

MINUTES OF SPECIAL CONVOCATION

Friday, 2nd June, 2000  
9:00 a.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Bindman (by telephone), Braithwaite, Carey, Chahbar, Cherniak, Copeland, Crowe, E. Ducharme, T. Ducharme, Lamont, Laskin, MacKenzie, Manes, Millar, Mulligan (by telephone), Pilkington, Porter, Puccini, Ross, Ruby, Simpson, Swaye, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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CONTINUATION OF DEBATE ON RULES OF PROFESSIONAL CONDUCT

Mr. MacKenzie introduced the remaining Rules that required policy decisions.

Re: Rule 4.01 (3) - Duty "of" Prosecutor (Tab 1, page 6 of Addendum #1- white book)

“(3) When acting as a prosecutor, a lawyer shall 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 prime 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 the accused or defence counsel (or to the court if the accused is not represented) of all relevant and known facts and witnesses, whether tending to show guilt or innocence.”*

It was moved by Mr. MacKenzie, seconded by Mr. Millar that the above proposed Rule be approved with Mr. T. Ducharme's amendment to the Commentary that the words “to the accused or defence counsel (or to the court if the accused is not represented)” be deleted and replaced with the words “to defence counsel or directly to an unrepresented accused” and further that the heading be changed to “Duty of Prosecutor” as suggested by Ms. Pilkington. The sentence in the Commentary would then read:

“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.”

Carried

Rule 6.06 (2) - Interference with Right to Fair Trial or Hearing (page 95 of gold book)

It was moved by Mr. MacKenzie, seconded by Mr. Millar that in the second paragraph of the Commentary the words “and to mitigate the effect of prejudicial publicity not initiated by the lawyer or the client” be deleted and replaced with the words “actual or anticipated prejudicial publicity” The paragraph would then read:

“The following are examples of extrajudicial statements that may materially prejudice a party’s right to a fair trial or hearing except where the lawyer reasonably believes that the statement is necessary to protect a client from actual or anticipated prejudicial publicity.”

Not Put

It was moved by Mr. Ducharme, seconded by Mr. Bindman that everything after the first paragraph of the Commentary to Rule 6.06 (2) be deleted.

Carried

ROLL-CALL VOTE

Bindman	For
Braithwaite	For
Carey	Against
Chahbar	For
Cherniak	Against
Copeland	For
Crowe	For
E. Ducharme	For
T. Ducharme	For
Laskin	Against
MacKenzie	Against
Manes	For
Millar	Against
Mulligan	For
Pilkington	Against
Porter	Against
Potter	For
Puccini	For
Ross	Against
Ruby	For
Simpson	For
Swaye	For
Wilson	Against
Wright	For

Vote: 15 - For; 9 - Against

It was suggested by Ms. Pilkington that the following paragraph from the original Rule (21) be reinserted in the Commentary to proposed Rule 6.06 (1) re: Communication with the Public:

“The lawyer should, when acting as an advocate, refrain from expressing the lawyer’s personal opinions as to the merits of a client’s case.”

It was moved by Ms. Pilkington, seconded by Mr. Cherniak that in the draft protocol set out in The Hon. Justice Dubin’s letter under the heading “Guidelines” proposed for Rule 6.06 that paragraph (b)(v) on page 4 be reinstated.

“(v) opinions concerning the guilt or innocence of the accused, the evidence or the merits of the case;”

The following amendments to the Task Force’s proposed Rule 6.06 (2) made by Mr. Wright were accepted by Messrs. MacKenzie and Millar.

That Rule 6.06 (2) be changed to read as follows:

“A lawyer shall 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.”

That the first paragraph in the Commentary following Rule 6.06 (2) be changed to read:

“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.”

That the words “extrajudicial” in the second paragraph of the Commentary on page 95 of the gold book and in the paragraph following (g) on page 96 be deleted and replaced with the words “out of court” so that they would read as follows:

“The following are examples of out of court statements.....”

It was moved by Ms. Pilkington, seconded by Mr. Cherniak that a second paragraph to the Task Force’s Rule 6.06 (2) be added as follows:

“A lawyer should refrain from making out of court statements expressing the lawyer’s personal opinion concerning the guilt or innocence of the accused, the evidence or the merits of the case.”

Lost

ROLL-CALL VOTE

Bindman	Against
Braithwaite	Against
Carey	For
Chahbar	Against
Cherniak	For
Copeland	Against
Crowe	Against

E. Ducharme	Against
T. Ducharme	Against
Laskin	Against
MacKenzie	Against
Manes	Against
Millar	Against
Mulligan	Against
Pilkington	For
Porter	Against
Potter	Against
Puccini	Against
Ross	Against
Ruby	Against
Simpson	Against
Swaye	Against
Wilson	Against
Wright	Against

Vote: 21 - Against; 3 - For

MOTION - Establishment of Award for Academic Excellence

It was moved by Ms. Ross, seconded by Mr. Crowe that the Law Society of Upper Canada establish a prize to be awarded to 15 students in the graduating classes of the University of Ottawa, Queens University, University of Toronto, University of Western Ontario, and University of Windsor law schools and to 25 students in the graduating class at Osgoode Hall Law School based upon academic excellence. The prize is to consist of a one year membership in the Osgoode Society for Canadian legal history.

Carried

It was moved by Mr. Wright, seconded by Ms. Potter that the motion be amended to include after "upon academic excellence" the words "community service or other meritorious factors".

Not Put

RESUMPTION OF THE DEBATE ON THE RULES

It was moved by Mr. MacKenzie, seconded by Mr. Millar that Rule 6.06 (2) be adopted.

Carried

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:50 P.M.

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Carey, Chahbar, Cherniak, Copeland, Crowe, E. Ducharme, T. Ducharme, Gottlieb, Laskin, MacKenzie, Manes, Millar, Mulligan (by telephone), Pilkington, Porter, Potter, Puccini, Simpson, Swaye, Wilson and Wright.

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RESUMPTION OF RULES DEBATE

Rule 4.01 - The Lawyer as Advocate (page 58 of the gold book)

It was moved by Ms. Ross, seconded by Mr. MacKenzie that the second last paragraph in the Commentary to the Task Force's proposed Rule 4.01 (1) be amended to read:

"In adversary 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 where this can be done without prejudicing the legitimate interests of the client."

Carried

Mr. T. Ducharme's amendment to delete proposed Rule 4.01 (2) (1) on page 61 of the gold book was accepted by Ms. Ross and Mr. MacKenzie which reads:

"(1) when representing an accused or potential accused the lawyer shall not influence or attempt to influence a vulnerable complainant or potential complainant concerning the laying, prosecution or withdrawal of criminal charges;"

An amendment by Mr. Cherniak was accepted by Ms. Ross and Mr. MacKenzie that at the end of the Commentary following proposed Rule 4.01 (2) the following sentence be added:

"When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present."

Rule 1.02 - Definitions (page 9 of the gold book)

It was moved by Mr. MacKenzie, seconded by Mr. Cherniak that under the definition of "law firm" paragraph (c) be deleted which reads:

"in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners."

Carried

Rule 2.05 (3) - Application of Rule (page 30 of the gold book)

It was accepted by Mr. MacKenzie and Mr. Cherniak that the last paragraph of the Commentary to Rule 2.05 (3) be deleted as suggested by Mr. T. Ducharme in his letter dated May 30th which reads:

"Practising in association - The definition of "law firm" (rule 1.02) includes one or more members practising in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners. This recognizes the risk that lawyers practising in association, like partners in a law firm, will share client confidences while discussing their files with one another."

Drafting Change to Rule 2.05 (4) (i) (A)- Law Firm Disqualification - accepted by Task Force

"(A) the adequacy and timing of the measures taken to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur [under (ii).]"

Delete (ii) "it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur."

An amendment was accepted by the Task Force in Rule 2.05 that a new (4.1) be added as follows:

"For greater certainty, subrule (4) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agents (including those occupying the offices of Crown Attorney, Assistant Crown Attorney, or part-time Assistant Crown Attorney), of their constitutional and statutory duties and responsibilities."

Rule 2.05 (9) - Due Diligence (page 3 of Mr. T. Ducharme's letter )

An amendment by Mr. Ducharme was accepted that the paragraph after C (b) in the Commentary be changed to read:

".....an inter-provincial law firm or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with lawyers in other units, offices or departments, this shall be taken into account in the determination of what screening measures are "reasonable"."

In the same Commentary after C (g) at the end of the paragraph beginning with "In cases where a transferring lawyer joining a government...." the following be added:

“Normally, this will be effected by instituting satisfactory screening measures, which could include referring conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (E). Only in those situations where the entire firm must be disqualified pursuant to subrule (4), will conduct of the matter be required to be referred to outside counsel.”

Rule 2.09 (5) and (6) - Withdrawal from Criminal Proceedings (page 48 of the gold book)

The following amendments to proposed Rule 2.09 (5) and (6) were accepted:

“(5) Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed 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 may not withdraw because of non-payment of fees.

(6) Where the 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 when 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.”

Rule 4.05 (2) - Disclosure of Information (page 69 of the gold book)

The following amendment was accepted that Rule 4.05 (2) (b) be changed to read:

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

Rule 2.08 (10) - Exception for Multi-discipline Practices (page 46 of the gold book)

An amendment was accepted to add the words “among members of the firm” after the word “profits” so that it would then read:

“(10) Subrule (9) does not apply to multi-discipline practices of lawyer and non-lawyer partners where the partnership agreement provides for the sharing of fees and profits among members of the firm.”

Drafting change to Rule 2.08 (7) - Division of Fees and Referral Fees (page 46 of the gold book)

An amendment by Mr. Wright was accepted to add the words “not in the same law firm” after the word “lawyers” so that the paragraph would then read:

“(7) Where the client consents, fees for a matter may be divided between lawyers, not in the same law firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.”

Rule 2.04 (12) - Prohibition Against Acting for Borrower and Lender (page 27 of the gold book)

It was moved by Mr. Wright, seconded by Ms. Puccini that an additional paragraph (f) be added to read as follows:

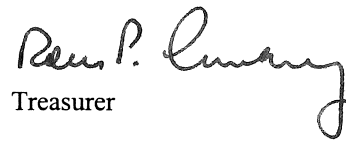
“(f) the lender has placed his or her funds through, and the instructions have been prepared by a mortgage broker registered under the Mortgage Brokers Act.”

Lost

Mr. T. Ducharme expressed Convocation's appreciation to the members of the Task Force, Paul Perell and Jim Varro for their work on the Rules.

CONVOCATION ROSE AT 3:15 P.M.

Confirmed in Convocation this 21st day of September, 2000

  
Treasurer