The Law Society of British Columbia

AGENDA

MEETING: Benchers

DATE: Friday, April 15, 2011

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 March 4, 2011 Meeting** • Minutes of the regular session • Minutes of the *in camera* session (Benchers only)	Tab 1 p. 1000
2	**2010 Law Society Scholarship: Credentials Committee Recommendation** • Memorandum from Ms. Small *(in camera)*	Tab 2 p. 2000
3	**Act and Rules Subcommittee: Amendment to Rule 3-57 (Payment of Fees from Trust)** • Memorandum from Mr. Hoskins for the Act and Rules Subcommittee	Tab 3 p. 3000
REGULAR AGENDA		
4	**Attorney General's Greeting** The Honourable Barry Penner, QC will greet the Benchers	
5	**President's Report** • Written report to be distributed electronically prior to meeting	
6	**CEO's Report** • Written report to be distributed electronically prior to meeting	
7	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	

OTHER MATTERS *(FOR DISCUSSION AND/OR DECISION)*		
8	**Review of the Non-Conflicts Portion of the Model Code of Professional Conduct** Mr. Blom to report • Report from the Ethics Committee	Tab 8 p. 8000
9	**Bencher Governance Considerations** Mr. Hume and Mr. Hoskins to report • Memorandum from Mr. Hoskins for the Executive Committee	Tab 9 p. 9000
10	**CLEBC Update** Ms. O'Grady and Mr. Stewart to report	
FOR INFORMATION ONLY		
11	**LIF: Program Report for 2010** • Presentation by Su Forbes, QC, Director of the Lawyers' Insurance Fund	
12	**Federation of Law Societies of Canada Update: Report on the Banff Council Meeting & Semi-annual Conference (March 17-19, 2011)** Mr. Hume to report • Report from Ronald MacDonald, QC, President of FLSC *(confidential)*	Tab 12 p. 12000
13	**Consolidation of Law Society Rules** • Memorandum from Mr. Hoskins for the Act & Rules Subcommittee	Tab 13 p. 13000
IN CAMERA SESSION		
14	**Bencher Concerns**	

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, March 4, 2011

PRESENT:

Gavin Hume, QC, President
Bruce LeRose, QC, 1st Vice-President
Art Vertlieb, QC, 2nd Vice-President
Haydn Acheson
Rita Andreone
Kathryn Berge, QC
Robert Brun, QC
Tom Fellhauer
Leon Getz, QC
Stacy Kuiack
Jan Lindsay, QC
Peter Lloyd, FCA
David Loukidelis, QC, Deputy Attorney General of BC
Benjimen Meisner
Nancy Merrill
David Mossop, QC
Suzette Narbonne
Thelma O'Grady
Lee Ongman
Gregory Petrisor
David Renwick, QC
Claude Richmond
Alan Ross
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Kenneth Walker

ABSENT:

Satwinder Bains
Joost Blom, QC
Patricia Bond
E. David Crossin, QC
Carol Hickman, QC

STAFF PRESENT:

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

GUESTS:

Chris Axworthy, QC, Faculty of Law Dean, Thompson Rivers University
Dom Bautista, Executive Director, Law Courts Center
Mark Benton, QC, Executive Director, Legal Services Society
Johanne Blenkin, Executive Director, BCCLS
Jeremy Hainsworth, Reporter, Lawyers Weekly
Azool Jaffer-Jeraj, President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Stephen McPhee, President, CBABC
Mayland McKimm, QC, Board Chair, Legal Services Society
Caroline Nevin, Executive Director, CBABC
Andrew Petter, QC, President, Simon Fraser University
Heather Raven, Associate Dean, Academic and Student Relations, UVIC
Wayne Robertson, QC, Executive Director, Law Foundation of BC

NEW BENCHER OATH OF OFFICE:

The President of the Law Society of British Columbia, Gavin Hume, QC administered the swearing of the Bencher's Oath of Office by Nancy Merrill, Nanaimo County Bencher.

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on January 28, 2011 were approved as circulated.

Consent Resolutions

The following resolutions were passed unanimously and by consent.

2. Amendment to Rule 1-6: Annual General Meetings

BE IT RESOLVED to amend Rule 1-6 by rescinding subrules (5), (8) and (9) and substituting the following:

(5) At least 60 days before an annual general meeting, the Executive Director must distribute to members of the Society by mail a notice containing the following information:

(a) the date and time of the meeting;

(b) the text of the resolution recommended by the Benchers to set the practice fee under section 23 *[Annual fees and practising certificate]* of the Act.

(8) At least 21 days before an annual general meeting, the Executive Director must make available to members of the Society,

(a) by mail, a notice containing the following information:

(i) the locations at which the meeting is to be held, and

(ii) each resolution and amendment received in accordance with subrules (6) and (7), and

(b) by electronic or other means, the audited financial statement of the Society for the previous calendar year.

(9) The accidental failure to comply with any requirement under subrule (5) or (8) does not invalidate anything done at the annual general meeting.

3. Approval of Thompson Rivers University and Lakehead University Law Degrees

BE IT RESOLVED to approve the law degree programs at Thompson Rivers University and Lakehead University for purposes of entry into the Law Society of BC Admission Program.

4. External Appointments: Appointment to the Board of Directors of the Legal Services Society and Nomination to the Board of Directors of the Vancouver Foundation

BE IT RESOLVED to appoint Suzette Narbonne to the Board of Directors of the Legal Services Society, for a three-year term commencing May 1, 2011.

BE IT RESOLVED that:

a. the Law Society shall hereby nominate Anna Fung, QC to the Board of Directors of the Vancouver Foundation for a three-year term, effective May 1, 2011; and

b. future nominations to the Board of Directors of the Vancouver Foundation on behalf of the Law Society shall be made by the Benchers, on the advice of the Executive Committee.

REGULAR AGENDA – for Discussion and Decision

5. President's Report

Mr. Hume referred the Benchers to his written report — circulated by email prior to the meeting — for an outline of his activities as President during the month of February 2011.

Mr. Hume briefed the Benchers on his attendance on behalf of the Law Society at the Commonwealth Law Conference in Hyderabad, India (February 5-9). He commented on the evident importance of the Federation's work in coordinating and projecting the unified presence of Canada's provincial societies on the international stage. Mr. Hume noted the interest and support of members of the bar and judiciary in major Commonwealth countries like Britain, Australia and Canada is greatly appreciated by members of the bar and judiciary from smaller countries where the rule of law is not as well-respected or practised.

Mr. Hume also reported on his recent attendance with Mr. McGee at a conference on governance of non-profit organizations. Mr. Hume noted that the program emphasized the importance of strategic planning as the foundation for decision-making, and the value of clear definition of directors' roles and responsibilities.

6. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

1. 2010 Annual Financial Statements
2. 2010 Key Performance Measures (KPMs)
3. Professional Regulation Briefing
4. Public Survey Results
5. Public Education Program
6. Updated Law Society website
7. Continuing Professional Development (CPD) Update
8. Land Title and Survey Authority (LTSA) Required E-filing Announcement
9. Green.Wise Update

Mr. McGee asked Jeanette McPhee, Chief Financial & Director of Trust Regulation, to review the draft 2010 financial statements with the Benchers. Ms. McPhee did so, and advised that the Audit Committee will meet on May 3, 2011 to receive the report of the Law Society auditors on the draft 2010 financial statements and to approve them for publication and distribution.

Mr. McGee asked Adam Whitcombe, Chief Information and Planning Officer, to brief the Benchers on the results of a survey of 800 randomly chosen BC residents that was conducted in late 2010.

Mr. Whitcombe reported that the 2010 survey was patterned after surveys conducted in 1998 and 2004, and examined public perception of BC lawyers across six categories:

- Expertise
- Trustworthiness
- Client service
- Efficiency
- Value for money
- Commitment to public service

Mr. Whitcombe observed that, across all categories, the 2010 results are generally more favourable than the 1998 and 2004 results, and indicate perceptions generally more positive than those conveyed in the media. Mr. Whitcombe noted that public confidence in the Law Society's ability to regulate lawyers has improved fairly consistently since the first survey was conducted in 1998. He concluded by noting that the survey responses indicate the strength of public concern regarding issues involving access to justice and legal services, and confirm the importance of ensuring that the Law Society avoids complacency, particularly in relation to those issues.

Mr. McGee asked Robyn Crisanti, Manager of Communications and Public Relations, to brief the Benchers on plans for a Law Society public education program.

Ms. Crisanti presented a plan for development of a Law Society public education program with the following objectives:

- Meet public expectations for accessible legal information
- Increase public understanding of the value provided by independently-regulated lawyers
- Increase public awareness of the role of the Law Society in the legal community

Ms. Crisanti outlined a three-pronged strategy, with three key messages:

- Strategy
    - Comprehensive public education program focused on the rule of law and the regulation of lawyers
    - Maximize reach of program
    - Reserve public forums for targeted events

- Key Messages
    - The Law Society is committed to access to justice and the education of the public on legal issues
    - Self-regulation of the legal profession protects the rule of law
    - Well-regulated lawyers provide services on which the public can rely

Mr. McGee noted that the public education program is a deliverable within the current Communications strategic plan.

7. Report on Outstanding Hearing and Review Reports

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

GUEST PRESENTATION

8. Presentation by Mayland McKimm, QC, Board Chair of the Legal Services Society (LSS)

Mr. Hume invited LSS Chair Mayland McKimm, QC to speak to the Benchers.

Mr. McKimm presented the Benchers with an overview of the LSS's latest research on the barriers to accessing justice that ordinary people face and the current challenges facing the organization in delivering legal aid. Mr. McKimm told the Benchers they can assist by identifying opportunities to integrate legal aid with other community programs, such as addiction and housing services, and by working together with others in the legal community to reign in the costs of mega-trials, which he noted consume disproportionate resources and are a major threat to LSS's ability to fund conventional criminal defence work.

Mr. Hume noted that Mr. McKimm is retiring from the LSS board at the end of April and thanked him on behalf of the Benchers and the Law Society for his dedication to the cause of enhancing access to justice over the years.

9. Presentation by Andrew Petter, QC, President and Vice-Chancellor of Simon Fraser University (SFU)

Mr. Hume invited SFU President Andrew Petter, QC to speak to the Benchers.

Professor Petter delivered a presentation on SFU, including narration for a brief video presentation on SFU's progress and plans for development as a community-focused research university. Prof. Petter referred the Benchers to www.envision.sfu.ca for information about SFU's 2011 strategic visioning project. He advised that the result of the project will be SFU's next five-year strategic plan, which should be ready by the fall.

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

10. Independent Oversight of the Law Society's Regulatory Functions

Mr. Lucas briefed the Benchers on the background of this matter. He reminded them that the subject of independent oversight was the main topic of discussion at the 2009 Benchers' Retreat, following which the Executive Committee directed staff to prepare a paper analyzing a number of policy options for that Committee's consideration. Over the intervening period of time, the Executive Committee considered various options, and settled on examining three in further detail. Mr. Lucas reported that in November 2010 Ms. Ensminger presented a paper to the Executive Committee that addressed three policy models for regulatory oversight of the Law Society's core regulatory functions: oversight and review by the BC Ombudsperson; a Voluntary External Review process; and a Performance Audit or Peer Review of Best Practices. He noted that the Executive Committee then asked Ms. Ensminger to re-work her paper to develop the Performance Audit or Peer Review of Best Practices model; which she did, and which the Executive Committee approved at its February 2011 meeting.

Mr. Lucas referred to the report at page 10000 of the meeting materials for background, and to page 10022 for the Executive Committee's recommendations to the Benchers:

> **The Executive Committee recommends a two-pronged strategy for improving the public's confidence in how lawyers are regulated in British Columbia:**
>
> 1. **The Law Society of BC should begin work on developing an oversight framework for British Columbia that is based on a performance audit and review of best practices model.**
>
> 2. **The Law Society of BC should enhance its communications with the public about the important role the Office of the BC Ombudsperson plays in reviewing the Law Society's handling of complaints against lawyers.**

Mr. Meisner moved (seconded by Ms. Berge) that Recommendations 1 and 2, as set out at page 10022 of the meeting materials be approved and adopted by the Benchers.

The key points raised in the ensuing discussion were:

- Work on a BC-based oversight model could be considered in 2011 in the form of a concept paper, building provision for a project into the 2012-2014 Strategic Plan
- Starting with a BC-based pilot project approach avoids administrative, resourcing and political difficulties and delays inherent in attempting to start the process at the national level through the Federation of Law Societies of Canada
- The transparency of the proposed oversight model is a key strength and would enhance public confidence in the Law Society's regulation of lawyers
- It would be more effective to go to the Federation with a working model that's been tested in British Columbia
- Long term success of any independent oversight model will require national scale and coordination

- Enhancing public communication and awareness of the Ombudsman's Office role in reviewing the Law Society's handling of complaints is an operational matter, and would be an element of the public education program being developed by the Communications department

The motion was carried.

OTHER MATTERS – For Discussion and/or Decision

11. 2010 Key Performance Measures (KPMs): Report on 2010 Performance

Ms. Andreone, 2011 Audit Committee Chair, briefed the Benchers on the scope of the Audit Committee's role in monitoring Law Society performance and enterprise risk. She described the process of developing the 2010 KPM report as productive and interactive, with early, detailed and open dialogue being a major key to the successful outcome. Ms. Andreone thanked Vice-Chair Peter Lloyd, FCA and the other members of the Audit Committee (Paul Albi, QC, William MacLeod and Phillip Marshall, for their dedication and hard work.

Mr. McGee reviewed highlights of the 2010 KPM report (presented at page 11000 of the meeting materials) and advised that management is satisfied with the overall results. He noted that the report indicates that performance generally exceeded targets, with a number of small negative variances.

12. Regional Call Ceremonies: Bencher Attendance

Mr. Hume briefed the Benchers, noting that at present there is no formal policy for the attendance of non-District Benchers at regional call ceremonies. Mr. Hume confirmed the Executive Committee's conclusions that:

- the attendance and involvement of Benchers at call ceremonies— Vancouver, Victoria and regional—may have public engagement and outreach implications and value

- a Bencher attendance policy for regional call ceremonies, with guidelines and criteria is needed.

Mr. Hume referred the Benchers to Ms. Small's memorandum at page 12000 of the meeting materials (Appendix 2 to these minutes) for background, and for the following summary of the Bencher attendance policy, guidelines and criteria developed by the Executive Committee (page 12001):

> […]Regional call ceremonies will continue to be organized by the local Bencher with access to Law Society staff for assistance, where necessary, with the following provisos:
>
> 1. All regional call ceremony locations and dates will be posted on the website and BencherNet as soon as they are known to staff
>
> 2. If a Bencher, other than the local Bencher, wishes to attend a regional ceremony, the Bencher must contact the President. In considering a Bencher request to attend, the President will generally take the following criteria into consideration:
>
>   a. whether there is any specific or special connection to the region or the persons involved;

b. the number of Benchers already scheduled to attend;

c. the overall scope and scale of the event, for example whether it is intended as an intimate vs. wide open event;

d. the reasonable budget impact for attending, including any event costs, travel, accommodation and things of that nature.

e. Other factors taken into consideration will be the strategic priorities set by the Benchers and whether Bencher attendance will enhance those goals including, for example, the focus on the retention of Aboriginal lawyers in the legal profession.

Mr. Hume also noted the Executive Committee's ongoing assessment of the possibility of investing additional staff resources to assist local Benchers with the organization of Victoria call ceremonies. Further discussions are scheduled to take place with the local Benchers in this regard and the results of those discussions will be brought back to the Benchers at a later date.

Mr. Hume asked the Benchers to confirm their approval of the policy, guidelines and criteria for Bencher attendance at regional call ceremonies as set out in Ms. Small's memorandum.

The Benchers approved unanimously.

IN CAMERA SESSION

The Benchers discussed other matters *in camera*.

WKM
2011-03-16

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

March 4, 2011

Introduction

My report this month covers the annual report to the Benchers on the 2010 Financial Statements, our report on Key Performance Measures (KPMs) for 2010, and updates on several other items of interest. Jeanette McPhee, our Chief Financial Officer, will provide detailed information about the Financial Statements at the meeting, and members of Management Board will be available to answer questions regarding the KPM results.

1. 2010 Annual Financial Statements

A copy of the draft 2010 Annual Financial Statements and Management's report thereon is attached to this report as Appendix 1. The Audit Committee will be meeting on May 3, 2011 to receive the Report of the Auditors on the Financial Statements and to formally approve the Statements for publication and distribution. In accordance with our governance policies, the draft financials are being presented to the Benchers for review and information.

2. 2010 Key Performance Measures (KPMs)

Rita Andreone, the Chair of the Audit Committee, will be presenting the 2010 Report on KPMs as a separate agenda item at the meeting. The report was reviewed by the Audit Committee at its last meeting. Management Board members will be available at the meeting to answer questions about KPM results specific to their departments.

Overall, there were positive results in 2010, with a few measures falling just short of target.

3. Professional Regulation Briefing

Deborah Armour, Chief Legal Officer, will be updating the Benchers on progress under her new plan for the Professional Regulation department during the in-camera portion of the meeting.

4. Public Survey Results

In November 2010, the Law Society commissioned a survey of the public to assess current perceptions of lawyers and the Law Society. This is a survey we have conducted several times before, beginning in 1998. Its primary purpose is to provide us with an assessment over time of public perceptions so that we can explore further any trends in public opinion. Our most recent results show a positive, albeit modest, trend in the public's perception of lawyers and the Law Society's ability to regulate the profession. The survey

will be made available to the public via our website and a news release shortly.

5. Public Education Program

The Communications team has developed a plan to foster public knowledge about the rule of law and importance of an independent and well-regulated legal profession. The plan will address gaps in the public legal education marketplace that are otherwise aptly filled by legal services organizations throughout the province and centralized via the Clicklaw website. Implementation of the plan will occur over the balance of 2011.

6. Updated Law Society website

As the Benchers are aware, our updated Law Society website will be launched on Monday, March 7. The revamped and renovated site has been in development for nearly six months and is a combined project of the Communications and Information Services departments. In addition to a more contemporary look and feel, the site has been reorganized to be more user-friendly and to take advantage of current best practices in web design. Over the past week, the Benchers, staff and lawyers, and members of the public have had the opportunity to try out the updated site and provide comments and suggestions. Ongoing feedback is most welcome.

7. Continuing Professional Development (CPD) Update

In my January 2011 report, I reported on the number of members with outstanding CPD requirements. The following updates that information as of February 8, 2011:

- 176 members have reported no hours;
- 12 members need only to complete the ethics requirement; and
- 117 members have reported some but not all required hours.

Alan Treleaven, Director, Education and Practice, will be available at the meeting to discuss these results and to report on the efforts his department is making to follow up with members with absent or incomplete results.

8. Land Title and Survey Authority (LTSA) Required E-filing Announcement

On March 11, the LTSA will formally announce its Required E-filing initiative at the Association of BC Land Surveyors' Annual General Meeting in Victoria. This initiative arises from recent amendments to the *Land Title Act* authorizing the Director of Land Titles to require that certain classes of applications be filed electronically. Required E-filing is necessary to permit the LTSA to address demographic changes to its workforce by automating examination of common land title application types. This automation is required for the LTSA's sustainability. Required E-filing also enables a secure and consistent approach to Land Title Office filing. The roll out of Required E-filing will be phased, with the first transactions involving lawyers to begin as early as January 1, 2012.

As a key stakeholder, the Law Society actively participated in the consultation process leading up to this announcement. We also assisted the LTSA in surveying affected members in December 2010 to assess member usage of the Land Title Registry. Adam Whitcombe, Chief Information and Planning Officer, has been the Law Society's liaison with the LTSA during the consultation process, and will be available at the meeting to answer any questions you might have about the roll out of the E-filing requirements.

9. Green.Wise Update

The Law Society received a certificate (attached as Appendix 2) from the David Suzuki Foundation recognizing our commitment to sustainable workplace practices and our ongoing participation in the David Suzuki at Work Program. The Green.Wise steering committee participated in a David Suzuki at Work workshop last November. This interactive workshop was facilitated by a Suzuki Ambassador and provided hands-on information, consultation, and the best tips for going green at work and developing sustainable work practices.

Our Green.Wise Committee was started just over a year ago as a staff initiative and this success shows what can be done in a short period of time when people are passionate about a worthwhile cause.

I would like to congratulate the Green.Wise Committee, chaired by Christine Gergich, for this achievement and thank them for their ongoing efforts to green our office by implementing sustainable business practices.

You may be interested to know, on a related note, that Iron Mountain reports that 57 tons of paper was shredded for the Law Society in 2010. All of this paper was shredded and recycled to save approximately 968 trees and 3,418 lbs. of air pollutants.

Timothy E. McGee
Chief Executive Officer

Memo

The Law Society of British Columbia

To Benchers

From Lesley Small

Date February 23, 2011

Subject **Regional Call Ceremonies**

The Executive Committee recently considered whether public awareness of the role of the Law Society would be raised by having more Benchers attend regional call ceremonies, and what budgetary considerations ought to be taken into consideration.

Current Practice

Staff currently organize four ceremonies in Vancouver on a yearly basis, and invitations are sent out to the Benchers advising of the scheduled dates. On average, six to eight Benchers (including the incumbent President) attend each ceremony (although staff call on Life Benchers on short notice when it appears that Bencher attendance will be insufficient). For the most part, it is the Vancouver and Westminster County Benchers who attend the Vancouver ceremony, although an out-of-town Bencher who is in Vancouver on other matters will attend, if convenient.

All other ceremonies are organized by the local Benchers, and the only involvement by staff is to provide the call certificate and a roll book to sign. Most ceremonies are organized four to six weeks in advance, although some are conducted on short notice.

Victoria has also formalized four call and admission ceremonies per year that occur shortly before or after the Vancouver ceremony, and the dates are posted. Approximately 50 candidates are called in Victoria on an annual basis. Excluding Victoria, statistics indicate 19 regional ceremonies in 2007, 22 in 2008, 23 in 2009 and 17 in 2010.

Underlying Question

The call ceremony is the final step in a candidate's pursuit of becoming a lawyer, and the occasion for celebration with family, friends, staff and other lawyers from their community. Regional call ceremonies were designed to ensure that candidates, at no additional expense, could enjoy that celebration in their own communities. As such, the Executive Committee considered whether a potential increase in the attendance of Benchers at local call ceremonies would be an effective means for Benchers to reach out to the public.

A Change to the Current Practice

The Executive Committee decided that, for the most part, the status quo will be maintained in relation to call ceremonies. Specifically, staff will continue to organize the

Vancouver call ceremonies and send out invitations to the Benchers. Given the size and location of the Vancouver call ceremonies, all local Benchers are encouraged to attend as well as out-of-town Benchers, if convenient. Regional call ceremonies will continue to be organized by the local Bencher with access to Law Society staff for assistance, where necessary, with the following provisos:

1. All regional call ceremony locations and dates will be posted on the website and BencherNet as soon as they are known to staff

2. If a Bencher, other than the local Bencher, wishes to attend a regional ceremony, the Bencher must contact the President. In considering a Bencher request to attend, the President will generally take the following criteria into consideration:

    a. whether there is any specific or special connection to the region or the persons involved;

    b. the number of Benchers already scheduled to attend;

    c. the overall scope and scale of the event, for example whether it is intended as an intimate vs. wide open event;

    d. the reasonable budget impact for attending, including any event costs, travel, accommodation and things of that nature.

3. Other factors taken into consideration will be the strategic priorities set by the Benchers and whether Bencher attendance will enhance those goals including, for example, the focus on the retention of Aboriginal lawyers in the legal profession.

Victoria Call Ceremonies

Given that Victoria has over the years formalized the call and admission ceremonies to four per year that occur shortly before or after the Vancouver ceremony, and that approximately 50 candidates are called in Victoria on an annual basis, the Executive Committee noted that it may be worth considering whether additional staff resources should be expended to assist the local Benchers with the organization of these events. Further discussions are scheduled to take place with the local Benchers in this regard and the results of those discussions will be brought back to the Benchers at a later date.

Memo

The Law Society of British Columbia

To Benchers

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

Date April 5, 2011

Subject **Rule 3-57, Payment of fees from trust; delivery of bill electronically**

I attach for the Benchers consideration draft amendments to Rule 3-57 and a suggested resolution to implement the change. The Act and Rules Subcommittee recommends the adoption of the amendment.

This matter was considered by the Benchers in December 2010. This is the relevant portion of the minutes of that meeting:

a. Proposed LSBC Policy on ICBC Electronic Billing and Recommendations for Considering Amendments to the Law Society Rules and the *Legal Profession Act* (Agenda Item 14)

BE IT RESOLVED to approve the four recommendations set out at page 14003 of the meeting materials:

1. The Act and Rules Subcommittee should make suggestions for revising Rule 3-57 in order to contemplate broader methods of delivering a bill than are covered at present. The revision should be principles-based and strive to avoid technology specific language in order to avoid become stale-dated.

3. The Act and Rules Subcommittee, as part of its general consideration of modernizing the application of the Act and Rules, should consider whether to expand the definition of "written" to include electronic storage, and whether s. 69 of the Act needs to be amended to better align with the *Electronic Transactions Act* and the approach in Rule 3-57(3)(d).

I attach the materials that were before the Benchers at that meeting for your reference.

The Act and Rules Subcommittee considered the matters that were referred to the Subcommittee and took the view that Rule 3-57 ought to be updated as proposed to allow lawyers to make a bill available to a client by any means that would allow the client to review the bill and save a paper or electronic copy or by other means agreed to by the client. The Subcommittee considered that no change to section 69 of the *Legal Profession Act* was needed.

The Subcommittee also suggested that subrule (3)(a) be amended to shorten the phrase “mailed by regular or registered mail” to delete the redundant words and just say “mailed”.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other Client Property

Payment of fees from trust

3-57 (1) In this Rule, **"fees"** means fees for services performed by a lawyer or a non-lawyer member of the lawyer's MDP, and taxes on those fees.

(2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(3) A bill or letter is delivered within the meaning of this Rule if it is

(a) mailed ~~by regular or registered mail~~ to the client at the client's last known address,

(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number, ~~or~~

(d) transmitted by electronic mail to the client at the client's last known electronic mail address~~.~~, or

(e) made available to the client

(i) by means that allow the client to review the content of the document and save or print a copy, or

(ii) by other means agreed to by the client.

(4) As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

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(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number,

(d) transmitted by electronic mail to the client at the client's last known electronic mail address, or

(e) made available to the client

(i) by means that allow the client to review the content of the document and save or print a copy, or

(ii) by other means agreed to by the client.

(4) As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing.

DELIVERY OF BILL

SUGGESTED RESOLUTION:

BE IT RESOLVED to rescind Rule 3-57(3) and substitute the following:

(3) A bill or letter is delivered within the meaning of this Rule if it is

(a) mailed to the client at the client's last known address,

(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number,

(d) transmitted by electronic mail to the client at the client's last known electronic mail address, or

(e) made available to the client

(i) by means that allow the client to review the content of the document and save or print a copy, or

(ii) by other means agreed to by the client.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Memo

The Law Society of British Columbia

To Benchers

From Doug Munro

Date October 13, 2010

Subject **ICBC Electronic Billing**

ICBC has created a process that requires its counsel to submit bills by uploading the bill to a website. The ICBC policy is contained in Appendix 1.[1] The Policy and Legal Services Department was asked to analyze whether submitting a bill in the manner contemplated by the ICBC policy is off-side the Law Society Rules. I also attach the relevant legislation and rules for reference (**Attachment**).

This issue is another in a series of issues that requires consideration of whether certain provisions of the *Legal Profession Act* and the Law Society Rules need to be updated to keep pace with technology.

ANALYSIS

Section 69 of the *Legal Profession Act* states:

> 69 (1) A lawyer must deliver a bill to the person charged.
>
> (2) A bill may be delivered under subsection (1) by mailing the bill to the last known business or residential address of the person charged.
>
> (3) The bill must be signed by or on behalf of the lawyer or accompanied by a letter, signed by or on behalf of the lawyer, that refers to the bill.

In March 2002 the Benchers amended Law Society Rules, Rule 3-57(3)(d) to now read:

> 3-57 (1) In this Rule, "fees" means fees for services performed by a lawyer or a non-lawyer member of the lawyer's MDP, and taxes on those fees.
>
> (2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.
>
> (3) A bill or letter is delivered within the meaning of this Rule if it is

[1] ICBC intends for the policy to comply with the *Legal Profession* Act and the *Electronic Transactions Act*, [SBC 2001] Chapter 10.

(d) transmitted by electronic mail to the client at the client's last known electronic mail address.

(4) As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing.

The proposed policy undoubtedly captures the spirit of the rule, if not the technical wording. Rule 3-57(3)(d) appears to have been worded to capture the use of email communication and was therefore crafted narrower than the concept of submitting a bill electronically to a website. Accessing a secure website and uploading a bill to it is arguably a more secure method of communication than transmission via unencrypted email, so there is not necessarily a compelling policy argument to favour email over the method set out in the ICBC policy.[2]

The *Legal Profession Act* defines "bill" as "a lawyer's written statement of fees, charges and disbursements" (s. 64). The Act also defines "written" to mean "includes written messages communicated electronically" (s. 1(1)). Section 69(1) of the Act states "A lawyer must deliver a bill to the person charged". This suggests that a bill may be communicated electronically. However, it is unclear whether s. 69(2) limits that interpretation and raises questions about whether Rule 3-57 is outside the scope of s. 69.

The key aspects of s. 69(2) are "delivered" "by mail" and "business or residential address". "Mail" might be broad enough to contemplate email or electronic communications, but "business or residential address" is not. The *Interpretation Act* defines "deliver" as "with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business". This also suggests a narrower approach. This suggests Rule 3-57 is outside the spirit of s. 69. However, s. 69(2) says the bill "may" be delivered in such a manner, so it is arguably permissive and not exhaustive of the types of delivery that are acceptable. It is also important to bear in mind that the *Legal Profession Act* cannot be amended every time technology changes, so arguably Rule 3-57 reflects a pragmatic compromise, and tidying up the language in the Act can be flagged for future consideration by the Act and Rules Committee as a non-urgent matter.

The *Electronic Transactions Act* does not purport to limit laws that require a specific form of delivery (s. 2(1)(b)). In any event, that Act supports rather than derogates from the approach in Rule 3-57 and the proposed policy. A possible approach is to find that Rule 3-57 accords with the *Electronic Transactions Act* and to find that submitting a bill to a website is acceptable for the purposes of complying with the rule. If that is the case, the Benchers may still wish to tidy up the language of Rule 3-57, and eventually seek legislative amendments to ensure our Rules align with the Act. For example, does the concept of "communicated" make the definition "written" too narrow for other matters? Does a bill cease to be written if it is stored electronically but not communicated?

[2] This is based on the assumption that ICBC has set up a secure billing site.

With respect to the signing requirement is s. 69(3) of the *Legal Profession Act*, guidance may be taken from the *Electronic Transactions Act*:

> 11(1) If there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.

Scanning one's signature will create an electronic copy of the signature. "Electronic" in the *Electronic Transactions Act* is defined to mean:

> created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means.

The second option in the proposed ICBC policy therefore seems to accord with the provisions of *Electronic Transactions Act*, and also complies with the Law Society's concept of electronic writing. It perhaps goes without saying that the Law Society should recognize Juricert as sufficient for these purposes, both because of our involvement in Juricert and the purpose for which it is used.

With respect to risks associated with lawyers' creating digitized signatures and providing them to their clients, I think we need to situate that risk in the practical reality of the day. Lawyers sign all kinds of documents that are sent to people. If a recipient wished to, the recipient could scan the signature and create a digital signing block and forge the lawyer's signature. This risk will always exist. As a general proposition, a prohibition on sending an electronic bill would not eliminate the risk.

In the case of the ICBC policy, I think the Benchers can take comfort in the fact that:

- ICBC is a sophisticated client;
- ICBC is setting up the delivery method;
- Rule 3-57(3)(d) allows for electronic transmission of a bill;
- A bill must be signed by or on behalf a lawyer (s. 69(3)), which when combined with 3-57(3)(d) contemplates the digitization of a lawyer's signature (i.e. the act of transmitting the signed bill requires the signature to be digitized);
- Rule 3-57(4) provides that "As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing." It would be odd to permit this, but not permit a client to establish a web-based model for submitting bills;
- Juricert is a creature of the Law Society, and is approved for Land Title transactions so as a matter of risk analysis it should be acceptable for client billing;
- The proposed policy appears to align with the scope of the *Electronic Transactions Act*, and in any event, that act does not limit the Law Society's ability to create its own rules for the delivery of a lawyer's bill.

The request from ICBC raises the collateral issue of whether the Law Society should endorse a policy of ICBC, or if the better approach is to articulate what our policy is and

whether the Law Society believes ICBC is in line with the Law Society policy. As a matter of policy it is probably better to take the latter approach. If the Benchers agree with this, then it might be desirable to state what our policy is and inform ICBC whether their proposal complies with it.

As a matter of policy a lawyer should be able to submit a bill in the manner contemplated by the ICBC policy. Our rules should be as flexible and technology neutral as possible in order to keep pace with changes in society. Technology changes so rapidly that we run the risk of constantly being out of date if we are too precise with language regarding a specific type of technology. The better approach is to capture the essential obligations in a manner that is intelligible. Potential confusion as to the scope of such a rule can always be addressed by the practice advisors and/or an ethics opinion.

RECOMMENDATIONS:

There are two short term recommendations, and two longer term recommendations.

1. The Act and Rules Subcommittee should make suggestions for revising Rule 3-57 in order to contemplate broader methods of delivering a bill than are covered at present. The revision should be principles-based and strive to avoid technology specific language in order to avoid become stale-dated.

2. The Law Society's practice advisors should indicate to ICBC that its proposed electronic billing policy is an acceptable substitute for Rule 3-57 and the requirements of s. 69. While ICBC has an obligation not to store personal information in a foreign jurisdiction, we may wish to suggest that their web-based services be housed in British Columbia.

The longer term recommendations are:

1. The Act and Rules Subcommittee, as part of its general consideration of modernizing the application of the Act and Rules, should consider whether to expand the definition of "written" to include electronic storage, and whether s. 69 of the Act needs to be amended to better align with the *Electronic Transactions Act* and the approach in Rule 3-57(3)(d).

2. The Benchers should direct staff to consider, either as part of the 2012-2015 Strategic Plan, or as part of a request for legislative amendment over that period, whether our requirements that a bill be signed and delivered need to be reconsidered in light of modern technology and to provide the Benchers with a policy analysis at that future time.

DM
/Appendix
/Attachment

APPENDIX 1: ICBC PROPOSED POLICY

The purpose of this policy statement is to address section 69 (2) and (3) of the *Legal Profession Act* [SBC 1998] CHAPTER 9, that the bill may be mailed to the last known business or residential address of the person charged and that the bill must be signed by or on behalf of the lawyer or accompanied by a letter, signed by or on behalf of the lawyer, that refers to the bill.

The Insurance Corporation of British Columbia ("ICBC") implemented electronic legal billing for the great majority of files on September 1, 2010. Further to this implementation, lawyer's bills are to be submitted electronically through a website designated by ICBC, and paper bills are no longer required to be submitted. If your firm already has the ability to 'sign' the electronic bill with a true digital signature (such as a Juricert certificate), your firm may utilize this method by uploading the digital signature to each invoice. In the alternative, if your firm does not already have true digital signatures (such as Juricert certificates), the electronic bill must be submitted with an attached digitized/electronic signature (a scanned signature saved in PDF or JPEG format and uploaded to each invoice) or accompanied by a letter with a digitized / electronic signature, in order to comply with the requirements under the Legal Professions Act for the delivery of a bill signed by the lawyer or accompanied by a letter signed by or on behalf of the lawyer.

ATTACHMENT: ICBC ELECRONIC BILLING

Legal Profession Act

1 (1) In this Act:
"written" or "in writing" includes written messages communicated electronically

64 (1) In this Part:
"bill" means a lawyer's written statement of fees, charges and disbursements

69 (1) A lawyer must deliver a bill to the person charged.

(2) A bill may be delivered under subsection (1) by mailing the bill to the last known business or residential address of the person charged.

(3) The bill must be signed by or on behalf of the lawyer or accompanied by a letter, signed by or on behalf of the lawyer, that refers to the bill.

(4) A bill under subsection (1) is sufficient in form if it contains a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursements.

Law Society Rules

3-57 (1) In this Rule, "fees" means fees for services performed by a lawyer or a non-lawyer member of the lawyer's MDP, and taxes on those fees.

(2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(3) A bill or letter is delivered within the meaning of this Rule if it is

> (a) mailed by regular or registered mail to the client at the client's last known address,
>
> (b) delivered personally to the client,
>
> (c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number, or
>
> (d) transmitted by electronic mail to the client at the client's last known electronic mail address.

(4) As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing.

Electronic Transactions Act - Excerpts

Definitions

1 In this Act:

"electronic" means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means;

"electronic agent" means a computer program, or other electronic means, used to initiate an activity or to respond to electronic information, records or activities in whole or in part without review by an individual at the time of the response or activity;

"electronic signature" means information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record.

Application and exceptions

2 (1) This Act does not limit the operation of a law that

(a) expressly authorizes, prohibits or regulates the use of information or records in electronic form, or

(b) requires information or a record to be posted, displayed or delivered in a specific manner.

(2) For the purpose of subsection (1), the use of "in writing" and "signature" and other similar words and expressions does not by itself prohibit the use of information or records in electronic form.

(3) The provisions of this Act relating to the satisfaction of a requirement of a law apply whether or not the law creates an obligation or provides consequences.

(4) This Act does not apply to

(a) wills,

(b) trusts created by wills,

(c) powers of attorney, to the extent that they concern the financial affairs or personal care of an individual,

(d) documents that create or transfer interests in land and that require registration to be effective against third parties, or

(e) other provisions, requirements, information or records prescribed in the regulations.

(5) Parts 2 and 3 do not apply to negotiable instruments or documents of title.

Part 2 — General

Legal recognition

3 Information or a record to which this Act applies must not be denied legal effect or enforceability solely by reason that it is in electronic form.

Use not mandatory

4 (1) Nothing in this Act requires a person to provide, receive or retain information or a record in electronic form without the person's consent.

(2) Consent by a person to provide, receive or retain information or a record in electronic form may be inferred from the person's conduct.

Requirement for a record to be in writing

5 A requirement under law that a record be in writing is satisfied if the record is

(a) in electronic form, and

(b) accessible in a manner usable for subsequent reference.

Requirement to provide information or a record to be in writing

6 A requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is

(a) accessible by the other person in a manner usable for subsequent reference, and

(b) capable of being retained by the other person in a manner usable for subsequent reference.

Requirement to provide information or a record in a specified non-electronic form

7 A requirement under law that a person provide information or a record organized in a specified non-electronic form to another person is satisfied if the person provides the information or record electronically and the information or record is

(a) organized in the same or substantially the same manner as the specified non-electronic form,

(b) accessible by the other person in a manner usable for subsequent reference, and

(c) capable of being retained by the other person in a manner usable for subsequent reference.

Requirement to provide and retain originals

8 (1) A requirement under law that a person provide an original record is satisfied by the provision of the record in electronic form if

(a) there exists a reliable assurance as to the integrity of the record in electronic form, and

(b) the record in electronic form is accessible by the person to whom it is provided and is capable of being retained by that person in a manner usable for subsequent reference.

(2) A requirement under law that a person retain an original record is satisfied by the retention of the record in electronic form if there exists a reliable assurance as to the integrity of the record.

(3) For the purposes of subsections (1) and (2),

(a) the criterion for assessing integrity is whether the record has remained complete and unaltered, apart from the introduction of changes that arise in the normal course of communication, storage and display, and

(b) the standard of reliability required must be assessed in view of the purpose for which the record was created and other relevant circumstances.

Requirement to retain a record

9 A requirement under law to retain a record is satisfied by the retention of the record in electronic form if

(a) the record is retained in the format in which it was created, provided or received, or in a format that does not materially change the record,

(b) the record will be accessible in a manner usable for subsequent reference by any person who is entitled to have access to the record or who is authorized to require its production, and

(c) on provision or receipt of the record, the information, if any, that identifies the origin and destination of the record and the date and time when it was sent or received is also retained.

Whether record is capable of being retained

10 A record in electronic form is deemed not to be capable of being retained if the person providing the record inhibits the printing or storage of the record by the recipient.

Signatures

11 (1) If there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.

(2) Subsection (1) does not apply to a signature for a record prescribed, or within a class prescribed, under section 21 (2) (d) unless the proof described in section 21 (2) (d) is present.

Copies

12 If information or a record may be provided in electronic form, a requirement under law for one or more copies of the information or record to be provided to a single addressee at the same time is satisfied by providing a single version in electronic form.

Collection, storage, etc.

13 In the absence of an express provision in an enactment that electronic means may not be used or that electronic means must be used in specified ways, the government may use electronic means to create, store, transfer, distribute, publish or otherwise deal with records or information.

Electronic payments to or by the government of British Columbia

14 (1) A payment that is authorized or required under law to be made to the government may be made in electronic form in a manner specified by the Minister of Finance.

(2) A payment that is authorized or required to be made by the government may be made in electronic form in a manner specified by the Minister of Finance.

Part 3 — Electronic Communication of Information and Records

Formation and operation of contracts

15 (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed

(a) by means of information or a record in electronic form, or

(b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically

in a manner that is intended to express the offer, acceptance or other matter.

(2) A contract is not invalid or unenforceable solely by reason that information or a record in electronic form was used in its formation.

The Law Society of British Columbia

New BC Code of Conduct (Non-Conflicts Provisions): Based on Federation of Law Societies Model Code of Conduct

April 5, 2011

Purpose of Report:	**Recommendation to Benchers to Adopt Non-Conflicts Portion of New BC Code of Professional Conduct**
Prepared by:	**Ethics Committee**

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date April 5, 2011

Subject **Federation of Law Societies Model Code of Conduct and the new BC Code of Conduct**

I. Background

This paper recommends that you adopt the non-conflicts portion of the Federation of Law Societies Model Code with the changes we have identified, but delay setting an effective date for implementation of that portion of the Code until we advise you further concerning the issues involved in adopting the conflicts portion of the Code.

You will recall that we have divided up the work of considering the Federation of Law Societies Model Code into two portions: the non-conflicts portion of the Code and the conflicts portion. This division was made necessary because the Federation elected to conduct a further review of the conflicts portion of the Code based on submissions made by the Canadian Bar Association. We thought it best to consider and ask the profession to review the non-conflicts portion of the Code pending the Federation's further review of the conflicts portion of the work.

Because of the need to divide the Code in this way, we plan to present it to you in two parts: the non-conflicts portion of the Code and the conflicts portion. This memorandum concerns the non-conflicts portion of the Code, although we will give you advice about the status of the conflicts portion, as well.

The Code that we will ultimately propose for British Columbia is based on the Model Code and has much language 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."

II. October 2010 Briefing

At the October 2010 meeting we briefed you concerning the status of the Model Code of Conduct at that time. We stated:

> 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.

The minute relating to that report states:

> **8. Ethics Committee: Progress Report on Implementation of the Model Code**
>
> Mr. Hume briefed the Benchers on progress made by the Ethics Committee in reviewing the provisions of the Federation's Model Code of Professional Conduct since January 2010. He confirmed that the Committee intends to consult the profession about the non-conflicts portion of the Code during October and the first part of November 2010. Mr. Hume provided an update regarding the Federation's continuing work on the conflicts portion of the Code. He advised that the Ethics Committee expects to consult with the profession separately regarding the Code's conflicts provisions, to assess the input received and then to report to the Benchers with recommendations. Whether such report and recommendations encompasses both the conflicts and non-conflicts aspects of the Code will depend on the timing of the completion of the Federation's work on conflicts, and on the nature of the ensuing Code provisions.

III. Current Status of Ethics Committee Consideration of the Model Code

Since our October 2010 report to you we have had the opportunity of consulting the profession about the non-conflicts portion of the Model Code, and have made some changes to that portion of the Code as a result of submissions we received from lawyers. We identify those changes in Section VI below.

The special advisory committee ("the Advisory Committee") of the Federation which was struck to conduct a further review of conflicts issues, giving special attention to the views of the Canadian Bar Association, has now completed its work. However, the Federation has not yet made a final decision about the content of a rule with respect to acting against current clients and will be considering that issue again after a further review of the conflicts rules by the Standing Committee on the Model Code (see Section V below).

We expect to brief you more fully on the conflicts portion of the Code within the next few months. As well as briefing you on the current content of the conflicts portion of the Code, we will recommend that you approve a consultation process with the profession similar to that we have conducted with the non-conflicts portion of the BC Code. We expect that consultation process and our review of submissions from the profession on the conflicts portion of the Code to be completed later in the year.

Given the current uncertainty at the Federation concerning the conflicts rules, we are unsure at this time when we will be making a further recommendation to you with respect to the adoption of the conflicts portion of the Code.

IV. Relationship of the BC Code to the Current Professional Conduct Handbook

Most rules in the *Professional Conduct Handbook* have their counterparts in the BC Code. The attached table of concordance permits a comparison between the two Codes. In some cases, however, we were of the view that the current language of the *Professional Conduct Handbook* was superior to that of the Model Code and in those circumstances we used the *Handbook* as a precedent, rather than the Model Code. Chapters 1 and 14 of the Handbook were taken in their current form and made part of the BC Code. Some of the other language of the *Professional Conduct Handbook* that we considered preferable to that of the Model Code was also imported into the BC Code. Most of the current appendices to the *Handbook* are also preserved in the BC Code, although the current appendices 4 and 6 of the *Professional Conduct Handbook* will appear in the precedent section on our website instead of forming a part of the BC Code.

V. Federation Standing Committee on the Model Code and Process for Convergence of Law Society Codes

The Federation of Law Societies has established 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 appointed Gavin Hume to chair that committee. In addition to reviewing the Model Code, generally, the Standing Committee will be reviewing some aspects of the draft conflicts rules throughout the balance of 2011 before those rules are finalized.

If the LSBC adopts the BC Code, where we think the language used in the BC Code is preferable to comparable language used in the Model Code, the LSBC will have the opportunity, through the Standing Committee, to persuade the Federation and other Law Societies to adopt it in place of the current Model Code language. Where such attempts are unsuccessful, however, it will be important for the LSBC to review the parts of the BC Code that diverge from the Model Code to see whether we can accept the language of the Model Code in place of our own.

VI. Major Changes to the Model Code Proposed by Ethics Committee

This section highlights the major changes we propose to make to the Model Code and the rationale for those changes. It also identifies some issues of professional conduct that we think ought to be considered further by the Federation for possible inclusion in or revision to the Federation's Model Code, or by ourselves in the BC Code. The changes identified by this section are shown in the attached redlined version of the BC Code, and are similar to most of the proposed changes to the Model Code we identified for you in our presentation to you of October 2010 and in the presentation we made to the profession in inviting comments from individual lawyers.

Where the proposed change came about because of a submission made by a lawyer following on our invitation to the profession to comment on the non-conflicts section of the proposed BC Code, we will indicate that.

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(5) Threatening Criminal or Regulatory Proceedings

Subrule 2.02(5) prevents a lawyer from threatening or assisting a client to threaten criminal or regulatory proceedings in order to gain a benefit for a client. The Model

Code Commentary, however, states that it is not 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. A lawyer pointed out to us as part of the consultation process that such a request is actually inconsistent with the rule. By threatening to report another lawyer's breach of undertaking to the Law Society the lawyer may be seen to be attempting to gain a civil advantage: the fulfillment of the undertaking. Accordingly we have deleted the last two sentences of the Commentary.

Subrules 2.02(7) and 2.02(8): 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.*

The words "illegal conduct" are deleted from the Model Code. We considered that those words would encompass some conduct that was trivial and that to be caught by the rule conduct must rise to the level of criminality or fraud. A lawyer pointed out to us as part of the consultation process that subrule 2.02(8) ought to be consistent with subrule 2.02(7) and we have, accordingly, amended subrule 2.02(8) to remove the words "illegal conduct" from that subrule, as well.

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. We have deleted both Subrule 6 and the Commentary from the BC Code.

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. Since we have not dealt with this issue in the BC Code, 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 4.01(2)(m)

The October 2010 version of the BC Code states that when acting as an advocate, a lawyer must not "needlessly abuse, hector or harass a witness." As a result of the consultation process with the profession, we were persuaded that the language of the

subrule should be revised to remove the suggestion that it is ever proper to abuse, hector or harass a witness, and we have, accordingly, deleted the word "needlessly." It was our view that this amendment in no way prevents or impedes searching and aggressive cross examination.

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).

We have amended Subrule 4.04(2)(d) from the draft you reviewed in October 2010 to eliminate the possibility for counsel for the person being examined for discovery to discuss the evidence given or to be given by the witness during an adjournment in the course of the examination. Instead, we prefer the position proposed by Wong J. of the BCSC 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. It was our view that counsel must respect the fact that discovery evidence will include an element of cross-examination and should not discuss evidence with the witness during a break, except in the limited circumstances the subrule now identifies.

Subrule 4.05(2)

As a result of the consultation process, we have amended this subrule to make it clear that advocates have an additional duty to disclose information in their possession that suggests that a juror may be legally disqualified from serving.

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 lawyers have 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. We have amended this subrule after consulting with the profession to expressly contemplate the possibility that inadvertent communication may have occurred by email.

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 propose revisions to Appendix B during the next year in the light of recommendations made by the Alternative Dispute Resolution Task Force.

VII. Recommendation

We recommend that you adopt the attached non-conflicts portion of the BC Code in place of our current *Professional Conduct Handbook*, but delay setting an effective date for it to replace the appropriate parts of the *Professional Conduct Handbook.* We will make a further recommendation to you later in the year regarding proclamation of this portion of the Code after we know with more certainty when the Federation is likely to complete the conflicts portion of the Model Code. Some of the possibilities for proclamation of the non-conflicts portion of the Code we will consider and advise you on are the following:

1. Wait until the Federation completes the conflicts portion of the Model Code, complete our conflicts portion of the BC Code and then set a date when both the non-conflicts portion of the BC Code and the conflicts portion will come into effect,

2. Combine the non-conflicts portion of the BC Code with the current conflicts provisions of the *Professional Conduct Handbook* (Chapters 6 and 7) in a new Code which will govern until both the Federation and we have concluded the work on the conflicts part of the Code, or

3. Complete our own work on the conflicts portion of the BC Code based on the work the Federation has done to date and set a date when both the non-conflicts portion and the conflicts portion of the Code will come into effect. We would then review the conflicts portion of the Code in the light of any changes the Federation ultimately makes to its conflicts rules.

Attachments:

So that you can identify the changes we propose to make to the Federation's Model Code, we attach to the electronic version of the Bencher materials 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 ("the BC Code") 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.

3) A redlined version of the BC Code that highlights the changes we propose to make to the Federation Model Code, including the new changes we propose after having consulted the profession.

We also attach:

4) A table of concordance between the draft BC Code and the current *Professional Conduct Handbook.*

The paper copy of the Bencher materials contains the redlined version of the BC Code only and the Table of Concordance.

[aprbenchers01non-conflictsmemo/11]

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

2009

MODEL CODE OF PROFESSIONAL CONDUCT

MODEL CODE OF PROFESSIONAL CONDUCT

Contents

PREFACE

MODEL CODE OF PROFESSIONAL CONDUCT

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.

MODEL CODE OF PROFESSIONAL CONDUCT

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:

1 This issue is currently specific to Ontario.

(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 lawyer.

2.07 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

2.07 (1) A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

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

An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See subrule (8) – Manner of Withdrawal.

Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the

absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.

Optional Withdrawal

2.07 (2) If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

2.07 (3) If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Commentary

When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

Withdrawal from Criminal Proceedings

2.07 (4) If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

Commentary
A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

2.07 (5) If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.

2.07 (6) If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary
If circumstances arise that, in the opinion of the lawyer, require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Obligatory Withdrawal

2.07 (7) A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

2.07 (8) When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

2.07 (9) On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

Commentary
If the lawyer who is discharged or withdraws is a member of a firm, the client should be

notified that the lawyer and the firm are no longer acting for the client.

If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter.

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

Duty of Successor Lawyer

2.07 (10) Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But, if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

CHAPTER 3 – MARKETING OF LEGAL SERVICES

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

3.01 (1) A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective client by any means.

Commentary

A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.

Right to Decline Representation - A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.06, without charge.

Restrictions

3.01 (2) In offering legal services, a lawyer must not use means that:

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

Commentary
A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

3.02 MARKETING

Marketing of Professional Services

3.02 (1) A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary

Examples of marketing that may contravene this rule include:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) taking advantage of a vulnerable person or group; and

(g) using testimonials or endorsements that contain emotional appeals.

Advertising of Fees

3.02 (2) A lawyer may advertise fees charged for their services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

3.03 ADVERTISING NATURE OF PRACTICE

3.03 (1) A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

Lawyers' advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in [name of jurisdiction] and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

CHAPTER 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

Advocacy

4.01 (1) When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent

in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Duty as Defence Counsel - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

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

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

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

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

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

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

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

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

(m) needlessly abuse, hector or harass a witness;

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

(o) needlessly inconvenience a witness; or

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

Commentary

In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, when the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. If the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 2.02(5) and (6) and accompanying commentary.

When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

Duty as Prosecutor

4.01 (3) When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary
When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Disclosure of Error or Omission

4.01 (4) A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary
If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to rule 2.07 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

4.01 (5) A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary
Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.

Undertakings

4.01 (6) A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary
A lawyer should also be guided by the provisions of Rule 6.02(11) Undertakings and Trust Conditions.

Agreement on Guilty Plea

4.01 (7) Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

4.01 (8) A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

Commentary
The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

4.02 THE LAWYER AS WITNESS

Submission of Evidence

4.02 (1) A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary
A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

Appeals

4.02 (2) A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.02 (6)-(8), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

4.04 (1) A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.

Communication with Witnesses Giving Evidence

4.04 (2) Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination the lawyer may discuss with the witness any matter.

Commentary

The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel.

The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

While any testimony-related discussion is generally prohibited during breaks, there are

two qualifications to the rule as it relates to examinations for discovery. First, if the examination for discovery of a witness is adjourned for longer than one week, it is permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer's intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.

This rule is not intended to prevent discussions or consultations that are necessary to fulfill undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in this rule.

This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

This rule applies with necessary modifications to examinations out of court.

4.05 RELATIONS WITH JURORS

Communications before Trial

4.05 (1) When acting as an advocate before the trial of a case, a lawyer must not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary
A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

4.05 (2) Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate must disclose to them any information of which the lawyer is aware that a juror or prospective juror:

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness

4.05 (3) A lawyer must promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

Communication During Trial

4.05 (4) Except as permitted by law, a lawyer acting as an advocate must not communicate with or cause another to communicate with any member of the jury during a trial of a case.

4.05 (5) A lawyer who is not connected with a case before the court must not communicate with or cause another to communicate with any member of the jury about the case.

4.05 (6) A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary
The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it.

Criticizing Tribunals - Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

4.06 (2) A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

4.06 (3) A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

Commentary

If possible, the lawyer should suggest solutions to the anticipated problem such as:

(a) further security, or

(b) reserving judgment.

If possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

If client information is involved in those situations, the lawyer should be guided by the

provisions of Rule 2.03 (Confidentiality).

4.07 LAWYERS AND MEDIATORS

Role of Mediator

4.07 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary

In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails.

Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 (Conflicts) and its commentaries and the common law authorities.

If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so.

If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

CHAPTER 5 - RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

5.01 SUPERVISION

Direct Supervision Required

5.01 (1) A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

Commentary

A lawyer may permit a non-lawyer to act only under the supervision of a lawyer. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non-lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

A lawyer who practises alone or operates a branch or part-time office should ensure that

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

A lawyer in private practice may permit a non-lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client. A lawyer in a community legal clinic funded by a provincial legal aid plan may do so, so long as the lawyer maintains direct supervision of the client's case in accordance with the supervision requirements of the legal aid plan and assumes full professional responsibility for the work.

Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer generally turns on the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Application

5.01 (2) In this rule, a non-lawyer does not include a student-at-law.

Delegation

5.01 (3) A lawyer must not permit a non-lawyer to:

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(k) sign correspondence containing a legal opinion;

(l) sign correspondence, unless

  (i) it is of a routine administrative nature,

  (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,

  (iii) the fact the person is a non-lawyer is disclosed, and

  (iv) the capacity in which the person signs the correspondence is indicated;

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

(n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(o) issue statements of account.

Commentary

A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision.

A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment.

In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

Suspended or Disbarred Lawyers

5.01 (4) Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred and struck off the Rolls, suspended, undertaken not to practise or who has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted.

Electronic Registration of Documents

5.01 (5) A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose his or her password or access phrase or number to others.

5.01 (6) When a non-lawyer employed by a lawyer has a personalized encrypted electronic access to any system for the electronic submission or registration of documents, the lawyer must ensure that the non-lawyer does not

(a) permit others to use such access; or

(b) disclose his or her password or access phrase or number to others.

Commentary

The implementation of systems for the electronic registration of documents imposes

special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

In a real estate practice, when it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has such access, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the system.

5.02 STUDENTS

Recruitment and Engagement Procedures

5.02 (1) A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or other students.

Duties of Principal

5.02 (2) A lawyer acting as a principal to a student must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Commentary
A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.

Duties of Articling Student

5.02 (3) An articling student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

5.03 HARASSMENT AND DISCRIMINATION

5.03 (1) The principles of human rights laws and related case law apply to the interpretation of this rule.

5.03 (2) A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

5.03 (3) A lawyer must not sexually harass any person.

5.03 (4) A lawyer must not engage in any other form of harassment of any person.

5.03 (5) A lawyer must not discriminate against any person.

Commentary
A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

CHAPTER 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

6.01 (1) A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

6.01 (2) A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

Commentary

In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report Misconduct

6.01 (3) Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law practice;

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

(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

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

Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

Encouraging Client to Report Dishonest Conduct

6.01 (4) A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

6.02 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

6.02 (1) A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary
The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly. Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system. A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer. A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

6.02 (2) A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

6.02 (3) A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Communications

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

6.02 (5) A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

6.02 (6) Subject to subrule (7), if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

6.02 (7) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a lawyer with respect to that matter.

Commentary

Subrule (6) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by closing his or her eyes to the

obvious.

Subrule (7) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

6.02(8) A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

Commentary

This subrule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of Rule 2.04 (Conflicts), and particularly subrules 2.04(7) through (11). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

6.02 (9) When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Inadvertent Communications

6.02 (10) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.

Commentary

Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong

address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

Undertakings and Trust Conditions

6.02 (11) A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

Commentary

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these Rules.

6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

6.03 (1) A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary
A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

6.03 (2) A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary
The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.04 (1) A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.05 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with the media, but there are other cases in which the lawyer should contact the media to properly serve the client.

Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

6.05 (2) A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.06 A lawyer must assist in preventing the unauthorized practice of law.

Commentary
Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust monies and the maintenance of compensation funds.

6.07 RETIRED JUDGES RETURNING TO PRACTICE

6.07 A judge who returns to practice after retiring, resigning or being removed from the bench must not**,** for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Notice of Claim

6.08 (2) A lawyer must give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary
The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

Co-operation

6.08 (3) When a claim of professional negligence is made against a lawyer, he or she must assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

Responding to Client's Claim

6.08 (4) If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer must expeditiously deal with the claim and must not take unfair advantage that would defeat or impair the client's claim.

6.08 (5) If liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance. [See also Rule 6.01(2)]

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(without conflicts provisions)

Clean Version

March 2011

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) 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;

"Society" means the Law Society of British Columbia;

"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

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 be satisfied that the person giving instructions for the organization is acting within that person's 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.

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 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.

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 or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, 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, criminal or fraudulent 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, criminal or fraudulent 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, criminal or fraudulent. 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, criminal or fraudulent. 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.

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

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

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.

2.03 (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

Separate document to follow in 2011

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.

2.06 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.

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.

Payment and Appropriation of Funds

2.06 (10) 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 (11) 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 (12) 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 (13) 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 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 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.

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.

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.

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.

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

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 fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

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

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

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

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

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

(m) abuse, 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 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

(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.

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

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.

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 on the following basis:

(i) where a discovery is to last no longer than a day, counsel for the witness should refrain from having any discussion with the witness during this time.

(ii) where a discovery is scheduled for longer than one day, counsel is permitted to discuss with his or her witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, counsel should advise the other side of his or her intention to do so.

(iii) counsel for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness. Such discussion should either wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-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.

For a discussion of issues relating to counsel speaking to the witness during examination for discovery see *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*. (1992), 72 B.C.L.R. (2nd) 240 (B.C.S.C) and *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* [2006] O.J. No. 4222 (Ont.Sup.Ct.). See also Shields and Shapray, "Woodshedding, Interruptions and Objections: How to Properly Conduct and Defend an Examination for Discovery", *the Advocate*, Vol. 68, Part 5, Sept. 2010.

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;

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness; or

(d) may be legally disqualified from serving as a juror.

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 an articled student.

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 articled 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 Articled Student

5.02 (3) An articled 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 comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

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

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

(a) a shortage of trust monies;

(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

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 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) in the case of a paper document, return it unread and uncopied to the party to whom it belongs,

(b) in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or

(c) 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 or delete 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, "electronic 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.

6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

6.03 (1) A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary
A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

6.03 (2) A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary
The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.04 (1) A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts)

when they apply.

6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.05 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with the media, but there are other cases in which the lawyer should contact the media to properly serve the client.

Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs

of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

6.05 (2) A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.06 A lawyer must assist in preventing the unauthorized practice of law.

Commentary

Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise

has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust monies and the maintenance of compensation funds.

6.07 RETIRED JUDGES RETURNING TO PRACTICE

6.07 A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

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.

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)]

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).

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

March 2011

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]~~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;

"Society" means the Law Society of ~~province or territory~~ British Columbia;

"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

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~~ be satisfied 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 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 verifying who are the legal or beneficial ownership of property and business entities, verifying and who has the control of business entities, and to clarifying 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.

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 or ought to know that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or fraudulently, 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 fraudulent 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 fraudulent 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 fraudulent~~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 fraudulent ~~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.

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

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

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.~~

2.03 (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

Separate document to follow in 2011

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.

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 another 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 another 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 (89) Despite Subrule subrule (7), does not apply to;
a lawyer permitted to practise in a multi-discipline disciplinary practices (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.~~

Payment and Appropriation of Funds

2.06 (~~9~~10) 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 (1~~0~~) 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~~12) 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

~~1 This issue is currently specific to Ontario.~~

2.06 (132) 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 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 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.~~

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 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.~~

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.

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

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~~ 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;

(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

(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.

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

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.

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 on the following basis:

(i) where a discovery is to last no longer than a day, counsel for the witness should refrain from having any discussion with the witness during this time.

(ii) where a discovery is scheduled for longer than one day, counsel is permitted to discuss with his or her witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, counsel should advise the other side of his or her intention to do so.

~~(c)~~**(iii)** counsel for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness. Such discussion should either wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-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.~~

For a discussion of issues relating to counsel speaking to the witness during examination for discovery see *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* (1992), 72 B.C.L.R. (2nd) 240 (B.C.S.C) and *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* [2006] O.J. No. 4222 (Ont.Sup.Ct.). See also Shields and Shapray, "Woodshedding, Interruptions and Objections: How to Properly Conduct and Defend an Examination for Discovery", *the Advocate*, Vol. 68, Part 5, Sept. 2010.

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; or

~~(c)~~(d) may be legally disqualified from serving as a juror.

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~~ an articled 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~~ articled 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~~ Articled Student

5.02 (3) An ~~articling~~ articled 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~~ comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

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 confidentiality or 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

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~~ 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) in the case of a paper document, return it unread and uncopied to the party to whom it belongs,

(b) in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or

(c) 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 or delete 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, "electronic 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.

6.03 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

6.03 (1) A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary
A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client. When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

6.03 (2) A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary
The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society. When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.04 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.04 (1) A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action. Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

6.05 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.05 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary
Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with the media, but there are other cases in which the lawyer should contact the media to properly serve the client.

Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

6.05 (2) A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important

that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

6.06 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.06 A lawyer must assist in preventing the unauthorized practice of law.

Commentary

Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust monies and the maintenance of compensation funds.

6.07 RETIRED JUDGES RETURNING TO PRACTICE

6.07 A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

6.08 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

6.08 (1) When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

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.

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)]

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).

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.

Table of Concordance Between BC Code and *Professional Conduct Handbook*

BC Code Rule	***Professional Conduct Handbook* Rule**
1.01 – 1.05	Chapter 1
1.06(1)	Chapter 2, Rule 1
1.06(2)	no similar rule
2.01(1)	Chapter 3, Rule 1
2.01(2)	Chapter 3, Rule 2
2.02(1)	Chapter 3, Rule 3
2.02(2)	Chapter 3, Rule 3
2.02(3)	no similar rule
2.02(4)	Chapter 1,Rule (3)(3)
2.02(5)	Chapter 4, Rule 2
2.02(6)	Chapter 4, Rule 3
2.02(7)	Chapter 4, Rule 6
2.02(8)	no similar rule
2.02(9)	Chapter 3, Rule 2.1
2.03(1)	Chapter 5, Rule 1-12
2.03(2)	Chapter 5, Rule 5
2.03(3)	Chapter 5, Rule 12
2.05(1) – 2.05(5)	Chapter 7.1
2.06(1)	Chapter 9, Rule 1
2.06(2)	(*Law Society Rules* part 8)
2.06(3)	no similar rule

2.06(4)	Chapter 9, Rule 5
2.06(5)	no similar rule
2.06(6)	Chapter 9, Rule 3 (in part)
2.06(7)	Chapter 9, Rule .01
2.06(8)	Chapter 9, Rule 6
2.06(9)	Chapter 9, Rule 6.1
2.06(10)	Chapter 10, Rule 6
2.06(11)	no similar rule
2.06(12)	no similar rule
2.06(13)	Chapter 9, Rule 2
2.07(1) – 2.07(10)	Chapter 10
3.01(1)	Chapter 3, Rule 3 (in part)
3.01(2)	Chapter 14, Rule 5 (in part)
3.02	Chapter 14
4.01(1)	no similar rule
4.01(2)	Chapter 8, Rule 1
4.01(3)	Chapter 8, Rule 18
4.01(4)	no similar rule
4.01(5)	Chapter 1, Rule 3(4)
4.01(6)	Chapter 11, Rule 7
4.07(7)	no similar rule
4.01(8)	Chapter 8, Rule 20
4.02(1)	Chapter 8, Rules 9 & 10
4.02(2)	Chapter 8, Rules 9 & 10
4.03	Chapter 8, Rules 12, 12.2 & 12.3

4.04(1)	no similar rule
4.04(2)	no similar rule
4.05(1)	no similar rule
4.05(2)	no similar rule
4.05(3)	no similar rule
4.05(4)	no similar rule
4.05(5)	no similar rule
4.05(6)	no similar rule
4.06(1)	no similar rule
4.06(2)	no similar rule
4.06(3)	no similar rule
4.07	Appendix 2 (in part)
5.01(1)	Chapter 12, Rule 1
5.01(2)	no similar rule
5.01(3)	Chapter 12, Rule 9
5.01(4)	Chapter 13, Rule 5
5.01(5)	no similar rule
5.01(6)	no similar rule
5.02(1)	no similar rule
5.02(3)	no similar rule
5.03(3)	no similar rule
5.03(1) – 5.03(5)	Chapter 2, Rule 1-6
6.01(1)	Chapter 13, Rule 3
6.01(2)	Chapter 2, Rule 2
6.01(3)	Chapter 13, Rule 2

6.02(1)	Chapter 1, Rule 3(4) in part
6.02(2)	Chapter 1, Rule 4(3)
6.02(3)	Chapter 11, Rule 14
6.02(4)	no similar rule
6.02(5)	Chapter 11, Rules 5 & 6
6.02(6)	Chapter 4, Rule 1.1
6.02(7)	Chapter 4, Rule 1.1 footnote 1
6.02(8)	no similar rule
6.02(9)	Chapter 4, Rule 1
6.02(10)	Chapter 5, Rule 15
6.02(11)	Chapter 11, Rule 7
6.02(12)	Chapter 11, Rule 8
6.02(13)	Chapter 11, Rule 8.1
6.04(1)	no similar rule
6.05(1)	Chapter 8, Rule 24
6.05(2)	no similar rule
6.06	(*Law Society Rules* Rule 2-10)
6.07	no similar rule
6.08(1)	Chapter 4, Rule 5.1
6.08(2)	Chapter 4, Rule 5
6.08(3)	no similar rule
6.08(4)	no similar rule
6.08(5)	no similar rule
Appendix A	Appendix 1
Appendix B & 4.07,	Appendix 2

Table of Concordance Between *Professional Conduct Handbook* and BC Code

***Professional Conduct Handbook* Rule**	**BC Code Rule**
Chapter 1	1.01 – 1.05
Chapter 1,Rule (3)(3)	2.02(4)
Chapter 1, Rule 3(4)	4.01(5)
Chapter 1, Rule 3(4) in part	6.02(1)
Chapter 1, Rule 4(3)	6.02(2)
Chapter 2, Rule 1	1.06(1)
Chapter 2, Rule 1 – 6	5.03(1) – 5.03(5)
Chapter 2, Rule 2	6.01(2)
Chapter 3, Rule 1	2.01(1)
Chapter 3, Rule 2	2.01(2)
Chapter 3, Rule 2.1	2.02(9)
Chapter 3, Rule 3	2.02(1)
Chapter 3, Rule 3	2.02(2)
Chapter 3, Rule 3 (in part)	3.01(1)
Chapter 4, Rule 1.1	6.02(6)
Chapter 4, Rule 1	6.02(9)
Chapter 4, Rule 1.1 footnote 1	6.02(7)
Chapter 4, Rule 2	2.02(5)
Chapter 4, Rule 3	2.02(6)
Chapter 4, Rule 5.1	6.08(1)

Chapter 4, Rule 5	6.08(2)
Chapter 4, Rule 6	2.02(7)
Chapter 5, Rule 1-12	2.03(1)
Chapter 5, Rule 5	2.03(2)
Chapter 5, Rule 12	2.03(3)
Chapter 5, Rule 15	6.02(10)
Chapter 7.1	2.05(1) – 2.05(6)
Chapter 8, Rule 1	4.01(2)
Chapter 8, Rules 9 & 10	4.02(2)
Chapter 8, Rules 9 & 10	4.02(1)
Chapter 8, Rules 12, 12.2 & 12.3	4.03
Chapter 8, Rule 18	4.01(3)
Chapter 8, Rule 20	4.01(8)
Chapter 8, Rule 24	6.05(1)
Chapter 9, Rule 1	2.06(1)
Chapter 9, Rule .01	2.06(7)
Chapter 9, Rule 2	2.06(13)*-12`
Chapter 9, Rule 3 (in part)	2.06(6)
Chapter 9, Rule 5	2.06(4)
Chapter 9, Rule 6	2.06(8)
Chapter 9, Rule 6.1	2.06(9)
Chapter 10, Rule 6	2.06(10)* – 9
Chapter 10	2.07(1) – 2.07(10)
Chapter 11, Rules 5 & 6	6.02(5)
Chapter 11, Rule 7	4.01(6)

Chapter 11, Rule 7	6.02(11)
Chapter 11, Rule 8	6.02(12)
Chapter 11, Rule 8.1	6.02(13)
Chapter 11, Rule 14	6.02(3)
Chapter 12, Rule 1	5.01(1)
Chapter 12, Rule 9	5.01(3)
Chapter 13, Rule 2	6.01(3)
Chapter 13, Rule 3	6.01(1)
Chapter 13, Rule 5	5.01(4)
Chapter 14, Rule 5 (in part)	3.01(2)
Chapter 14	3.02
(Law Society Rules part 8)	2.06(2)
(Law Society Rules 2-10)	6.06
Appendix 1	Appendix A
Appendix 2	4.07; Appendix B

Memo

The Law Society of British Columbia 9000

To Benchers

From Jeffrey G. Hoskins, QC for Executive Committee

Date April 5, 2011

Subject **Some governance issues**

Following a recent meeting with the President and the CEO, I was asked to prepare a memorandum on a number of governance issues for the consideration of the Executive Committee and for them to refer to the Benchers topics they considered worthy. The Executive Committee discussed the topics that I prepared and resolved to refer those matters that appear below to the Benchers for further consideration.

The Committee classified some matters as high priority or importance and others as lower priority or importance. I have further divided the issues into matters that can be done by a simple Rule change and those that require the authority of the members voting in a referendum under section 12 of the *Legal Profession Act*.

Of the matters that the Benchers consider should be pursued further, there may be some that can be referred to Act and Rules Subcommittee for implementation and others that require further study and can be considered as part of the new Strategic Planning process later this year.

Things that can be done by simple rule change: HIGH PRIORITY

1. Appointment of non-lawyer non-Bencher members of public to regulatory committees

Under the current Rules, membership in the Discipline Committee, Credentials Committee, Practice Standards Committee and Special Compensation Fund Committee are limited to current Benchers and lawyers. All other Committees are open to the membership of anyone appointed by the President.

This excludes from the key regulatory functions of the Law Society all members of the general public, including Life Appointed Benchers and many retired judges. Given that the Benchers are now prepared to have non-lawyer non-Benchers sitting on hearing panels, they may be willing to consider such persons as members of the regulatory committees.

The Benchers can change this restriction by amending the Rules that govern the composition of those Committees.

2. Election of Executive Committee

The current Rule 1-39(11)(b) provides as follows:

> (11) If a vote is required for an election under this Rule,
>
> (b) a ballot must be rejected unless it contains votes for the same number of candidates as there are positions to be filled, and

As a result, Benchers are compelled to vote for three candidates, even if they have a preference for only one or two. This is unlike the rules in any other Law Society election or in public elections such as local government elections in British Columbia. Aside from the restriction on civil liberties, since all votes count the same in the final result, the result of the election can be affected.

There is no requirement for a referendum of members for the Benchers to change the rules governing the election of the Executive Committee.

3. Bencher elections by electronic means

The Law Society conducts Bencher elections at least annually. The process is labour-intensive and completely paper-based. Some years ago, we investigated the cost of changing to an electronic web-based system, such as that used by a great many organizations today. While the cost for a relatively small membership base such as the Law Society's was thought to be prohibitive at one time, is it time to investigate again to see if technological advances and/or increased membership make a difference?

Things that can be done by simple rule change: - LOWER PRIORITY

4. Webcasting general meetings –

In 2003, the membership voted 87.7 per cent in favour of the following referendum question:

> **Question 1: Webcasting of general meetings**
>
> Are you in favour of the Benchers amending the Rules respecting general meetings to
>
> (a) allow members to attend and vote by way of the Internet, and

(b) ensure that the meeting would not be invalidated by reason alone of a technical failure that prevented some members from attending and voting by way of the Internet?

Despite that endorsement, the Benchers have never implemented the rule change that was mandated. At the time, the cost involved was considered too great and the issue of the Law Society collecting mandatory fees on behalf of the CBA-BC Branch complicated the question of instituting a change that potentially could affect the outcome of that debate.

Is it time to investigate the current cost of making the transition or to ask the Benchers if they are interested in such an investigation?

5. Appointment of lawyer Bencher to fill vacancy in last 6 months of a term

Rule 1-38 permits the Benchers to appoint a lawyer to fill a vacancy for Bencher that occurs in the last quarter of the term of office. (In the first three-quarters of the term, the Rules require that a Bencher by-election be held promptly). However, the Benchers have made no such appointment in well over 20 years.

One reason that the Benchers have decided not to make an appointment in the past is that the tag-end term used to be counted as if it were a full term for the purpose of Bencher term limits. That rule was amended in early 2010 so that a half term or less does not count against the Bencher term limit.

I suspect that some Benchers considered it unseemly for the Benchers as a whole to apparently endorse one possible candidate for Bencher in the general election that inevitably follows quickly in November of the same year.

The Benchers may want to consider a policy guideline as to when they will consider appointing a lawyer to ensure more continuous representation, especially for districts with only one or two Benchers. Alternatively, if the Benchers are not inclined ever to use the power to appoint, they may consider rescinding the Rule.

Things that require a referendum vote to amend the Rules

The issues that follow are all subject to section 12 of the *Legal Profession Act*, which requires that the membership endorse rule changes in a referendum ballot before the Benchers can give them effect by amending the Law Society Rules. This requirement was included in the *Legal Profession Act* because the nature of these provisions gives the appearance that the self-interest of the Benchers is involved.

In order to dispel that appearance and give any proposals for reform more credibility with the membership voting in a subsequent referendum, I suggest that the Benchers refer

some or all of the following issues to a committee of knowledgeable and trusted people who are not current Benchers, such as senior members of the Bar, former Appointed Benchers and members of the general public. That would also have the effect of taking the issues off the Bencher agenda leaving it free for broader issues. It would be helpful if the Benchers would commit in advance to putting the recommendations of the independent Committee to the members in a referendum and to implementing changes that are duly approved by the members.

HIGH PRIORITY

6. Bencher turnover

Every two years, there is a general election of Benchers and the terms of Appointed Benchers come to an end, and several are replaced at the same time. In alternate years, an election is required to replace the out-going President and sometimes others who have left for one reason or another. The result is a very large number of inexperienced Benchers in alternate years and a very low number in other years.

These are the figures for the past decade:

YEAR	NEW BENCHERS
2001	2
2002	13
2003	2
2004	8
2005	1
2006	11
2007	1
2008	5
2009	2
2010	10
2011	1

The inefficiency of this system came to me once again in the orientation of a single new Bencher that took place recently. The Law Society was required to dedicate a large number of staff hours per Bencher to the education of one individual. Other years, the logistics of orienting and training a large number of people has become a problem.

I think that there is also a risk factor and a quality control issue of sorts in having up to 42 per cent of the Board completely without experience at the same time. With annual partial elections and an eight-year term limit, the annual turnover should be somewhat over one-eighth, allowing for other vacancies. In other words, we should expect four or five new Benchers annually.

One common way of mitigating the effects of high turnover of elected officials is "staggered elections" - electing only a partial slate of candidates at intervals, so there is always substantial carry-over when new members arrive.

In the case of Bencher elections, I would suggest electing as close as possible to half of the Benchers each year. The provincial government could also be asked to appoint half of the Appointed Benchers each year. I suspect that they would find that easier to handle than the current six-at-a-time approach. In Vancouver especially, I think there would be a benefit for the voters who now have to select up to 13 candidates in a field that often exceeds 30.

The transition from full elections to partial staggered elections would have some manageable complexities. In the long run, though, this would have little effect on the Law Society administration of elections, in that the current Rules require at least one election on November 15 every year, to replace the outgoing President in off years.

7. Bencher term of office

The current term of office for Benchers in British Columbia is two years. The Bencher term of office is three years in Alberta and four years in Ontario. Frequency of election has its rewards in terms of involvement of the electorate, but it is also a distraction and an expense. It may be worth considering what the optimum term of office for Benchers would be.

If the term of office were increased to three years, this would require an amendment to the term limit, which is currently eight years for most Benchers. Presumably that would have to be increased to nine.

8. Bencher electoral districts

Since 1955 Benchers have been elected in the districts established under the *County Boundaries Act*. Originally there were 20 elected Benchers. Five have been added over the years, but all to existing districts. There have been no revisions to the boundaries in 56 years, with the exception of the division of the County of Yale into Okanagan and Kamloops Districts. In the meantime, the County Courts were abolished 20 years ago, and the County Boundaries now have little legal significance outside of Bencher elections.

Most problematic is that the uneven distribution of lawyer population in the province has left the districts with a wide variation in the number of lawyers represented by Benchers.

The table on the next page shows the numbers of members in each District as of March 1, 2011, along with the number of members per Benchers who represent the District. While

the average Bencher represents 453 lawyers, the actual figures vary from a low of 70 to a high of 575.

Bencher representation by district

DISTRICT (Benchers)	MEMBERS	MEMS/BENCHER	VARIATION (%)
Cariboo (2)	212	106	-76.6
Kamloops (1)	243	243	-46.4
Kootenay (1)	123	123	-72.9
Nanaimo (1)	435	435	- 4.0
Okanagan (1)	459	459	+ 1.3
Prince Rupert (1)	70	70	-84.6
Vancouver (13)	7,090	545	+20.2
Victoria (2)	1,151	575	+26.9
Westminster (3)	1,548	516	+13.8
TOTALS (25)	**11,331**	**453**	

The Supreme Court of Canada has found that, in the context of federal and provincial elections, Canadians have a right under section 3 of the *Charter* to relative parity of voting power (*Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158). Other factors apply, of course, and the *Charter* does not govern Bencher elections, but the principle is one that could be better served with some adjustments.

This issue has been looked at in the past, without resolution (except the Yale County division). Here are some suggestions that may bear further examination:

- divide Cariboo County into Prince George (109 lawyers) and the rest (103 lawyers)
- increase Vancouver Island (1,586 lawyers) by one Bencher (397 per Bencher)
- make Richmond (268 lawyers) part of Westminster County (increases to 1,816 lawyers or 454 per Bencher)

- divide the enhanced (by Richmond) Westminster County into two districts: one east of Pitt River and Surrey Langley boundary with one Bencher (485 lawyers) and one west with three Benchers (1,331 lawyers, 444 per Bencher)
- make the North Shore and Sunshine Coast a separate district with one Bencher (411 lawyers)
- leave the districts as they are (or adjust slightly) but apply a formula to determine the number of Benchers (e.g., one Bencher for every 450 members or part thereof on July 1 before each election)

9. Election of Second Vice-President by Benchers

The current Rules indicate that the members elect the Second Vice-President at the Annual General Meeting. In reality, the Benchers make that decision when they decide who the Bencher nominee will be. The Rules to do not even give the AGM the option to reject the Bencher nominee. "If only one candidate is nominated, the President must declare that candidate the Second Vice President elect." Rule 1-18(5).

In over 30 years since this system was instituted, there has been no candidate nominated to challenge the Benchers' nominee. It has been suggested that the resulting process is a sham and the Benchers ought to come clean and amend the Rules to indicate the true state of affairs, which is that the Benchers elect the Second Vice-President.

10. Term of office of a President or Vice-President who takes office mid-year

Rule 1-3(5) governs the situation when a President or Vice-President resigns mid-term, which in recent years has happened twice - in 2003 and in 2004. When a President or Vice-President resigns on or after July 1, i.e., in the second half of the calendar year, those on the "Ladder" below the officer who resigned move up one rung for the remainder of the year and stay there for the next year, when they would have been at that level. That is what happened in 2003-04.

However, when a President or Vice-President resigns in the first half of the year, those below move up and a new Second Vice-President is chosen. At the end of the year, the President is finished and everyone else on the ladder moves up. That is what happened in 2004. As a result, some or all of the Benchers on the Ladder serve less time as President or Vice-President than they may have expected. A President, through no doing of his or her own, may serve as little as slightly more than six months in that position.

The Benchers may want to consider a rule amendment to move the watershed date from July 1 (half-way through the year) to another date, such as April 1 (one-quarter way through the year). Alternatively, the amended Rule could allow the Benchers to decide

when the situation arises. Either way, the amendment would require membership approval in a referendum.

LOWER PRIORITY

11. Eligibility of President to be re-elected for second one-year term

The Executive Committee also considered a related issue, which they found to be a lower priority.

The automatic replacement of the President on an annual basis has a negative effect on the continuity of the leadership of the Law Society. This is partly dispelled by the Ladder, which gives a long apprenticeship to each incoming President. However, it is also subject to the inclination of each incumbent as to how much the Vice-Presidents are involved in decision-making.

Before 1998, the Act allowed for the Benchers to resolve to continue a Treasurer (as he or she then was) for a second one-year term of office. That was removed from the current Act and not included in the Rules.

The Benchers, or an independent committee, might want to consider giving the Benchers the flexibility to extend a president (and the vice-presidents) in appropriate circumstances.

Memo

The Law Society of British Columbia

13000

To Benchers

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

Date April 5, 2011

Subject **Law Society Rules consolidation**

The work of the Ethics Committee on the BC version of the Model Code of Professional Conduct (CPC) will likely be concluded before the end of 2011. When that project is completed and the Benchers have adopted the new Code for BC and set an effective date, it will be necessary to ensure that all practising lawyers in BC have access to the final version of the Code.

After two years of discussion from time to time, the Act and Rules Subcommittee has authorized me to complete a review and consolidation of the Law Society Rules to be completed and distributed or made available to lawyers at the same time and on the same basis as the Model Code.

There has been no formal review of the Law Society Rules since 1998. In the intervening years it has become replete with amendments, additions and deletions. The result is a set of Rules that are difficult and unwieldy to use and messy and unprofessional in appearance. We are up to three places of decimal in places where repeated insertions have taken place.

The Subcommittee has embarked on a program of approving draft revisions of individual Parts of the Rules over the next several months. The Subcommittee expects to be in a position to recommend to the Benchers the adoption of a complete revised and consolidated set of Rules in the fall of 2011.

The objectives of the revision and consolidation are these:

- re-number all rules and subrules in consecutive whole number order to eliminate decimal numbering;
- verify and update cross-references;
- add marginal notes to cross-references to aid recognition;
- provide brief historical notes for the benefit of those researching past provisions;
- ensure consistency and economy of language.

I attach a draft revision of Rules 4-17 to 4-19 as a demonstration of the sort of changes that will be made and what a (nearly) finished product will look like.

The Rules require that the Law Society provide each lawyer and articled student with a copy of the Act, Rules and Handbook. At some point in the year, the Benchers will need to consider to what extent that obligation can be fulfilled through electronic publication and whether the cost of producing and providing paper copies can be recovered in whole or in part from those who refuse to receive them electronically.

LAW SOCIETY RULES

2011 consolidation

PART 4 – DISCIPLINE

Interim suspension, practice conditions or medical examination

4-~~17~~22(~~0.~~1) In Rules 4-~~17~~ 22 to 4-~~18.1~~24, **"proceeding"** means the proceeding required under subrule (~~1.1~~4).

(~~1~~2) If there has been a direction under Rule 4-~~13~~16(1) *[Direction to issue, expand or rescind citation]* to issue a citation, any 3 Benchers may do one or more of the following:

(a) suspend the lawyer, if the 3 Benchers consider, on the balance of probabilities, that the continued practice of the lawyer will be dangerous or harmful to the public or the lawyer's clients;

(b) in any case not referred to in paragraph (a), place conditions on the practice of the lawyer;

(c) suspend the enrolment of an articled student;

(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

(ii) instruct the qualified medical practitioner to report to the Discipline Committee on the respondent's ability to practise law or, in the case of an articled student, the respondent's ability to complete his or her articles.

(~~1.1~~3) The 3 Benchers referred to in subrule (~~1~~2) must not include the Chair of the Discipline Committee.

(~~1.1~~4) Before Benchers take action under this Rule, there must be a proceeding at which 3 or more Benchers and discipline counsel must be present.

(~~1.11~~5) The proceeding referred to in subrule (~~1.1~~4) may take place without notice to the respondent if the majority of Benchers present are satisfied that notice would not be in the public interest.

(~~1.12~~6) The respondent and respondent's counsel may be present at a proceeding.

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(~~1.13~~7) All proceedings under this Rule must be recorded by a court reporter.

(~~1.14~~8) Subject to the Act and these Rules, the Benchers present may determine the practice and procedure to be followed at a proceeding.

(~~1.15~~9) Unless the Benchers present order otherwise, the proceeding is not open to the public.

(~~1.16~~10) The respondent or discipline counsel may request an adjournment of a proceeding.

(~~1.17~~11) Rule 4-~~29~~ 37 *[Adjournment]* applies to an application for an adjournment made before the commencement of the proceeding as if it were a hearing.

(~~1.18~~12) Despite subrule (~~1.17~~11), the Executive Director is not required to notify a complainant of a request made under subrule (~~1.16~~10).

(~~1.19~~13) 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.

(~~2~~14) An order made under subrule (~~1~~2) or varied under subrule (~~3~~15) is effective until the first of

(a) final disposition of the citation,

(~~a.1~~b) variation or further variation under subrule (~~3~~15), or

(~~b~~c) a contrary order under Rule 4-~~19~~25 *[Review of interim suspension, practice conditions or medical examination order]*.

(~~3~~15) An order made under subrule (~~1~~2)(b) or (d) may be varied by the 3 Benchers, or a majority of them, on the application of the respondent or discipline counsel.

(~~4~~16) On an application to vary an order under subrule (~~3~~15),

(a) both the respondent and discipline counsel must be given a reasonable opportunity to make submissions in writing, and

(b) the 3 Benchers may allow oral submissions if, in their discretion, it is appropriate to do so.

[1998 4-17; ~~(1.1) added~~ 10/2001; ~~(1) and (2) amended, (0.1), (1.11) to (1.19), (3) and (4) added~~ 10/2006; ~~(1) amended, (1.111) added~~ 03/2010; ~~(1) and (1.19) amended~~ 10/2010]

LAW SOCIETY RULES

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Notification of respondent

4-~~18~~23 When an order is made under Rule 4-~~17~~22(~~1~~2) *[Interim suspension, practice conditions or medical examination]* without notice to the respondent, the Executive Director must immediately notify the respondent in writing, that

(a) the action has been taken,

(b) the respondent is entitled, on request, to a transcript of the proceeding under Rule 4-~~17~~22(~~1~~2), and

(c) the respondent may apply under Rule 4-~~19~~25 *[Review of interim suspension, practice conditions or medical examination order]* to have the order rescinded or varied.

Disclosure

4-~~18.1~~24 (1) Unless an order has been made under Rule 4-~~17~~20(~~1~~2) *[Interim suspension, practice conditions or medical examination]*, 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) the fact that a Committee or an individual has referred a matter for consideration by 3 or more Benchers under Rule 4-~~17~~20;

(b) the scheduling of a proceeding under Rule 4-~~17~~20;

(c) the fact that a proceeding has taken place.

(2) When an order has been made or refused under Rule 4-~~17~~20(~~1~~2), the Executive Director may, on request, disclose the fact of the order or refusal and the reasons for it.

[~~added~~ 10/2006 4-18.1]

Review of interim suspension, practice conditions or medical examination order

4-~~19~~25 (1) If an order has been made under Rule 4-~~17~~20(~~1~~2) *[Interim suspension, practice conditions or medical examination]*, the respondent may apply in writing to the President at any time for rescission or variation of the order.

(2) An application under subrule (1) must be heard as soon as practicable and, if the respondent has been suspended without notice, in any event not later than 7 days after the date on which it is received by the Society, unless the respondent consents to a longer time.

~~(3) [rescinded]~~

LAW SOCIETY RULES

2011 consolidation

(43) When application is made under subrule (1), the President must appoint a new panel under Rule 4-2836 *[Appointment of panel]*.

(54) A panel appointed under subrule (43) must not include a person who

(a) participated in the decision that authorized the issue of the citation,

(b) was one of the Benchers who made the order under review, or

(c) is part of a panel assigned to hear the citation.

(65) A hearing under this Rule is open to the public, but the panel may exclude some or all members of the public in any circumstances it considers appropriate.

(6.1) On application by anyone, the panel may make the following orders to protect the interests of any person:

(a) an order that specific information not be disclosed;

(b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

(7) All proceedings at a hearing under this Rule must be recorded by a court reporter, and any person may obtain, at his or her expense, a transcript of any part of the hearing that he or she was entitled to attend.

(8) The respondent and discipline counsel may call witnesses to testify who

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

(b) are subject to cross-examination.

(9) If the order under Rule 4-1720(12) *[Interim suspension, practice conditions or medical examination]* took effect without notice to the respondent, witnesses called by discipline counsel must testify first, followed by witnesses called by the respondent.

(10) If subrule (9) does not apply, witnesses called by the respondent must testify first, followed by witnesses called by discipline counsel.

(11) The panel may

(a) accept an agreed statement of facts, and

(b) admit any other evidence it considers appropriate.

LAW SOCIETY RULES

2011 consolidation

(12) Following completion of the evidence, the panel must

(a) invite the respondent and discipline counsel to make submissions on the issues to be decided by the panel,

(b) decide by majority vote whether cause has been shown by the appropriate party under subrule (13) or (14), as the case may be, and

(c) make an order if required under subrule (13) or (14).

(13) If an order has been made under Rule 4-~~17~~20(~~1~~2) *[Interim suspension, practice conditions or medical examination]* with notice to the respondent, the panel must, if cause is shown on the balance of probabilities by or on behalf of the respondent, rescind or vary the order.

(14) If an order has been made under Rule 4-~~17~~20(~~1~~2) without notice to the respondent, the panel must rescind or vary the order, unless discipline counsel shows cause, on the balance of probabilities, why the order should not be rescinded or varied.

[1998 4-19; ~~(6) amended, (6.1) added~~ 09/1999; ~~(1), (4), (12) and (14) amended, (3) rescinded,~~ 10/2006; ~~(11) amended~~ 04/2009]

LAW SOCIETY RULES

2011 consolidation

PART 4 – DISCIPLINE

Interim suspension, practice conditions or medical examination

4-22 (1) In Rules 4-22 to 4-24, **"proceeding"** means the proceeding required under subrule (4).

(2) If there has been a direction under Rule 4-16(1) *[Direction to issue, expand or rescind citation]* to issue a citation, any 3 Benchers may do one or more of the following:

(a) suspend the lawyer, if the 3 Benchers consider, on the balance of probabilities, that the continued practice of the lawyer will be dangerous or harmful to the public or the lawyer's clients;

(b) in any case not referred to in paragraph (a), place conditions on the practice of the lawyer;

(c) suspend the enrolment of an articled student;

(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

(ii) instruct the qualified medical practitioner to report to the Discipline Committee on the respondent's ability to practise law or, in the case of an articled student, the respondent's ability to complete his or her articles.

(3) The 3 Benchers referred to in subrule (2) must not include the Chair of the Discipline Committee.

(4) Before Benchers take action under this Rule, there must be a proceeding at which 3 or more Benchers and discipline counsel must be present.

(5) The proceeding referred to in subrule (4) may take place without notice to the respondent if the majority of Benchers present are satisfied that notice would not be in the public interest.

(6) The respondent and respondent's counsel may be present at a proceeding.

(7) All proceedings under this Rule must be recorded by a court reporter.

(8) Subject to the Act and these Rules, the Benchers present may determine the practice and procedure to be followed at a proceeding.

(9) Unless the Benchers present order otherwise, the proceeding is not open to the public.

(10) The respondent or discipline counsel may request an adjournment of a proceeding.

(11) Rule 4-37 *[Adjournment]* applies to an application for an adjournment made before the commencement of the proceeding as if it were a hearing.

(12) Despite subrule (11), the Executive Director is not required to notify a complainant of a request made under subrule (10).

(13) 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.

(14) An order made under subrule (2) or varied under subrule (15) is effective until the first of

(a) final disposition of the citation,

(b) variation or further variation under subrule (15), or

(c) a contrary order under Rule 4-25 *[Review of interim suspension, practice conditions or medical examination order]*.

(15) An order made under subrule (2)(b) or (d) may be varied by the 3 Benchers, or a majority of them, on the application of the respondent or discipline counsel.

(16) On an application to vary an order under subrule (15),

(a) both the respondent and discipline counsel must be given a reasonable opportunity to make submissions in writing, and

(b) the 3 Benchers may allow oral submissions if, in their discretion, it is appropriate to do so.

[1998 4-17; 10/2001; 10/2006; 03/2010; 10/2010]

LAW SOCIETY RULES

2011 consolidation

Notification of respondent

4-23 When an order is made under Rule 4-22(2) *[Interim suspension, practice conditions or medical examination]* without notice to the respondent, the Executive Director must immediately notify the respondent in writing, that

(a) the action has been taken,

(b) the respondent is entitled, on request, to a transcript of the proceeding under Rule 4-22(2), and

(c) the respondent may apply under Rule 4-25 *[Review of interim suspension, practice conditions or medical examination order]* to have the order rescinded or varied.

Disclosure

4-24 (1) Unless an order has been made under Rule 4-20(2) *[Interim suspension, practice conditions or medical examination]*, 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) the fact that a Committee or an individual has referred a matter for consideration by 3 or more Benchers under Rule 4-20;

(b) the scheduling of a proceeding under Rule 4-20;

(c) the fact that a proceeding has taken place.

(2) When an order has been made or refused under Rule 4-20(2), the Executive Director may, on request, disclose the fact of the order or refusal and the reasons for it.

[10/2006 4-18.1]

Review of interim suspension, practice conditions or medical examination order

4-25 (1) If an order has been made under Rule 4-20(2) *[Interim suspension, practice conditions or medical examination]*, the respondent may apply in writing to the President at any time for rescission or variation of the order.

(2) An application under subrule (1) must be heard as soon as practicable and, if the respondent has been suspended without notice, in any event not later than 7 days after the date on which it is received by the Society, unless the respondent consents to a longer time.

(3) When application is made under subrule (1), the President must appoint a new panel under Rule 4-36 *[Appointment of panel]*.

(4) A panel appointed under subrule (3) must not include a person who

(a) participated in the decision that authorized the issue of the citation,

(b) was one of the Benchers who made the order under review, or

(c) is part of a panel assigned to hear the citation.

(5) A hearing under this Rule is open to the public, but the panel may exclude some or all members of the public in any circumstances it considers appropriate.

(6) On application by anyone, the panel may make the following orders to protect the interests of any person:

(a) an order that specific information not be disclosed;

(b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

(7) All proceedings at a hearing under this Rule must be recorded by a court reporter, and any person may obtain, at his or her expense, a transcript of any part of the hearing that he or she was entitled to attend.

(8) The respondent and discipline counsel may call witnesses to testify who

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

(b) are subject to cross-examination.

(9) If the order under Rule 4-20(2) *[Interim suspension, practice conditions or medical examination]* took effect without notice to the respondent, witnesses called by discipline counsel must testify first, followed by witnesses called by the respondent.

(10) If subrule (9) does not apply, witnesses called by the respondent must testify first, followed by witnesses called by discipline counsel.

(11) The panel may

(a) accept an agreed statement of facts, and

(b) admit any other evidence it considers appropriate.

(12) Following completion of the evidence, the panel must

(a) invite the respondent and discipline counsel to make submissions on the issues to be decided by the panel,

(b) decide by majority vote whether cause has been shown by the appropriate party under subrule (13) or (14), as the case may be, and

(c) make an order if required under subrule (13) or (14).

(13) If an order has been made under Rule 4-20(2) *[Interim suspension, practice conditions or medical examination]* with notice to the respondent, the panel must, if cause is shown on the balance of probabilities by or on behalf of the respondent, rescind or vary the order.

(14) If an order has been made under Rule 4-20(2) without notice to the respondent, the panel must rescind or vary the order, unless discipline counsel shows cause, on the balance of probabilities, why the order should not be rescinded or varied.

[1998 4-19; 09/1999; 10/2006; 04/2009]