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New sexual harassment rule

In June 1992, the Professional Conduct Committee passed a Rule of Professional Conduct addressing the issue of sexual harassment.

The new rule follows on the heels of a model sexual harassment policy developed for use in law offices that was recently approved by Convocation. Members can obtain a copy of the policy by contacting the Law Society.

Set out below is the text of the new sexual harassment Rule (Rule 27):

Sexual harassment of a colleague, of staff, of clients, or of other persons, in a professional context, is professional misconduct.

COMMENTARY

1. Sexual harassment is defined as one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

- (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group; or
- (ii) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services; or
- (iii) when submission to such conduct is made implicitly or explicitly a condition of employment; or
- (iv) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of promotion, raise in salary, job security and benefits affecting the employee); or

- (v) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile or offensive work environment.

2. Types of behaviour which constitute sexual harassment include, but are not limited to:

- sexist jokes causing embarrassment or offence, told or carried out after the joker has been advised that they are embarrassing or offensive, or that are by their nature clearly embarrassing or offensive
- leering
- the display of sexually offensive material
- sexually degrading words used to describe a person
- derogatory or degrading remarks directed towards members of one sex or one sexual orientation
- sexually suggestive or obscene comments or gestures
- unwelcome inquiries or comments about a person's sex life
- unwelcome sexual flirtations, advances, propositions
- persistent unwanted contact or attention after the end of a consensual relationship
- requests for sexual favours
- unwanted touching
- verbal abuse or threats
- sexual assault.

3. Sexual harassment can occur in the form of behaviour by men towards women, between men, between women or by women towards men.

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When lawyers part company...

Written agreement smooths breakup

Davis and Jenkins have been partners for six years. Davis is primarily a litigator and has left the "business end" of things to Jenkins, who practises mainly real estate.

For the first five years of their partnership, Davis and Jenkins made equal partnership draws. There was little controversy over this as their billings were roughly equal.

Recently, their professional "marriage" has soured. Davis thinks that his billings are "carrying" Jenkins, whose billings have plummeted due to the downturn in the real estate market. She nevertheless feels that her contribution to the operation of the office has aided Davis with his practice and that she should be compensated for this.

There is no written partnership agreement.

As the date nears when a decision will have to be made on how to divide the firm's earnings, discussions reach an impasse. Davis decides that he wants to dissolve the partnership. To give effect to his plan, he takes the following steps:

- waits until Jenkins is on a mountain climbing vacation away from all communication.
- writes a cheque on the firm's general account to himself in an amount equalling three-quarters of the firm earnings available for division between Jenkins and himself.
- removes all corporate minute books and wills kept by the firm along with one-half of the furniture and other supplies from the office.
- compiles a list of all the firm's clients and advises them of the firm's dissolution, indicating that he would be pleased to provide for all their future legal needs.
- faxes Jenkins a notice of the firm's dissolution on the morning of her return from vacation.

The Law Society receives a significant number of complaints from both the public and the profession which result from circumstances similar to those described above.

One common element in nearly all the reported complaints of this type is the absence of any kind of formal contractual arrangement between the lawyers engaged in the dispute. Although such agreements cannot protect lawyers from all the perils set out in the above scenario, they will often

anticipate and provide the means by which such disputes can be resolved effectively without resorting to either the courts or the Law Society.

This is particularly true in common areas of friction such as evaluating non-billable time and calculating firm members' entitlement to draws.

Another area of concern to the Society is the conduct exhibited by lawyers when a dispute has arisen. The Rules of Professional Conduct require lawyers to exhibit courtesy and good faith toward their former partners or associates notwithstanding any ongoing disputes between them. At the same time, they are required to act in a manner that will not prejudice clients or former clients.

Client interests come first

For the most part, the Law Society concentrates its efforts on ensuring the protection of client interests while a firm dispute is ongoing. An unfortunate side effect of many such disputes is that clients, their files, trust funds and other property become bargaining leverage. In these circumstances, the Society is usually successful in extricating the client from the firm dispute.

The procedures outlined below can serve as a guide when dealing with clients in the event of a firm breakup.

When lawyers practising together undertake to provide legal services to a client in the name of a law firm, the clients are usually regarded as firm clients. Quite apart from the substantive law, it would seem inappropriate for individual lawyers intending to leave a firm to approach the firm's client without the consent of the firm.

Ideally, the law firm should contact those clients who might be affected to inform them of the lawyer's impending withdrawal. It might be courteous to give some indication of the departing lawyer's future plans. The firm might offer assurances, if appropriate, that the client's legal business could still be handled by another lawyer who will be, or continues to be, associated with the firm. However, if the client expresses a wish that his or her legal work be transferred from the firm to the departing lawyer, then the firm should obtain a written direction from the client.

The departing lawyer may mail out announcement cards announcing his or her new law practice. There would seem to be no objection to the lawyer

including clients of the firm, with whom he or she has had past dealings, in this mailing. This announcement should contain only the name, location, telephone number and any other relevant information relating to the lawyer's new law practice. In particular, it should not include a request to be retained for any present or future work nor any direct solicitation of the former law firm's clients.

However, if the clients of the firm thereafter initiate a further contact with the departing lawyer asking him or her to take over or continue work that was formerly being handled by the law firm, then, at that stage, the lawyer is able to prepare a direction to the law firm, for signature by the client, authorizing the transfer of the file and any trust funds on hand.

It is imperative that clients not be involved, nor feel that they are involved, in any dispute between the law firm and the departing lawyer.

Lawyer bankruptcy

Recent economic trends have resulted in a significant increase in the number of lawyer bankruptcies. In 1989, a total of 13 members made assignments or were petitioned into bankruptcy. This figure doubled to 26 members in 1990 and increased to 31 in 1991. So far in 1992, some 38 members found themselves in similar circumstances.

Members facing the likelihood of bankruptcy should review section 7 of Regulation 573 made pursuant to the *Law Society Act*. Subsection (1) of section 7 provides that **every** member, and not just practising members, notify the Law Society of their bankruptcy.

Subsection (2) speaks to the major restriction imposed on a bankrupt member. It is an absolute prohibition against handling trust funds. Bankrupt members cannot operate trust bank accounts **in their names** with themselves or other solicitors acting as sole signing officers or co-signers. This restriction would also prevent a bankrupt partner's name being associated with a partnership mixed trust account. Funds on deposit in a trust account should be reconciled as at the date of bankruptcy and returned to the client, billed or transferred to another solicitor in trust.

The most common method utilized to accommodate the restriction on handling trust funds is to arrange with another solicitor to handle trust money for the bankrupt member. Trust monies which otherwise would have been payable to the bankrupt, instead are made payable to the other solicitor. That solicitor would then deposit the trust monies into a regular mixed trust account or a separate mixed trust account for trust monies belonging only to the bankrupt member's clients. The bankrupt member is not permitted to have signing authority on such accounts.

Solicitors handling trust monies belonging to the bankrupt member's clients have the same responsibilities as if the trust monies belonged to their own clients, including that of filing the necessary Forms 1/2/3.

Subsection (3) stipulates that a member by becoming bankrupt may be guilty of conduct unbecoming a barrister and solicitor. Each case is reviewed to determine whether this section will have any application. Factors considered include the reasons for the bankruptcy and the conduct of the bankrupt.

Members are reminded that other legislation may also have an effect on their practices in the event of bankruptcy. For example, the *Trustee Act* prohibits bankrupts from acting as trustees. This would affect members who hold mortgages in trust or act as trustees of estates.

For further information on lawyer bankruptcy, call the Office of the Staff Trustee at (416) 947-3366 or toll free 1-800-668-7380.

Practice Advisory Director

The Law Society welcomes Patricia Rogerson as the new Director of Practice Advisory. Ms. Rogerson assumed the post on Sept. 3 after serving four years as a staff trustee with the Society.

During her tenure as staff trustee, Ms. Rogerson travelled throughout Ontario providing assistance to lawyers in small and large communities. She looks forward to continuing to serve members in all parts of the province. Her experience as a sole practitioner in the areas of wills and estates, family law litigation and real estate will be an asset as she prepares to lead Practice Advisory's team of three full-time lawyers.

Guide to LSUC practice services

AUDIT & INVESTIGATION

Director: Jim Yakimovich
Telephone: (416) 947-5260

The mandate of the Department of Audit and Investigation is twofold: to assist members with accounting issues and to conduct investigations in those instances where non-compliance is a concern.

The department's activities ensure that law firms comply with the record keeping requirements of Regulation 573 and with the Rules of Professional Conduct. It also reviews members' annual filings.

COMPLAINTS

Assistant Secretary: Scott Kerr
Telephone: (416) 947-3310

The Complaints Department is the primary intake source for a wide range of grievances about the conduct of lawyers. It is the responsibility of Complaints staff to investigate and, where possible, resolve complaints.

This department does not deal with complaints that can be characterized solely as fee disputes or as claims of professional negligence.

Most complaints are dealt with either by an exchange of correspondence or by telephone communication. As fewer than five per cent of all matters result in disciplinary action, the department's main focus is on resolving what are usually minor grievances brought on most often by communication problems between lawyers and clients.

Approximately 5,250 complaints were lodged with the Society in 1991 and it is anticipated that this figure will rise to just under 6,000 in 1992.

PRACTICE ADVISORY

Director: Patricia Rogerson
Telephone: (416) 947-3369

The Practice Advisory Service provides confidential advice to lawyers with ethical, procedural, administrative, management and personal problems. It does not offer legal opinions nor give rulings on behalf of the Law Society.

By monitoring new developments affecting the practice of law, responding to lawyers' enquiries and participating in various legal education activities sponsored by the Law Society and C.B.A.O., Practice Advisory attempts to help lawyers avoid situations which could result in complaints, discipline procedures or negligence claims.

PROFESSIONAL CONDUCT

Senior Counsel: Stephen Traviss
Telephone: (416) 947-3350

The Professional Conduct Committee has two principal responsibilities: to give advice to lawyers on ethical dilemmas; and to revise and update the Rules of Professional Conduct as the need arises. Most ethical inquiries from lawyers can be dealt with initially by the Society's Professional Conduct Counsel or by the Practice Advisor and her staff. Where the staff lawyer requires Bench input the necessary referral is made.

PROFESSIONAL STANDARDS

Staff Lawyer: Susan McCaffrey
Telephone: (416) 947-3925

The Professional Standards Department addresses issues of lawyers' competency, both on an individual practitioner basis, and for the profession as a whole. It operates the Practice Review Programme, which is designed to provide remedial assistance to members experiencing difficulties with their practices. The department is also active in continuing legal education, the Bar Admission Course, and loss prevention initiatives.

The department has distributed checklists for use in criminal defence and real estate practices. Checklists are also being developed in the areas of family law, civil litigation, and wills and estates.

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