

  (iv) the capacity in which the person signs the correspondence is indicated;

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

(n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(o) issue statements of account.

Commentary
A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision. A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment. In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-

lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

Suspended or Disbarred Lawyers

5.01 (4) Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred and struck off the Rolls, suspended, undertaken not to practise or who has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted.

Electronic Registration of Documents

5.01 (5) A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose his or her password or access phrase or number to others.

5.01 (6) When a non-lawyer employed by a lawyer has a personalized encrypted electronic access to any system for the electronic submission or registration of documents, the lawyer must ensure that the non-lawyer does not

(a) permit others to use such access; or

(b) disclose his or her password or access phrase or number to others.

Commentary

The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without

registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

In a real estate practice, when it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has such access, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the system.

5.02 STUDENTS

Recruitment and Engagement Procedures

5.02 (1) A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or other students.

Duties of Principal

5.02 (2) A lawyer acting as a principal to a student must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Commentary
A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.

Duties of Articling Student

5.02 (3) An articling student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

5.03 HARASSMENT AND DISCRIMINATION

5.03 (1) The principles of human rights laws and related case law apply to the interpretation of this rule.

5.03 (2) A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

5.03 (3) A lawyer must not sexually harass any person.

5.03 (4) A lawyer must not engage in any other form of harassment of any person.

5.03 (5) A lawyer must not discriminate against any person.

Commentary
A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

6.01 (1) A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

6.01 (2) A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

Commentary
In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one. When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so. If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report Misconduct

6.01 (3) Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law practice;

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

(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

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

Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

Encouraging Client to Report Dishonest Conduct

6.01 (4) A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

6.02 (1) A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

6.02 (2) A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

6.02 (3) A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Communications

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

6.02 (5) A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

6.02 (6) Subject to subrule (7), if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

6.02 (7) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a lawyer with respect to that matter.

Commentary

Subrule (6) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by closing his or her eyes to the

obvious.

Subrule (7) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

6.02(8) A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

Commentary

This subrule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of Rule 2.04 (Conflicts), and particularly subrules 2.04(7) through (11). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

6.02 (9) When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary
If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Inadvertent Communications

6.02 (10) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.

Commentary
Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form. Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily

reserved to the lawyer.

Undertakings and Trust Conditions

6.02 (11) A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

Commentary

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

Trust conditions can be varied with the consent of the person imposing them. Any

variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these Rules.

6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

6.03 (1) A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary
A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

6.03 (2) A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary
The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

MODEL CODE OF PROFESSIONAL CONDUCT

6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.04 (1) A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.05 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with the media, but there are other cases in which the lawyer should contact the media to properly serve the client.

Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

6.05 (2) A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.06 A lawyer must assist in preventing the unauthorized practice of law.

Commentary
Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust monies and the maintenance of compensation funds.

6.07 RETIRED JUDGES RETURNING TO PRACTICE

6.07 A judge who returns to practice after retiring, resigning or being removed from the bench must not**,** for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Notice of Claim

6.08 (2) A lawyer must give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary
The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

Co-operation

6.08 (3) When a claim of professional negligence is made against a lawyer, he or she must assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

Responding to Client's Claim

6.08 (4) If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer must expeditiously deal with the claim and must not take unfair advantage that would defeat or impair the client's claim.

6.08 (5) If liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance. [See also Rule 6.01(2)]

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(without conflicts provisions)

clean version

September 2010

For discussion purposes only

DEFINITIONS

In this Code, unless the context indicates otherwise,

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) in an arrangement for sharing space;

(d) as a law corporation,

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

(f) in a corporation or other body;

(g) in a Multi-Disciplinary Practice (MDP).

"lawyer" means a member of the Society, and includes an articled student enrolled in the Law Society Admission Program;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

CHAPTER 1 – STANDARDS OF THE LEGAL PROFESSION

1.01 CANONS OF LEGAL ETHICS

1.01 These Canons of Legal Ethics in Rules 1.01 to 1.05 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned. A version of these Canons has formed part of the *Code of Professional Conduct* of the Law Society of British Columbia since 1921. They are included here both for their historical value and for their statement of general principles that underlie the remainder of the rules in this Code.

A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.

In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

1.01 (1) To the state

(a) A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

(b) When engaged as a Crown prosecutor, a lawyer's primary duty is not to seek a conviction but to see that justice is done; to that end the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused.

(c) A lawyer should accept without hesitation, and if need be without fee or reward, the cause of any person assigned to the lawyer by the court, and exert every effort on behalf of that person.

1.02 To courts and tribunals

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

(b) Judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint. Whenever there is proper ground for serious complaint against a judicial officer, it is proper for a lawyer to submit the grievance to the appropriate authorities.

(c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.

(d) A lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer's or a client's favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.

1.03 To the client

(a) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give

an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* (hear the other side) is a safe rule to follow.

(b) A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interests between the lawyer and a client or between clients.

(c) Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

(d) A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time, the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.

(e) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

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

(g) A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject-matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client's secrets or confidences. Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.

(h) A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client's moneys and trust property only as authorized by the client, and not commingle it with that of

the lawyer.

(i) A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low. The client's ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.

(j) A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.

(k) A lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters, such as the attestation or custody of a document, unless it is necessary in the interests of justice. If the lawyer is a necessary witness with respect to other matters, the conduct of the case should be entrusted to other counsel.

1.04 To other lawyers

(a) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.

(b) A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given. A lawyer should never communicate upon or attempt to negotiate or compromise a matter directly with any party who the lawyer knows is represented therein by another lawyer, except through or with the consent of that other lawyer.

(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.

1.05 To oneself

(a) A lawyer should assist in maintaining the honour and integrity of the legal profession, should expose before the proper tribunals without fear or favour, unprofessional or dishonest conduct by any other lawyer and should accept without hesitation a retainer against any lawyer who is alleged to have wronged the client.

(b) It is the duty of every lawyer to guard the Bar against the admission to the profession of any candidate whose moral character or education renders that person unfit for admission.

(c) A lawyer should make legal services available to the public in an efficient and convenient manner that will command respect and confidence. A lawyer's best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.

(d) No client is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the state or disrespect for judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

(e) A lawyer should recognize that the oaths taken upon admission to the Bar are solemn undertakings to be strictly observed.

(f) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

1.06 INTEGRITY

1.06 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary
Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be. Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety. Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

1.06 (2) A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Commentary

Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

CHAPTER 2 - RELATIONSHIP TO CLIENTS

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

"Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

2.01 (2) A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

For a discussion of the correct procedure in swearing an affidavit or taking a solemn declaration, see Appendix A to this Code.

In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client.

The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

(a) decline to act;

(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

A lawyer should be wary of bold and over-confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal

services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

2.02 QUALITY OF SERVICE

Dishonesty, Fraud by Client

2.02 (7) When acting for a client, a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions

for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.

The lawyer should also make inquiries of a client who:

(a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

The lawyer should make a record of the results of these inquiries.

A bona fide test case is not necessarily precluded by this subrule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Restricting Future Representation

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

2.03 CONFIDENTIALITY

Future Harm / Public Safety Exception

2.03 (3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there

is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Commentary

Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this subrule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 SCR 455 at paragraph 83, the Court also observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

In assessing whether disclosure of confidential information is justified, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

How and when disclosure should be made under this subrule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the Law Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

If confidential information is disclosed under this rule, the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm he or she intended to prevent, the identity of the person who prompted him to communicate the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made

2.04 CONFLICTS

See separate document

2.05 PRESERVATION OF CLIENT'S PROPERTY

Accounting and Delivery

2.06 FEES AND DISBURSEMENTS

Division of Fees and Referral Fees

2.06 (7) In this rule, **"another lawyer"** includes a person who is:

(a) a member of a recognized legal profession in any other jurisdiction; and

(b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction

2.06 (8) A lawyer must not:

(a) directly or indirectly share, split or divide his or her fees with any person other than another lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.

Commentary
This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from: (a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated

from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for Multi-disciplinary Practices

2.06 (9) Despite subrule (7), a lawyer permitted to practise in a multi-disciplinary practice (MDP) under the Rules may share fees, profits or revenue from the practice of law in the MDP with a non-lawyer member of the MDP only if all the owners of the MDP are individuals or professional corporations actively involved in the MDP's delivery of legal services to clients or in the management of the MDP.

Commentary

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

See also the definitions of **"MDP"** and "**professional corporation**" in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.

2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.07 (1) A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a

lawyer to withdraw on capricious or arbitrary grounds.

An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See subrule (8) – Manner of Withdrawal.

Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

When a lawyer leaves a law firm to practise alone or to join another law firm, the departing lawyer and the law firm have a duty to inform all clients for whom the departing lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them. The same duty may arise when a firm is winding up or dividing into smaller units.

This duty does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm.

When this Chapter requires a notification to clients, each client must receive a letter as soon as practicable after the effective date of the changes is determined, informing the client of the right to choose his or her lawyer.

It is preferable that this letter be sent jointly by the firm and any lawyers affected by the changes. However, in the absence of a joint announcement, the firm or any lawyers affected by the changes may send letters in substantially the form set out in a precedent letter on the Law Society website at **[link]**.

Lawyers whose clients are affected by changes in a law firm have a continuing obligation to protect client information and property, and must minimize any adverse effect on the interests of clients. This obligation generally includes an obligation to ensure that files transferred to a new lawyer or law firm are properly transitioned, including, when necessary, describing the status of the file and noting any unfulfilled undertakings and

other outstanding commitments.

The right of a client to be informed of changes to a law firm and to choose his or her lawyer cannot be curtailed by any contractual or other arrangement.

With respect to communication other than that required by these Rules, lawyers should be mindful of the common law restrictions upon uses of proprietary information, and interference with contractual and professional relations between the law firm and its clients.

Non-payment of Fees

2.07 (3) If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw.

Commentary

When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for a hearing or trial.

In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse counsel's withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See *R. v. Cunningham*, 2010 SCC 10.

The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Re Leask and Cronin* (1985), 66 BCLR 187 (SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the Rules of Court before being relieved of the responsibilities that attach as "solicitor acting for the party." See *Luchka* v. *Zens* (1989), 37 BCLR (2d) 127 (CA)."

Withdrawal from Criminal Proceedings

2.07 (4) If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

Manner of Withdrawal

2.07 (9) On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

Commentary
If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client. The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute. Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client. A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

Confidentiality

2.07 (10) Subject to exceptions permitted by law, if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.

Commentary
One such exception is that in *R. v. Cunningham*, 2010 SCC 10, which establishes that, in a criminal case, if the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court. See para. 31: > Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *R. v. McClure*, 2001 SCC 14 and *Smith v. Jones*, [1999] 1 S.C.R. 455). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

Duty of Successor Lawyer

2.07 (11) Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

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

CHAPTER 3 – MARKETING OF LEGAL SERVICES

3.02 MARKETING

Application of Rule

3.02 (1) This Rule applies to any marketing activity undertaken or authorized by a lawyer in which he or she is identified as a lawyer, mediator or arbitrator.

Definitions

3.02 (2) In this Chapter:

"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;

"lawyer" includes a member of the Law Society, and a person enrolled in the Law Society Admission Program.

Content and Format of Marketing Activities

3.02 (3) Any marketing activity undertaken or authorized by a lawyer must not be:

(a) false,

(b) inaccurate,

(c) unverifiable,

(d) reasonably capable of misleading the recipient or intended recipient, or

(e) contrary to the best interests of the public.

Commentary
For example, a marketing activity violates Rule 4 if it: (a) is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient, (b) 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 (c) otherwise brings the administration of justice into disrepute.

Former firm of current judge or master

3.02 (4) A lawyer must not state on any letterhead or business card or in any other marketing activity the name of a judge or master as being a predecessor or former member of the lawyer's firm.

Notary Public

3.02 (5) A lawyer who, on any letterhead, business card or sign, or in any other marketing activity:

(a) uses the term "Notary," "Notary Public" or any similar designation, or

(b) in any other way represents to the public that the lawyer is a notary public,

must also indicate in the same publication or marketing activity the lawyer's status as a lawyer.

Designation

3.02 (6) A lawyer must not list a person not entitled to practise law in British Columbia on any letterhead or in any other marketing activity without making it clear in the marketing activity that the person is not entitled to practise law in British Columbia.
In particular, a person who fits one or more of the following descriptions must not be listed without an appropriate indication of the person's status:

(a) a retired member,

(b) a non-practising member,

(c) a deceased member,

(d) an articled student,

(e) a legal assistant or paralegal,

(f) a patent agent, if registered as such under the *Patent Act*,

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

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

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

3.03 ADVERTISING NATURE OF PRACTICE

Preferred areas of practice

3.03 (1) A lawyer may state in any marketing activity a preference for practice in any one or more fields of law if the lawyer regularly practises in each field of law in respect of which the lawyer wishes to state a preference.

Specialization

3.03 (2) Unless otherwise authorized by the *Legal Profession Act*, the Rules, or this Code or by the Benchers, a lawyer must:

(a) not use the title "specialist" or any similar designation suggesting a recognized special status or accreditation in any other marketing activity, and

(b) take all reasonable steps to discourage use, in relation to the lawyer by another person, of the title "specialist" or any similar designation suggesting a recognized special status or accreditation in any marketing activity.

Real estate sales

3.02 (3) When engaged in marketing of real property for sale or lease, a lawyer must include in any marketing activity:

(a) the name of the lawyer or the lawyer's firm, and

(b) if a telephone number is used, only the telephone number of the lawyer or the lawyer's firm.

Multi-Disciplinary Practice

3.02 (4) Unless permitted to practise law in an MDP under the Law Society Rules, a lawyer must not, in any marketing activity

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

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

3.02 (5) A lawyer practising law in an MDP must ensure that all marketing activity for the firm indicates that the firm is an MDP.

CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

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

(g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

4.02 THE LAWYER AS WITNESS

Submission of Evidence

4.02 (1) A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

(a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;

(b) the matter is purely formal or uncontroverted; or

(c) it is necessary in the interests of justice for the lawyer to give evidence.

Commentary
A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

4.04 (2) Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination, with the leave of the court, the lawyer may discuss with the witness any matter;

(d) during examination for discovery, the lawyer may discuss the evidence given or to be given by the witness during an adjournment in the course of the examination.

Commentary
The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel. The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination. The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing. This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Duty to Report

6.01 (3) Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) a shortage of trust monies;

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

(c) the abandonment of a law practice;

(d) participation in criminal activity related to a lawyer's practice;

(e) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(f) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

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

Commentary
Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer). Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive. Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to

seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Inadvertent Communications

6.02 (10) A lawyer who has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:

(a) return the document, unread and uncopied, to the party to whom it belongs, or

(b) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:

(i) of the extent to which the lawyer is aware of the contents, and

(ii) what use the lawyer intends to make of the contents of the document.

Commentary

For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form, such as computer hard drives and memory cards.

Undertakings and Trust Conditions

6.02 (11) A lawyer must:

(a) not give an undertaking that cannot be fulfilled;

(b) fulfill every undertaking given; and

(c) honour every trust condition once accepted.

Commentary
Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility. Trust conditions, which are equivalent to undertakings, should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party. The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions. If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis. Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them. Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical

obligations that exist between lawyers.

Trust cheques

6.02 (12) Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque

(a) will be paid, and

(b) is capable of being certified if presented for that purpose.

Commentary

Unless funds are to be paid under an agreement that specifically requires another form of payment or payment by another person, a lawyer must not refuse to accept another lawyer's uncertified cheque for the funds. It is not improper for a lawyer, at his or her own expense, to have another lawyer's cheque certified.

Real estate transactions

6.02 (13) If a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of the purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to or as directed by the vendor on completion of registration.

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary
Under the Lawyers' Compulsory Professional Liability Insurance Policy, a lawyer is contractually required to give written notice to the insurer immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could reasonably be expected to be the basis of a claim or suit covered under the policy. Subrule (2) imposes an ethical duty to report to the insurer. Subrule (1) should not be construed as relieving a lawyer from the obligation to report to the insurer before attempting any rectification.

Notice of Claim

6.08 (2) A lawyer must give prompt notice of any circumstances that may reasonably be expected to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary
The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

Co-operation

6.08 (3) A lawyer facing a claim or potential claim of professional negligence must not fail to assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim or potential claim to be dealt with promptly.

APPENDIX A — AFFIDAVITS, SOLEMN DECLARATIONS AND OFFICER CERTIFICATIONS

Affidavits and solemn declarations

1. A lawyer must not swear an affidavit or take a solemn declaration unless the deponent:

   (a) is physically present before the lawyer,

   (b) acknowledges that he or she is the deponent,

   (c) understands or appears to understand the statement contained in the document,

   (d) in the case of an affidavit, swears, declares or affirms that the contents of the document are true,

   (e) in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath, and

   (f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

Commentary

Non-practising and retired members

Non-practising and retired members are not permitted to act as notaries public or commissioners for the purpose of taking affidavits or solemn declarations. See Law Society Rules 2-3 and 2-4 for the definitions of non-practising and retired members.

Interjurisdictional Practice

A British Columbia lawyer, as a notary public, may administer oaths and take affidavits, declarations and affirmations only within British Columbia: See section 14 of the *Legal Profession Act* for a lawyer's right to act as a notary public, and section 18 of the *Notaries Act*, RSBC 1996, c. 334 for rights and powers of a notary public, including the right to draw affidavits, affirmations or statutory declarations for other jurisdictions.

A British Columbia lawyer, as a commissioner for taking affidavits for British Columbia, has authority to administer oaths and take affidavits, declarations and affirmations outside of BC *for use in BC*: See sections 59, 63 and related sections of the *Evidence Act*, RSBC 1996, c.124.

Notwithstanding Law Society mobility provisions across Canada, a British Columbia lawyer cannot swear an affidavit in another province or territory for use in that jurisdiction unless the lawyer is a member of the bar in that jurisdiction or the jurisdiction's own legislation allows it. For example, because of Alberta legislation, a member of the Law Society of British Columbia, while in Alberta acting under the mobility provisions on an Alberta matter, cannot swear an affidavit for use in Alberta.

British Columbia lawyers should contact the law society of the other province or territory if they need to check whether they are entitled to swear an affidavit in that jurisdiction.

Likewise, lawyers from other jurisdictions visiting British Columbia may not swear affidavits in BC for use in BC: See section 60 of the *Evidence Act* and the definition of **"practising lawyer"** in section 1(1) of the *Legal Profession Act.*

Deponent present before commissioner

See *R.* v. *Schultz*, [1922] 2 WWR 582 (Sask. CA) in which the accused filled in and signed a declaration and left it on the desk of a commissioner for taking oaths, later meeting the commissioner outside and asking him to complete it. The court held that it was not a solemn declaration within the meaning of the *Canada Evidence Act*, stating that: "The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was 'declared before him' is not true. The essential requirement of the *Act* is not the signature of the declarant but his solemn declaration made before the commissioner." (p. 584) Likewise, it has been held in the U.S. that the taking of an affidavit over the telephone is grounds for a charge of negligence and professional misconduct: *Bar Association of New York City* v. *Napolis* (1915), 155 N.Y. Sup. 416 (N.Y. Sup. Ct. App. Div.). In B.C., the conduct of a lawyer who affixed his name to the jurat of the signed affidavit without ever having seen the deponent constituted professional misconduct: Law Society *Discipline Case Digest* 83/14.

Identification

The commissioner should be satisfied that the deponent is who the deponent represents himself or herself to be. Where the commissioner does not know the deponent personally, identification should be inspected and/or appropriate introductions should be obtained.

Appearing to understand

To be satisfied of this, the commissioner may read the document aloud to the deponent, have the deponent read it aloud or accept the deponent's statement that its contents are understood: *R.* v. *Whynot* (1954), 110 CCC 35 at 42 (NSCA).

It is also important that the deponent understands the significance of the oath or declaration he or she is proposing to take. See *King* v. *Phillips* (1908), 14 CCC 239 (B.C. Co. Ct.); *R.* v. *Nichols*, [1975] 5 WWR 600 (Alta SC); and *Owen* v. *Yorke*, (6 December, 1984), Vancouver A843177 (BCSC).

If it appears that a deponent is unable to read the document, the commissioner must certify in the jurat that the document was read in his or her presence and the commissioner was satisfied that the deponent understood it: B.C., *Rules of Court*, Rule 51(5). If it appears that the deponent does not understand English, the lawyer must arrange for a competent interpreter to interpret the document to the deponent and certify by endorsement in Form 60 that he or she has done so: *Rules of Court*, Rule 51(6).

Affirmation

The British Columbia Law Reform Commission has raised the question of whether an affidavit may properly be created by solemn affirmation under provincial law. For this reason, in cases where a deponent does not want to swear an affidavit, it may be prudent to create the affidavit by solemn declaration rather than by solemn affirmation. See Appendix B to Law Reform Commission of British Columbia, *Report on Affidavits: Alternatives to Oaths* LRC 115 (1990). **[Is this still applicable after 20 years?]**

Swear or Affirm that the Contents are True

This can be accomplished by the commissioner asking the deponent: “Do you swear that the contents of this affidavit are true, so help you God?” or, if the affidavit is being affirmed, “Do you solemnly affirm [or words with the same effect] that the evidence given by you is the truth, the whole truth and nothing but the truth?,” to which the deponent must answer in the affirmative. In taking an affirmation the lawyer should comply with section 20 of the *Evidence Act*, RSBC 1996, c. 124 and the *Affirmation Regulation*, B.C. Reg. 396/89.

Section 29 of the *Interpretation Act*, RSBC 1996, c. 238, defines an affidavit or oath as follows:

> “affidavit” or “oath” includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word “swear” includes solemnly declare or affirm;

If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialling the alterations, taking the oath again from the deponent and then signing the altered affidavit. A second jurat should be added, commencing with the word “resworn.”

Generally, an affidavit is sworn and filed in a proceeding that is already commenced. An

affidavit may also be sworn before the proceeding is commenced: *Rules of Court*, Rule 51(12). However, an affidavit may not be postdated: *Re: Stanley Foo*, hearing report pending, May, 1997.

Swearing to an affidavit exhibits that are not in existence can amount to professional misconduct: *Re: Stanley Foo*.

Solemn Declaration

A solemn declaration should be made in the words of the statute: *King* v. *Phillips*, *supra*; *R.* v. *Whynot*, *supra.*

The proper form for a solemn declaration is set out in section 41 of the *Canada Evidence Act*, RSC 1985, c. C-5:

> **Solemn declaration**
>
> 41. Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:
>
> > I, ..., solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.
> >
> > Declared before me ..... at ..... this ..... day of ....., 20 .....

and in section 69 of the *Evidence Act*, RSBC 1996, c. 124:

> **Statutory declarations**
>
> 69. A gold commissioner, mayor or commissioner authorized to take affidavits, or any other person authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making it before him or her in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing, in the following words:
>
> > I, A.B., solemnly declare that [state the facts declared to], and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath.

Execution

A deponent unable to sign an affidavit may place his or her mark on it: *Rules of Court*, Rule 51(3)(b)(ii). An affidavit by a person who could not make any mark at all was accepted by the court in *R.* v. *Holloway* (1901), 65 JP 712 (Magistrates Ct.).

Witnessing the execution of an instrument

2. When a lawyer witnesses the execution of an instrument by an individual under the *Land Title Act*, RSBC 1996, c. 250, the lawyer's signature is a certification by the lawyer that:

   (a) the individual appeared before and acknowledged to the lawyer that he or she is the person named in the instrument as transferor, and

   (b) the signature witnessed by the lawyer is the signature of the individual who made the acknowledgment. (See section 43 of the *Land Title Act*.)

Commentary

Non-practising and retired members are not permitted to act as officers for the purpose of witnessing the execution of instruments under the *Land Title Act*.

APPENDIX B — FAMILY LAW MEDIATION

Definitions

1. In this Appendix:

   (a) **"family law mediation"** means a process by which two adult persons ("participants") attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation or divorce;

   (b) without limiting the generality of the foregoing, **"family law mediation"** includes one or more of the following acts when performed by a lawyer acting as a family mediator:

      (i) informing the participants of the legal issues involved,

      (ii) advising the participants of a court's probable disposition of the issue,

      (iii) preparing any agreement between the participants other than a memorandum recording the results of the mediation,

      (iv) giving any other legal advice.

Disqualifications

2. (a) If a lawyer, or a partner, associate or employee of that lawyer has previously acted or is presently acting for one or both of the participants to the mediation in a solicitor-client relationship with respect to any matter which may reasonably be expected to become an issue during the family law mediation, that lawyer may not act as a family law mediator for the participants.

   (b) If a lawyer has acted as a family law mediator for the participants, neither that lawyer, nor any partner, associate or employee of that lawyer may act in a solicitor-client relationship for either participant against the other participant.

   (c) If a lawyer, or a partner, associate or employee of that lawyer has acted as a family law mediator for the participants, neither that lawyer, nor a partner, associate or employee of that lawyer may act for or against any person where to do so might require the lawyer to disclose or make use of confidential information given in the course of mediation.

Mediator's duties

3. A lawyer who acts as a family law mediator must ensure that if agreement is reached between the participants and as a result the lawyer drafts a document representing the agreement reached, the lawyer actively encourages each participant to obtain independent legal advice before executing the agreement.

Written agreement

4. A lawyer who acts as a family law mediator and the participants with respect of whom the lawyer mediates shall, before mediation commences, enter into a written agreement which shall include at least the following provisions:

    (a) an agreement that the lawyer, throughout the mediation process, is not acting as legal counsel for either participant,

    (b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant which is relevant to the issues being mediated,

    (c) an agreement that the mediation process is part of an attempt to settle the differences between the participants and that all communications between the participants and between each participant and the mediator will be "without prejudice" so that:

        (i) neither participant will attempt to introduce evidence of the communications in any legal proceedings,

        (ii) neither participant will attempt to call the mediator as a witness in any legal proceedings,

    (d) an acknowledgment that the lawyer must report to the Superintendent of Family and Child Services any instance arising from the mediation in which the lawyer has reasonable grounds to believe that a child is in need of protection,

    (e) an agreement as to the lawyer's rate of remuneration and terms of payment,

    (f) an agreement as to the circumstances in which mediation will terminate.

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(without conflicts provisions)

redlined version

September 2010

For discussion purposes only

DEFINITIONS

In this Code, unless the context indicates otherwise,

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) ~~as a clinic under the [provincial or territorial Act governing legal aid]~~in an arrangement for sharing space;

(d) as a law corporation,

(e) in a government, a Crown corporation or any other public body; ~~or~~

(~~e~~f) in a corporation or other ~~organization~~body;

(g) in a Multi-Disciplinary Practice (MDP).

"lawyer" means a member of the Society, and includes ~~a law student registered~~an articled student enrolled in the Law Society~~'s pre-call training program~~ Admission Program;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

CHAPTER 1 – STANDARDS OF THE LEGAL PROFESSION

1.01 CANONS OF LEGAL ETHICS

1.01 These Canons of Legal Ethics in Rules 1.01 to 1.05 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned. A version of these Canons has formed part of the *Code of Professional Conduct* of the Law Society of British Columbia since 1921. They are included here both for their historical value and for their statement of general principles that underlie the remainder of the rules in this Code.

A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.

In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

1.01 (1) To the state

(a) A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

(b) When engaged as a Crown prosecutor, a lawyer's primary duty is not to seek a conviction but to see that justice is done; to that end the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused.

(c) A lawyer should accept without hesitation, and if need be without fee or reward, the cause of any person assigned to the lawyer by the court, and exert every effort on behalf of that person.

1.02 To courts and tribunals

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

(b) Judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint. Whenever there is proper ground for serious complaint against a judicial officer, it is proper for a lawyer to submit the grievance to the appropriate authorities.

(c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.

(d) A lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer's or a client's favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.

1.03 To the client

(a) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* (hear the other side) is a safe rule to follow.

(b) A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interests between the lawyer and a client or between clients.

(c) Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

(d) A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time, the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.

(e) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

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

(g) A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject-matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client's secrets or confidences. Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.

(h) A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client's moneys and trust property only as authorized by the client, and not commingle it with that of the lawyer.

(i) A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low. The client's ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.

(j) A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.

(k) A lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters, such as the attestation or custody of a document, unless it is necessary in the interests of justice. If the lawyer is a necessary witness with respect to other matters, the conduct of the case should be entrusted to other counsel.

1.04 To other lawyers

(a) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.

(b) A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given. A lawyer should never communicate upon or attempt to negotiate or compromise a matter directly with any party who the lawyer knows is represented therein by another lawyer, except through or with the consent of that other lawyer.

(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.

1.05 To oneself

(a) A lawyer should assist in maintaining the honour and integrity of the legal profession, should expose before the proper tribunals without fear or favour,

unprofessional or dishonest conduct by any other lawyer and should accept without hesitation a retainer against any lawyer who is alleged to have wronged the client.

(b) It is the duty of every lawyer to guard the Bar against the admission to the profession of any candidate whose moral character or education renders that person unfit for admission.

(c) A lawyer should make legal services available to the public in an efficient and convenient manner that will command respect and confidence. A lawyer's best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.

(d) No client is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the state or disrespect for judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

(e) A lawyer should recognize that the oaths taken upon admission to the Bar are solemn undertakings to be strictly observed.

(f) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

1.~~01~~06 INTEGRITY

1.~~01~~ 06 (1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary
Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be. Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety. Dishonourable or questionable conduct on the part of a lawyer in either private life or

professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

1.~~01~~ 06 (2) A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Commentary

Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

CHAPTER 2 - RELATIONSHIP TO CLIENTS

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

"Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

2.01 (2) A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

For a discussion of the correct procedure in swearing an affidavit or taking a solemn declaration, see Appendix A to this Code.

In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client.

The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

(a) decline to act;

(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

A lawyer should be wary of bold and over-confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal

services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

2.02 QUALITY OF SERVICE

Dishonesty, Fraud by Client

2.02 (7) When acting for a client, a lawyer must not engage in any activity that the lawyer knows or ought to know ~~never knowingly~~ assists in or encourages any dishonesty, ~~fraud,~~ crime or fraud, ~~illegal conduct, or instruct the client on how to violate the law and avoid punishment.~~including a fraudulent conveyance, preference or settlement.

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

A lawyer should be alert to and avoid unwittingly becoming involved with a client

engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, ~~fraud, crime~~ or ~~illegal conduct~~fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify~~ing who are~~ the legal or beneficial ownership of property and business entities~~, verifying~~ and who has the control of business entities, and to clarify~~ing~~ the nature and purpose of a complex or unusual transaction where the nature and purpose ~~is~~ are not clear.

The lawyer should also make inquiries of a client who:

(a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

The lawyer should make a record of the results of these inquiries.

A bona fide test case is not necessarily precluded by this subrule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Restricting Future Representation

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

2.03 CONFIDENTIALITY

Future Harm / Public Safety Exception

2.03 (3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of ~~:~~

death or serious bodily harm, and disclosure is necessary to prevent the death or harm~~.;~~ ~~or~~

~~(a) substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury.~~

Commentary

Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this subrule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 S~~.~~C~~.~~R~~.~~ 455 at paragraph 83, the Court also observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

~~"Unlawful acts" giving rise to substantial financial injury may include criminal, quasi-criminal or fraudulent acts that are contrary to criminal, regulatory or civil law.~~

In assessing whether disclosure of confidential information is justified ~~to prevent substantial harm~~, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

How and when disclosure should be made under this subrule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the ~~local law~~ Law ~~society~~ Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

If confidential information is disclosed under ~~Rule 2.03(3)~~this rule, the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm he or she intended to prevent, the identity of the person who prompted him to communicate the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made

~~A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the Code of Professional Conduct make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (subrule 2.02 (9)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (subrule 2.02 (10)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization (subrule 2.02 (5)) and the lawyer should comply with subrule 2.02 (10), which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.~~

2.04 CONFLICTS

See separate document

2.05 PRESERVATION OF CLIENT'S PROPERTY

Accounting and Delivery

2.05 (6) If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the *Income Tax Act* (Canada), the *Charter* and the *Criminal Code*.

A lawyer is never required to take or keep possession of property relevant to a crime or offence. If a lawyer comes into possession of property relevant to a crime, either from a client or another person, the lawyer must act in keeping with the lawyer's duty of loyalty and confidentiality to the client and the lawyer's duty to the administration of justice, which requires, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. Generally, a lawyer in such circumstances should, as soon as reasonably possible:

(a) turn over the property to the prosecution, either directly or anonymously;

(b) deposit the property with the trial judge in the relevant proceeding;

(c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or

(d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.

When a lawyer discloses or delivers to the Crown or law enforcement authorities property relevant to a crime or offence, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the property.

If a lawyer delivers the property to the court under paragraph (c), he or she should do so in accordance with the protocol established for such purposes, which permits the lawyer to deliver the property to the court without formal application or investigation, ensures that the property is available to both the Crown and defence counsel for testing and

~~examination upon motion to the court, and ensures that the fact that property was received from the defence counsel will not be the subject of comment or argument at trial.~~

2.06 FEES AND DISBURSEMENTS

Division of Fees and Referral Fees

2.06 (7) In this rule, **"another lawyer"** includes a person who is:

(a) a member of a recognized legal profession in any other jurisdiction; and

(b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction

2.06 (8) A lawyer must not:

(a) directly or indirectly share, split~~,~~ or divide his or her fees with any person ~~who is not a~~other than another lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person ~~who is not a~~other than another lawyer.

Commentary

This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for Multi-~~discipline~~ disciplinary Practices ~~and Interjurisdictional Law Firms~~

2.06 (~~8~~9) Despite ~~Subrule~~ subrule (7)~~, does not apply to;~~
a lawyer permitted to practise in a multi-~~discipline~~ disciplinary practice~~s~~ (MDP) under the Rules may ~~of lawyer and non-lawyer partners if the partnership agreement provides for the sharing~~ share ~~of~~ fees, ~~cash flows or~~ profits or revenue from the practice of law in the MDP with a non-lawyer member of the MDP only if all the owners of the MDP are individuals or professional corporations actively involved in the MDP's delivery of legal services to clients or in the management of the MDP.~~among the members of the firm; and~~

~~(a) sharing of fees, cash flows or profits by lawyers who are:~~

~~(i) members of an interprovincial law firm; or~~

~~(ii) members of a law partnership of Canadian and non-Canadian lawyers who otherwise comply with this rule.~~

Commentary

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

See also the definitions of **"MDP"** and "**professional corporation**" in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.~~An affiliation is different from a multi-disciplinary practice established in accordance with the rules/regulations/by-laws under the governing legislation, an interprovincial law partnership or a partnership between Canadian lawyers [1] and foreign lawyers. An affiliation is subject to rule 2.06 (7). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.~~

2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.07 (1) A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

~~1 This issue is currently specific to Ontario.~~

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

An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See subrule (8) – Manner of Withdrawal.

Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

When a lawyer leaves a law firm to practise alone or to join another law firm, the departing lawyer and the law firm have a duty to inform all clients for whom the departing lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them. The same duty may arise when a firm is winding up or dividing into smaller units.

This duty does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm.

When this Chapter requires a notification to clients, each client must receive a letter as soon as practicable after the effective date of the changes is determined, informing the client of the right to choose his or her lawyer.

It is preferable that this letter be sent jointly by the firm and any lawyers affected by the changes. However, in the absence of a joint announcement, the firm or any lawyers affected by the changes may send letters in substantially the form set out in a precedent letter on the Law Society website at **[link]**.

Lawyers whose clients are affected by changes in a law firm have a continuing obligation to protect client information and property, and must minimize any adverse effect on the

interests of clients. This obligation generally includes an obligation to ensure that files transferred to a new lawyer or law firm are properly transitioned, including, when necessary, describing the status of the file and noting any unfulfilled undertakings and other outstanding commitments.

The right of a client to be informed of changes to a law firm and to choose his or her lawyer cannot be curtailed by any contractual or other arrangement.

With respect to communication other than that required by these Rules, lawyers should be mindful of the common law restrictions upon uses of proprietary information, and interference with contractual and professional relations between the law firm and its clients.~~When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.~~

Non-payment of Fees

2.07 (3) If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw~~ unless serious prejudice to the client would result~~.

Commentary

When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for a hearing or trial.

In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse counsel's withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See *R. v. Cunningham*, 2010 SCC 10.

The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Re Leask and Cronin* (1985), 66 BCLR 187 (SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the Rules of Court before being relieved of the responsibilities that attach as "solicitor acting for the party." See *Luchka* v. *Zens* (1989), 37 BCLR (2d) 127 (CA)."

Withdrawal from Criminal Proceedings

2.07 (4) If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

~~**Commentary**~~

~~A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.~~

Manner of Withdrawal

2.07 (9) On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

Commentary

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

~~If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter.~~

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

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

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

Confidentiality

2.07 (10) Subject to exceptions permitted by law, if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.

Commentary

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

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

Duty of Successor Lawyer

2.07 (~~10~~11) Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

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

CHAPTER 3 – MARKETING OF LEGAL SERVICES

3.02 MARKETING

~~**Marketing of Professional Services**~~ **Application of Rule**

3.02 (1) This Rule applies to any marketing activity undertaken or authorized by a lawyer in which he or she is identified as a lawyer, mediator or arbitrator.

~~A lawyer may market professional services, provided that the marketing is:~~

~~(a) demonstrably true, accurate and verifiable;~~

~~(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;~~

~~(c) in the best interests of the public and consistent with a high standard of professionalism.~~

Definitions

3.02 (2) In this Chapter:

"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;

"lawyer" includes a member of the Law Society, and a person enrolled in the Law Society Admission Program.

~~**Advertising of Fees**~~

~~**3.02 (2)** A lawyer may advertise fees charged for their services provided that:~~

~~(a) the advertising is reasonably precise as to the services offered for each fee quoted;~~

~~(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and~~

~~(c) the lawyer strictly adheres to the advertised fee in every applicable case.~~

Content and Format of Marketing Activities

3.02 (3) Any marketing activity undertaken or authorized by a lawyer must not be:

(a) false,

(b) inaccurate,

(c) unverifiable,

(d) reasonably capable of misleading the recipient or intended recipient, or

(e) contrary to the best interests of the public.

Commentary

For example, a marketing activity violates Rule 4 if it:

(a) is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient,

(b) 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

(c) otherwise brings the administration of justice into disrepute.

~~Examples of marketing that may contravene this rule include:~~

~~stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;~~

~~suggesting qualitative superiority to other lawyers;~~

~~raising expectations unjustifiably;~~

~~suggesting or implying the lawyer is aggressive;~~

~~disparaging or demeaning other persons, groups, organizations or institutions;~~

~~taking advantage of a vulnerable person or group; and~~

~~using testimonials or endorsements that contain emotional appeals.~~

Former firm of current judge or master

3.02 (4) A lawyer must not state on any letterhead or business card or in any other marketing activity the name of a judge or master as being a predecessor or former member of the lawyer's firm.

Notary Public

3.02 (5) A lawyer who, on any letterhead, business card or sign, or in any other marketing activity:

(a) uses the term "Notary," "Notary Public" or any similar designation, or

(b) in any other way represents to the public that the lawyer is a notary public,

must also indicate in the same publication or marketing activity the lawyer's status as a lawyer.

Designation

3.02 (6) A lawyer must not list a person not entitled to practise law in British Columbia on any letterhead or in any other marketing activity without making it clear in the marketing activity that the person is not entitled to practise law in British Columbia.
In particular, a person who fits one or more of the following descriptions must not be listed without an appropriate indication of the person's status:

(a) a retired member,

(b) a non-practising member,

(c) a deceased member,

(d) an articled student,

(e) a legal assistant or paralegal,

(f) a patent agent, if registered as such under the *Patent Act*,

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

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

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

3.03 ADVERTISING NATURE OF PRACTICE

Preferred areas of practice

3.03 (1) A lawyer may state in any marketing activity a preference for practice in any one or more fields of law if the lawyer regularly practises in each field of law in respect of which the lawyer wishes to state a preference.~~A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.~~

Specialization

3.03 (2) Unless otherwise authorized by the *Legal Profession Act*, the Rules, or this Code or by the Benchers, a lawyer must:

(a) not use the title “specialist” or any similar designation suggesting a recognized special status or accreditation in any other marketing activity, and

(b) take all reasonable steps to discourage use, in relation to the lawyer by another person, of the title “specialist” or any similar designation suggesting a recognized special status or accreditation in any marketing activity.

~~**Commentary**~~

~~Lawyers' advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.~~

~~A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.~~

~~If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in [name of jurisdiction] and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.~~

~~A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.~~

Real estate sales

3.02 (3) When engaged in marketing of real property for sale or lease, a lawyer must include in any marketing activity:

(a) the name of the lawyer or the lawyer's firm, and

(b) if a telephone number is used, only the telephone number of the lawyer or the lawyer's firm.

Multi-Disciplinary Practice

3.02 (4) Unless permitted to practise law in an MDP under the Law Society Rules, a lawyer must not, in any marketing activity

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

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

3.02 (5) A lawyer practising law in an MDP must ensure that all marketing activity for the firm indicates that the firm is an MDP.

CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

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

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

4.02 THE LAWYER AS WITNESS

Submission of Evidence

4.02 (1) A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

(a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal~~, ; or unless~~

(b) the matter is purely formal or uncontroverted; or

~~(a)~~(c) it is necessary in the interests of justice for the lawyer to give evidence.

Commentary
A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

4.04 (2) Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination, with the leave of the court, the lawyer may discuss with the witness any matter.;

~~(c)~~(d) during examination for discovery, the lawyer may discuss the evidence given or to be given by the witness during an adjournment in the course of the examination.

Commentary

The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel.

The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

~~While any testimony-related discussion is generally prohibited during breaks, there are two qualifications to the rule as it relates to examinations for discovery. First, if the examination for discovery of a witness is adjourned for longer than one week, it is~~

~~permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer's intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.~~

~~This rule is not intended to prevent discussions or consultations that are necessary to fulfill undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in this rule.~~

This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.~~This rule applies with necessary modifications to examinations out of court.~~

CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Duty to Report ~~Misconduct~~

6.01 (3) Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) ~~the misappropriation or misapplication~~ a shortage of trust monies;

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

~~(b)~~(c) the abandonment of a law practice;

~~(c)~~(d) participation in criminal activity related to a lawyer's practice;

~~(d)~~(e) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

~~(e)~~(f) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

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

Commentary
Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer). Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive. Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Inadvertent Communications

6.02 (10) A lawyer who ~~receives~~ has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:~~relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.~~

(a) return the document, unread and uncopied, to the party to whom it belongs, or

(b) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:

(i) of the extent to which the lawyer is aware of the contents, and

(ii) what use the lawyer intends to make of the contents of the document.

Commentary

~~Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.~~ For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form, such as computer hard drives and memory cards.

~~Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.~~

Undertakings and Trust Conditions

6.02 (11) A lawyer must:

(a) not give an undertaking that cannot be fulfilled; ~~and must~~

(b) fulfill every undertaking given; and

(c) honour every trust condition once accepted.

Commentary

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to

expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

Trust conditions, which are equivalent to undertakings, should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

Trust cheques

6.02 (12) Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque

(a) will be paid, and

(b) is capable of being certified if presented for that purpose.

Commentary

Unless funds are to be paid under an agreement that specifically requires another form of payment or payment by another person, a lawyer must not refuse to accept another lawyer's uncertified cheque for the funds. It is not improper for a lawyer, at his or her own expense, to have another lawyer's cheque certified.

Real estate transactions

6.02 (13) If a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of the purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to or as directed by the vendor on completion of registration.

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary

Under the Lawyers' Compulsory Professional Liability Insurance Policy, a lawyer is

contractually required to give written notice to the insurer immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could reasonably be expected to be the basis of a claim or suit covered under the policy. Subrule (2) imposes an ethical duty to report to the insurer. Subrule (1) should not be construed as relieving a lawyer from the obligation to report to the insurer before attempting any rectification.

Notice of Claim

6.08 (2) A lawyer must give prompt notice of any ~~circumstance~~ circumstances that ~~the lawyer~~ may reasonably be expected to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary

The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

Co-operation

6.08 (3) ~~When a~~A lawyer facing a claim or potential claim of professional ~~negligence is made against a lawyer, he or she must~~negligence must not fail to assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim or potential claim to be dealt with promptly.

APPENDIX A — AFFIDAVITS, SOLEMN DECLARATIONS AND OFFICER CERTIFICATIONS

Affidavits and solemn declarations

1. A lawyer must not swear an affidavit or take a solemn declaration unless the deponent:

   (a) is physically present before the lawyer,

   (b) acknowledges that he or she is the deponent,

   (c) understands or appears to understand the statement contained in the document,

   (d) in the case of an affidavit, swears, declares or affirms that the contents of the document are true,

   (e) in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath, and

   (f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

Commentary

Non-practising and retired members

Non-practising and retired members are not permitted to act as notaries public or commissioners for the purpose of taking affidavits or solemn declarations. See Law Society Rules 2-3 and 2-4 for the definitions of non-practising and retired members.

Interjurisdictional Practice

A British Columbia lawyer, as a notary public, may administer oaths and take affidavits, declarations and affirmations only within British Columbia: See section 14 of the *Legal Profession Act* for a lawyer's right to act as a notary public, and section 18 of the *Notaries Act*, RSBC 1996, c. 334 for rights and powers of a notary public, including the right to draw affidavits, affirmations or statutory declarations for other jurisdictions.

A British Columbia lawyer, as a commissioner for taking affidavits for British Columbia, has authority to administer oaths and take affidavits, declarations and affirmations outside of BC *for use in BC*: See sections 59, 63 and related sections of the *Evidence Act*, RSBC 1996, c.124.

Notwithstanding Law Society mobility provisions across Canada, a British Columbia lawyer cannot swear an affidavit in another province or territory for use in that jurisdiction unless the lawyer is a member of the bar in that jurisdiction or the jurisdiction's own legislation allows it. For example, because of Alberta legislation, a member of the Law Society of British Columbia, while in Alberta acting under the mobility provisions on an Alberta matter, cannot swear an affidavit for use in Alberta.

British Columbia lawyers should contact the law society of the other province or territory if they need to check whether they are entitled to swear an affidavit in that jurisdiction.

Likewise, lawyers from other jurisdictions visiting British Columbia may not swear affidavits in BC for use in BC: See section 60 of the *Evidence Act* and the definition of **"practising lawyer"** in section 1(1) of the *Legal Profession Act.*

Deponent present before commissioner

See *R.* v. *Schultz*, [1922] 2 WWR 582 (Sask. CA) in which the accused filled in and signed a declaration and left it on the desk of a commissioner for taking oaths, later meeting the commissioner outside and asking him to complete it. The court held that it was not a solemn declaration within the meaning of the *Canada Evidence Act*, stating that: "The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was 'declared before him' is not true. The essential requirement of the *Act* is not the signature of the declarant but his solemn declaration made before the commissioner." (p. 584) Likewise, it has been held in the U.S. that the taking of an affidavit over the telephone is grounds for a charge of negligence and professional misconduct: *Bar Association of New York City* v. *Napolis* (1915), 155 N.Y. Sup. 416 (N.Y. Sup. Ct. App. Div.). In B.C., the conduct of a lawyer who affixed his name to the jurat of the signed affidavit without ever having seen the deponent constituted professional misconduct: Law Society *Discipline Case Digest* 83/14.

Identification

The commissioner should be satisfied that the deponent is who the deponent represents himself or herself to be. Where the commissioner does not know the deponent personally, identification should be inspected and/or appropriate introductions should be obtained.

Appearing to understand

To be satisfied of this, the commissioner may read the document aloud to the deponent, have the deponent read it aloud or accept the deponent's statement that its contents are understood: *R.* v. *Whynot* (1954), 110 CCC 35 at 42 (NSCA).

It is also important that the deponent understands the significance of the oath or declaration he or she is proposing to take. See *King* v. *Phillips* (1908), 14 CCC 239 (B.C. Co. Ct.); *R.* v. *Nichols*, [1975] 5 WWR 600 (Alta SC); and *Owen* v. *Yorke*, (6 December, 1984), Vancouver A843177 (BCSC).

If it appears that a deponent is unable to read the document, the commissioner must certify in the jurat that the document was read in his or her presence and the commissioner was satisfied that the deponent understood it: B.C., *Rules of Court*, Rule 51(5). If it appears that the deponent does not understand English, the lawyer must arrange for a competent interpreter to interpret the document to the deponent and certify by endorsement in Form 60 that he or she has done so: *Rules of Court*, Rule 51(6).

Affirmation

The British Columbia Law Reform Commission has raised the question of whether an affidavit may properly be created by solemn affirmation under provincial law. For this reason, in cases where a deponent does not want to swear an affidavit, it may be prudent to create the affidavit by solemn declaration rather than by solemn affirmation. See Appendix B to Law Reform Commission of British Columbia, *Report on Affidavits: Alternatives to Oaths* LRC 115 (1990). **[Is this still applicable after 20 years?]**

Swear or Affirm that the Contents are True

This can be accomplished by the commissioner asking the deponent: "Do you swear that the contents of this affidavit are true, so help you God?" or, if the affidavit is being affirmed, "Do you solemnly affirm [or words with the same effect] that the evidence given by you is the truth, the whole truth and nothing but the truth?," to which the deponent must answer in the affirmative. In taking an affirmation the lawyer should comply with section 20 of the *Evidence Act*, RSBC 1996, c. 124 and the *Affirmation Regulation*, B.C. Reg. 396/89.

Section 29 of the *Interpretation Act*, RSBC 1996, c. 238, defines an affidavit or oath as follows:

> "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm;

If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialling the alterations, taking the oath again from the deponent and then signing the altered affidavit. A second jurat should be added, commencing with the word "resworn."

Generally, an affidavit is sworn and filed in a proceeding that is already commenced. An

affidavit may also be sworn before the proceeding is commenced: *Rules of Court*, Rule 51(12). However, an affidavit may not be postdated: *Re: Stanley Foo*, hearing report pending, May, 1997.

Swearing to an affidavit exhibits that are not in existence can amount to professional misconduct: *Re: Stanley Foo*.

Solemn Declaration

A solemn declaration should be made in the words of the statute: *King* v. *Phillips*, *supra*; *R.* v. *Whynot*, *supra.*

The proper form for a solemn declaration is set out in section 41 of the *Canada Evidence Act*, RSC 1985, c. C-5:

> **Solemn declaration**
>
> 41. Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:
>
> > I, ..., solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.
> >
> > Declared before me ..... at ..... this ..... day of ....., 20 .....

and in section 69 of the *Evidence Act*, RSBC 1996, c. 124:

> **Statutory declarations**
>
> 69. A gold commissioner, mayor or commissioner authorized to take affidavits, or any other person authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making it before him or her in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing, in the following words:
>
> > I, A.B., solemnly declare that [state the facts declared to], and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath.

Execution

A deponent unable to sign an affidavit may place his or her mark on it: *Rules of Court*, Rule 51(3)(b)(ii). An affidavit by a person who could not make any mark at all was accepted by the court in *R.* v. *Holloway* (1901), 65 JP 712 (Magistrates Ct.).

Witnessing the execution of an instrument

2. When a lawyer witnesses the execution of an instrument by an individual under the *Land Title Act*, RSBC 1996, c. 250, the lawyer's signature is a certification by the lawyer that:

(a) the individual appeared before and acknowledged to the lawyer that he or she is the person named in the instrument as transferor, and

(b) the signature witnessed by the lawyer is the signature of the individual who made the acknowledgment. (See section 43 of the *Land Title Act*.)

Commentary

Non-practising and retired members are not permitted to act as officers for the purpose of witnessing the execution of instruments under the *Land Title Act*.

APPENDIX B — FAMILY LAW MEDIATION

Definitions

1. In this Appendix:

(a) **"family law mediation"** means a process by which two adult persons ("participants") attempt, with the assistance of an impartial person (the family law mediator), to reach a consensual settlement of issues relating to their marriage, cohabitation, separation or divorce;

(b) without limiting the generality of the foregoing, **"family law mediation"** includes one or more of the following acts when performed by a lawyer acting as a family mediator:

(i) informing the participants of the legal issues involved,

(ii) advising the participants of a court's probable disposition of the issue,

(iii) preparing any agreement between the participants other than a memorandum recording the results of the mediation,

(iv) giving any other legal advice.

Disqualifications

2. (a) If a lawyer, or a partner, associate or employee of that lawyer has previously acted or is presently acting for one or both of the participants to the mediation in a solicitor-client relationship with respect to any matter which may reasonably be expected to become an issue during the family law mediation, that lawyer may not act as a family law mediator for the participants.

(b) If a lawyer has acted as a family law mediator for the participants, neither that lawyer, nor any partner, associate or employee of that lawyer may act in a solicitor-client relationship for either participant against the other participant.

(c) If a lawyer, or a partner, associate or employee of that lawyer has acted as a family law mediator for the participants, neither that lawyer, nor a partner, associate or employee of that lawyer may act for or against any person where to do so might require the lawyer to disclose or make use of confidential information given in the course of mediation.

Mediator's duties

3. A lawyer who acts as a family law mediator must ensure that if agreement is reached between the participants and as a result the lawyer drafts a document representing the agreement reached, the lawyer actively encourages each participant to obtain independent legal advice before executing the agreement.

Written agreement

4. A lawyer who acts as a family law mediator and the participants with respect of whom the lawyer mediates shall, before mediation commences, enter into a written agreement which shall include at least the following provisions:

(a) an agreement that the lawyer, throughout the mediation process, is not acting as legal counsel for either participant,

(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant which is relevant to the issues being mediated,

(c) an agreement that the mediation process is part of an attempt to settle the differences between the participants and that all communications between the participants and between each participant and the mediator will be "without prejudice" so that:

(i) neither participant will attempt to introduce evidence of the communications in any legal proceedings,

(ii) neither participant will attempt to call the mediator as a witness in any legal proceedings,

(d) an acknowledgment that the lawyer must report to the Superintendent of Family and Child Services any instance arising from the mediation in which the lawyer has reasonable grounds to believe that a child is in need of protection,

(e) an agreement as to the lawyer's rate of remuneration and terms of payment,

(f) an agreement as to the circumstances in which mediation will terminate.